

**In the matter of Part Cargo *ex* Steamship "Santa Catharina."**

The Standard Oil Company of Brazil - - - - *Appellants*

*v.*

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

FROM

THE HIGH COURT OF JUSTICE (ENGLAND) PROBATE, DIVORCE AND  
ADMIRALTY DIVISION (IN PRIZE).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1919.

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*Present at the Hearing:*

LORD PARMOOR.

LORD WRENBURY.

LORD STERNDALE.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

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The appellants in this case are the Standard Oil Company of Brazil, a Company incorporated and carrying on business in New York, who, in the month of July, 1914, shipped certain quantities of petroleum, their property, on the German steamship "Santa Catharina" at New York, to be conveyed as to part to Rio Janeiro, and as to the rest to other South American ports. The steamer left New York on the 25th July, 1914, bound for Rio Janeiro, and on the 11th August she was seized as prize by H.M.S. "Glasgow," in latitude South 18° 30' and longitude West 38° 24'. Before it became practicable to take her into any port for adjudication the vessel and her cargo were totally destroyed by fire, and the appellants claim compensation from the British Government, alleging that the loss of the petroleum was caused by negligence on the part of the captors. It is admitted that the vessel if taken before a Prize Court would have been condemned as lawful prize, and it is also admitted

that the property in the petroleum was in the neutral appellant Company, and that it, or its proceeds, would have been released to the appellants by the Prize Court, and the only question in the Court below and on the appeal was as to whether the loss was occasioned by any negligence for which the captors are responsible to the neutral owner. The late learned President found that the loss of the property was not caused by any negligence.

There is no serious contest as to the principles of law which have to be applied, and the question to be decided is really one of fact.

The extent of the duty owed by captors to the neutral owners of goods on board a lawfully captured enemy ship is stated by Sir William Scott in *The Maria*, 4 Christ. Rob. 351, and in *The William*, 6 Christ. Rob. 316. The captors are not insurers, bound to restore the goods to the neutral owners in any event. For instance, they are not liable if the goods are stolen from them as in *The Maria*, but they are under a duty to take all reasonable care of the property, and the duty is not limited merely "to take as much care as he would in his own affairs." "The law requires that there should be no deficiency of due diligence." (*The William*.) Some questions were raised between Counsel on the argument as to the burden of proof which on one matter arising on the evidence does require consideration, and will be dealt with when that point is considered; but whilst it is clear that in such a case as the present, where the facts as to the loss are in the knowledge of the captors and not of the owners of the goods, the burden is on the captors to show how the loss occurred, according to the principle of *Scott v. The London and St. Katherine Docks Company* 3 H. & C. 596 and similar cases, yet when all the material facts are ascertained, it is for the tribunal which has to deal with the case to say whether the loss is due to negligence.

The evidence in this case was all documentary. There were affidavits by naval officers as to the facts, and there were affidavits filed by the claimants of two expert witnesses. There are also some relevant entries in the ship's log made before the capture.

The vessel started on her voyage with 1,261 tons of bunker coal, sufficient for her voyage down the South American coast and back to Barbadoes. It was a coal known as the "Miller Vein Bituminous Coal," the analysis of which is given, and the claimants' expert witnesses say that the analysis shows it to be good bunker coal. The coal was stowed in the ship's usual bunkers, including the thwart ship bunker, and with an additional quantity on the spar deck. The log contains entries recording the temperature of the coal on the spar deck, showing it to be about 80° Fahrenheit on the 29th July, five days after the vessel had started, and from that time there are almost daily entries recording slight variations of the temperature up and down. The log does not record any steps being taken to reduce the temperature, but obviously some steps must have been taken,

as it occasionally got lower, and signs of watering on the coal in the thwart ship bunker were subsequently seen. At the date of the capture the temperature had reached 82° Fahrenheit.

When the vessel was captured, she was anchored at a spot on the South American coast, outside territorial waters, which was apparently used as a rendezvous by His Majesty's ships of war and their colliers and store ships, and may be conveniently called the rendezvous. The ship remained there until the 11th October, when she had to be scuttled owing to the fire which had then broken out and could not be got under. The Captain of the "Canopus" states in his affidavit that there was no Prize Court to which the vessel could have been taken nearer than 2,000 miles, that neither a sufficient prize crew to take her to any such port nor any escort for her could be spared, and it was in the early days of the war before the ocean had been cleared of German cruisers. It seems that negotiations were entered into with the Brazilian Government with a view to getting permission to take her to a Brazilian port to await a prize crew from England, but that took time, and before any such permission could be acted on, the fire broke out.

In their original claim the appellants attributed the loss in part at any rate to this delay in keeping the prize so long at anchor in a hot climate; but they amended their claim on the 17th August, 1917, after the evidence for the Crown (with the exception of that of Lieutenant Faragher) had been seen, and after they had got the advice of their expert witnesses who had seen the evidence, and whose affidavits were also made in August, 1917. The appellants then amended their claim by striking out an allegation that the captors did not sufficiently ventilate the bunker, and another allegation that they improperly kept the ship stationary and insufficiently ventilated for an unreasonable time in a tropical climate; and they now admit that this delay was sufficiently accounted for and do not rely on it.

