

Privy Council Appeal No. 174 of 1919.

In the matter of part cargo ex Steamship "Oscar II."

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

v.

Olivarius and Christensen and the Thames and Mersey Marine
Insurance Company, Limited - - - - - *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 4TH MAY, 1920.

Present at the Hearing :

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
THE LORD JUSTICE CLERK.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

In this case the Procurator-General appeals from a decree of Lord Sterndale, sitting in Prize, by which he ordered the restoration to the claimants, as owners, of 250 bags of coffee, part of the cargo of the "Oscar II," their value to be ascertained hereafter by the Registrar and merchants. It was admitted that the ship with her cargo was sunk on the 1st of July, 1915, by reason of a collision with H.M.S. "Patuca," in which the latter was alone to blame; that the "Patuca" was engaged at the time in capturing the "Oscar II" in order to bring her and her cargo into port as Prize of War for the Crown; and that in fact the coffee was not liable to condemnation on any ground. No evidence was given nor were the precise circumstances explained

under which the collision occurred. It is, however, clear that the captors' obligation to be answerable for due care in the custody and treatment of the property seized had already attached, and their Lordships were informed that the "Oscar II" had reached port before she actually foundered in consequence of the collision. There seems to have been no salvage.

The owners of this coffee had a good claim against somebody. So much was not in dispute. The question was whether the Procurator-General could be made liable. Shortly after the "Oscar II" sank, the Lords Commissioners of the Admiralty accepted liability both for ship and cargo, but as they claimed to limit the amount of the liability, no action was taken against the navigating officer. Matters then remained in abeyance until the following year. In March, 1916, for reasons which must be surmised, the Procurator-General issued a writ praying condemnation as prize of part of the lost cargo of the "Oscar II," the 250 bags in question not being included in the claim. In July, 1918, the present claimants issued a writ to recover from the Crown and the Procurator-General damages for the loss of their cargo by reason of the collision, and the Procurator-General having entered an appearance and alleged that their action was misconceived, the question went to trial without further formal proceeding than an admission of facts. The learned President expressed a doubt whether the course taken by the claimants was correct in form but, as the question was merely one of procedure and could only affect costs, he treated the point as immaterial, and it has not been pressed on their Lordships as a ground for allowing the appeal. The true issue is the liability of the Procurator-General.

Captures at sea in time of war are made under the authority of the Crown in the exercise of its belligerent rights. In the regular course those who effect the capture must hold the Sovereign's commission, though a capture made without it may be afterwards ratified and adopted by the Crown. Subject to condemnation in Prize, the capture is for the Crown's benefit, and it is by the Crown's bounty that the actual captors participate in the fruits of the prize. On the other hand, the obligation is unquestioned to bring the prize in for condemnation and, pending its delivery into the custody of a Court of Prize, to safeguard it from avoidable injury or loss. This obligation is for the benefit of the parties interested, to whom the property may be released by the Court if grounds of condemnation fail. These belligerent rights and these obligations towards neutrals are correlative and ought to correspond. They are rights and obligations of the Crown, though exercised and discharged by the proper executive officers.

The Prize Court Rules now make provision for the commencement of the proceedings for condemnation, to which according to old practice the actual captors were parties, by the issue of a writ in the name of the Crown only, by its proper officer who is the Procurator-General. As a result of this change the position of

neutrals in a Court of Prize must be greatly prejudiced, unless, in assuming the position of captor in the Prize Court proceedings, the Crown also assumes responsibility towards neutral claimants. This matter came before their Lordships' Board in the "*Zamora*," [1916], 2 A.C. 77, and, at least as regards liability for dealings with the *res* during the proceedings to the prejudice of the parties ultimately successful, the question was decided. What now remains open is responsibility for damage arising from failure to take care of the *res* prior to the commencement of proceedings in the Prize Court. Is there any reason why a similar conclusion should not be deduced from the Orders and Rules in the present case? If not, can it be said that to such extent the Orders and Rules are *ultra vires*?

The general effect of that judgment, so far as relates to the present question, is summed up in a passage on page 111 :—

"In their Lordships' opinion these rules are framed on the footing that, when the Crown by its proper officer is a party to the proceedings, it takes upon itself the liability as to damages and costs, to which under the old procedure the actual captors were subject."

This passage does not limit the liability spoken of to the consequences of dealings, which take place after the issue of the writ, and it sums up the whole argument upon the construction of the Orders and Rules, which forms the foundation of the judgment, in a manner which does not lend itself to a restricted application.

It was contended before their Lordships that the Procurator-General takes the place of captor only for the purpose of the proceedings in the Prize Court. Hence, it was said, he cannot as captor for that purpose have any responsibility for the derelictions of duty of persons, strangers to himself and his office, which took place before the proceedings began. It was said further, that the present proceedings, for the purpose of which alone he assumed the position of captor, are taken against other cargo and do not relate to the parcel of coffee in question, and that a claim cannot now be enforced against him at the instance of persons, whose cargo he does not seek to have condemned.