Only a very small prize crew could be spared from the "Glasgow." Lieutenant Faragher, R.N.R., was in charge, with a petty officer, one able seaman and two stokers. Lieutenant Faragher says that his attention was at once called to the fact that the temperature of the coal on board, and especially in the thwart ship bunker, was above normal, and that it appeared to have had water poured on it by the German crew, who had then been taken off. He ventilated the coal as much as possible by taking off the hatches, and closed apertures below to prevent air passing through the coal, and he also watered it as much as he could. He reported the state of things to the officers from time to time in charge of the ships at the rendezvous. On the 30th September he got up steam in one boiler for the purpose of pumping water on to the coal. On the 1st October Admiral Grant, who had arrived on H.M.S. "Canopus" and had taken charge of the ships at the rendezvous, came on board. He gave directions

that the heated coal, which was principally on the starboard side of the bunker, should be removed from that on the port side, which was not heated, and that was done. Admiral Grant and Lieutenant Faragher each gave reasons why the heated coal could not be jettisoned, which would have been the only thing which could have made the ship absolutely safe, and these reasons are satisfactory. On the 10th October Admiral Grant received orders to join Admiral Cradock's squadron at once, and he left on the evening of that day with the "Canopus." The situation was urgent. He took off the prize crew, who were wanted on the "Glasgow." H.M.S. "Orama" had arrived at the rendezvous on the same day, and Captain Segrave, her Captain, was given the charge of the "Santa Catharina," as well as of the other ships there. He had to coal his ship from the colliers there, and that work was urgent. Admiral Grant told Captain Segrave that the coal on the "Santa Catharina" had been heating and that he must keep an eye on her. He told him that the prize crew would be taken off, and Captain Segrave said that he had to coal and could not spare a prize crew. Admiral Grant, thinking, as he says, that there was no imminent danger, gave Captain Segrave no special instructions. Lieutenant Faragher also deposes that at this time he thought that there was no imminent danger, and gives as his reason that the amount of water which had then been poured on the coal had made it safe for a time. The result was there was no one put on board that night, and at 1.30 p.m. the next day smoke was seen to be rising from the "Santa Catharina." All that was possible seems then to have been done to get the fire under, but it was too late. Captain Segrave gives reasons, which seem fairly satisfactory, as to why he did not send anyone on board before 1.30 on the 11th. It is clear, and is not seriously contested, that in the position of things which then existed, the officers in charge of the British ships and of this prize must give their first attention to the exigencies of the war, arising from the presence in those seas of German cruisers. Coaling is of the utmost importance for keeping vessels in a state of efficiency for action of any kind, and it would not be negligent to omit to send men to see the state of the prize if they were wanted for the work of coaling, unless there was actual imminent danger. It is said, however, that at least one watchman might have been spared, and counsel for the appellants insist that it was obviously the duty of the officers in charge to send at least a watchman on board instead of leaving the vessel wholly unattended with no one on board. This is now the main allegation of negligence, though not specially mentioned in the amended claim made after knowledge of the facts. It is, however, fairly clear that a watchman, if there, could have done no good. He could not himself have done anything effectual to stop the fire, and at most he might have seen the imminence of the danger sooner than it was seen, and have signalled for and got assistance before the smoke caused it to be sent. It is at this point that the ques-