In their Lordships' opinion, the effect of the Prize Court Rules is that, after the proceedings are instituted, the Procurator-General is the captor not for particular and specified purposes, but generally, though it is true that the actual captors are referred to in some rules for specific purposes, such as joint capture and prize bounty. It is not necessary for their Lordships to decide on the present occasion whether damages could have been claimed against him, if he had commenced no proceedings in Prize, though they are not to be understood as negating his liability even in such a case. They are, however, unable to find anything in the rules to limit his liability, since he has elected to begin proceedings, to such dealings with the subject matter of the suit as took place in the course of it, and they think

that, as a matter of construction, his position and liabilities cannot be so restricted.

Equally little are they able to accept the argument that his liability is only to such persons as may be interested in the actual goods, whose condemnation he may have chosen to seek in such proceedings as he thinks fit to institute. The actual captors seized the whole ship and all her cargo. To bring any of it into port they had to bring in all, and they exposed all in common to the risk of such dereliction of duty as they were guilty of and were bound to deliver to the custody of the Court all that they might ultimately bring in. Upon this argument, if there had been partial damage to part of the cargo instead of total loss of all, the Procurator-General might have chosen the undamaged cargo as the subject of his proceedings for condemnation and by forbearing to ask for the condemnation of such cargo as suffered injury, might have escaped all liability in respect of it. Such a contention only needs to be stated to be dismissed. A Court of Prize, unless constrained by the authority of the most explicit and binding regulations, could not expose to so gross an unfairness those neutrals whose interests are committed to its protection.

It was then argued, that, if the Rules impose on the Procurator-General so wide a liability, they go beyond the function of rules of practice and procedure, transcend the statutory power given by the Act of 1894, which is a rule-making power, and trench upon the Royal prerogative, which the Naval Prize Act of 1864 expressly saves. Their Lordships think that these points are scarcely debateable, since the decision in the "*Zamora*," even though they may not have been expressly dealt with in the terms of that judgment. The argument involves no little injustice. Had the Crown been pleased to issue the proclamation, usual in former wars, granting prize to the actual captors, and had the traditional practice remained unaltered, they would have been liable in the Prize Court proceedings for neglect of due care. On the present view, by forbearing to issue such a proclamation, the Crown takes to itself the fruits of the capture, when harvested in the Prize Court, but leaves to the neutral only the satisfaction, often a barren one, of looking to the actual captors in other proceedings for payment of compensation, if his property is damaged by neglect of the captors' duty. The argument further involves some confusion. The prerogative of the Crown is strictly not involved either in the capture or in its incidents. No question then arises between the Crown and its subjects. The belligerent right of the Crown is to seize the property of neutrals at sea in time of war under certain circumstances and on certain conditions. One such condition is that the property be brought before a Court of Prize for adjudication; another is that in the meantime a certain established measure of care be used in dealing with the property. It is not one of the belligerent rights of the Crown to damage neutral property after seizure, either by omission or commission.

The obligation to bring the property before the Court for condemnation is one which may be discharged by the actual captors ; or, if the Crown is minded to discharge that obligation and to institute the necessary proceedings by its proper officer, such a course may be taken either at pleasure or under a permanent regulation. If the Crown is pleased to take this course, it waives the right to leave the actual captors to be the parties to act. Again to seek the exercise of one part of the jurisdiction of the Court is in itself a submission to the exercise, when justice requires it, of the correlative jurisdiction of the Court, if the claim for a decree of condemnation fails. The enforcement against the party, who alone is before it as captor, of the liability for neglect of a captor's duty may indeed be regarded as being in itself a matter of practice and procedure, for it is part of the *cursus curiæ*, rules or no rules. The matter may, however, be put somewhat higher. If the Crown is pleased to assume a position which involves the abandonment of its right not to be made liable in damages but to leave the enforcement of such liability to be made against the parties actually in fault, such a diminution or waiver of its position is valid. Now the Rules are made under the authority of an Order in Council and, as this Board pointed out in the "*Zamora*" if by Order in Council the Crown intimates consent to being placed in a position more limited than might have been claimed for it, had its full rights been insisted on, a Court of Prize is bound to give effect to such a waiver in favour of the neutral. Were it otherwise, the Crown would be placed in the position of seeming to approbate the part of the Rules by which it obtains as captor the advantage of a condemnation, and to reprobate that part by which it bears the captor's responsibility. Such a waiver is the effect of what is done under the Prize Court Rules and this is why the construction of those Rules was accepted in the "*Zamora*" as being the only real question. Their Lordships think that the construction, which in that case made the Procurator-General liable in damages and costs under the Rules is equally applicable in the present case. There is no ground for holding the Rules to be *ultra vires*. The decision of Lord Sterndale was, therefore, right and ought to be affirmed. Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

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HIS MAJESTY'S PROCURATOR-GENERAL

v.

OLIVARIUS AND CHRISTENSEN AND THE
THAMES AND MERSEY MARINE INSURANCE
COMPANY, LIMITED.

DELIVERED BY LORD SUMNER.

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