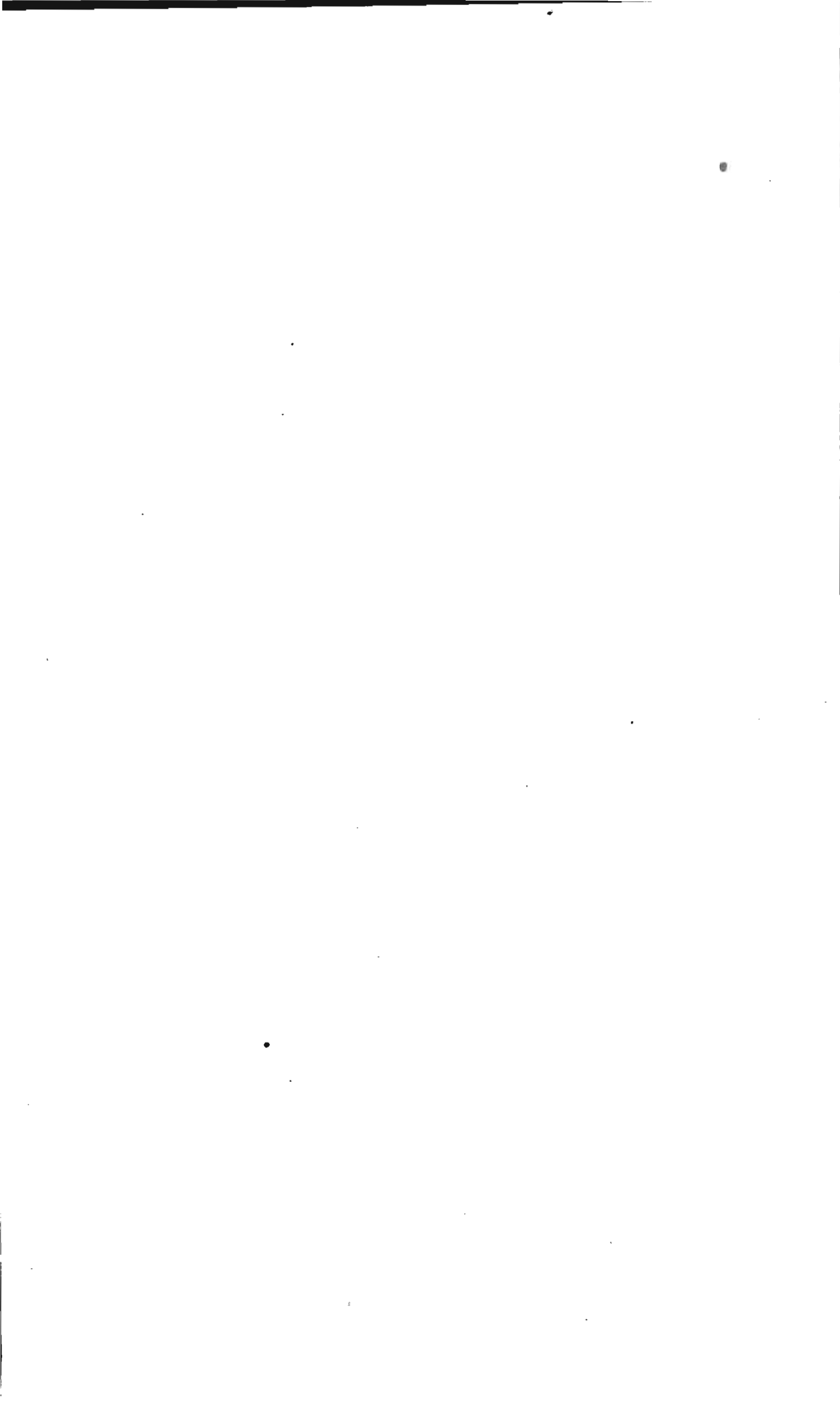
tion of the burden of proof must be considered. It is said that the Crown must prove that a watchman could not have done anything which would have prevented the loss. For this proposition counsel quote *Travers v. Cooper*, 1915, 1 K.B. 73, a case where also a vessel was left unattended, and which, assuming that the absence here of a watchman was negligent, as it undoubtedly was in that case, "does support the proposition. Here, however, the question arises whether the omission to put a watchman on board was under the circumstances negligent. Judging after the event, inasmuch as what happened shows that the danger was much more imminent than was supposed, it is natural to say that someone should certainly have been on board, and it may be so, but it is quite clear that both Lieutenant Faragher and Admiral Grant did really think, whether they ought to or not, that the danger was not imminent, and that enough had been done to make it safe to leave the vessel for a time. Unless, therefore, they were negligent in not knowing that which it is clear they did not know, it may be said to be merely an error of judgment on their part, and a mere error of judgment in not doing in circumstances of danger what after the event is seen to have been the best thing to do is not as a general rule to be imputed as negligence. A question perhaps arises as to whether Lieutenant Faragher should have taken, or Admiral Grant should have ordered him to take, other steps than he did take to ascertain the extent of the heating by inserting iron rods into the mass of coal or something of the kind as suggested by the appellants' experts. If it had been possible for them to have the coal jettisoned on discovering the extent to which the heating had gone, they should probably have taken some such steps, before they could justify not jettisoning, but their Lordships are satisfied that they could not jettison. All they could do was to put water on, in order as was said to palliate the mischief which could not be removed.

Their Lordships feel considerable doubt on this part of the case, and would rather hesitate to come to the conclusion that it was not negligent to leave the vessel entirely unattended on the night of the 10th October, but they do come to the conclusion that a single watchman could not have prevented the loss, and that there were reasons which made it impossible to put on board a sufficient number of men to have been of real use. The evidence of what was found when the boat's crew from the "Orama" got on board on the 11th shows that the fire had taken such hold that even if a watchman had been able to summon them some hours before it would have been too late. On the whole matter, their Lordships do not see their way to differ with the learned President, who was Judge of the facts. It is true that the evidence here is on paper and is before the Board in the same way as it was before the Judge below, but his opinion carries great weight. He had undoubtedly great knowledge of everything connected with coal, and its liability to spontaneous combustion, which is a difficult subject. Whilst it is right, as

Lord Stowell points out, to hold captors liable for any "deficiency of due diligence," it is not right to require of them, at a time when they have paramount duties to attend to, to take every possible precaution which, judging after the event, may be seen to have been desirable.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed and with the usual consequences.

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In the Privy Council.

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IN THE MATTER OF PART CARGO EX STEAM-  
SHIP "SANTA CATHARINA."  
THE STANDARD OIL COMPANY OF BRAZIL

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H.M. PROCURATOR-GENERAL.

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DELIVERED BY SIR ARTHUR CHANNELL.