Privy Council Appeal No. 1 *of* 1920.

In the matter of the Steamship "Dusseldorf."

Waldemar Eckell (on behalf of the Norwegian Government) - *Appellant*

v.

His Majesty's 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 29TH JULY, 1920.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

In this case the "Dusseldorf," a German ship, was making her way from Narvik, with a cargo of iron ore, down the Norwegian coast towards the entrance to the Baltic, and so to Emden. Her object was to keep within Norwegian territorial waters, so as to baffle capture by British men-of-war. She was taken by H.M.S. "Tay and Tyne," at a point off Buholmen and Grisholmen, which was, as it turned out, a little (say 200 yards) within the territorial limits. The learned President, Lord Sterndale, found that the commander of the "Tay and Tyne" had no intention of violating Norwegian neutrality, but that, by an error of judgment, which their Lordships consider to have been very pardonable, he conceived that the three-mile line should be drawn a little further to the east than its true position. It is plain that the German ship-owners had a narrow and somewhat lucky escape, and that the sovereignty of Norway suffered the minimum of prejudice from this unintentional violation.

The present claim is made on behalf of His Majesty the King of Norway by the appellant, Mr. Waldemar Eckell, the Royal Norwegian Consul-General in London. His claim is, firstly, for delivery up of the "Dusseldorf" and her cargo or its proceeds; secondly, for the cost of removing her to Norway;

thirdly, for costs and fees payable to the Marshal of the Prize Court or otherwise upon her delivery; and fourthly, the vessel having been regularly requisitioned by His Majesty's Government pending the hearing before the Prize Court, for an account of profits made by the Crown from the use of the ship, or alternatively, for payment of a reasonable sum for her use.

It may be well to consider in the first instance how this matter stands, apart from authority. In the vessel herself and her cargo, on their own account, the Norwegian Government have neither right, title nor interest, nor had they ever even possession. The German owners have all the right and interest, and, in the absence of any treaty or convention dealing with the case, they can neither come before the Court directly as claimants nor can they be allowed to do indirectly what is directly incompetent. Indeed, as against them, the capture is good, being the capture of enemy property; and the "claim of territory," as it is called, is one which is available to the territorial sovereign only, and not to the private ship-owner. These considerations, apart from the validity and effect of Orders, regularly made, permitting the Admiralty to requisition the vessel, at once dispose of the fourth claim, namely, that for profits or freight or hire in respect of the benefit which the British Government obtained from requisitioning the vessel under the Prize Rules. If the appellant recovered any such sum, it would be held simply in the interest of the enemy owners. No claim has been made, nor has any evidence been given, on the footing that the Norwegian Government have come under any pecuniary liability to the owners of the "Dusseldorf," nor is there any suggestion that the seizure involved them in any outlay or pecuniary disadvantage outside of these proceedings. No one would wish to make light of a violation of territorial sovereignty, but in itself this is a matter arising between sovereigns and, apart from the peculiar position of captors who are bound to bring their alleged prize before the Court, it would in itself be non-justiciable, for in effect the Prize Court would be called on to pronounce a decree, founded on the conduct of his officers, against the Sovereign in virtue of whose commission it is authorised to act, and to evaluate imponderable wrongs, which lie outside the category of those with which it is wont to deal.

A Court of Prize is not, as such, a disciplinary tribunal for officers in His Majesty's Navy, charged with the correction of errors committed by them while discharging their duties. Any complaint against such officers, which the Government of Norway might have, and any claim for amends for an invasion of the territorial sovereignty of Norway, would fitly be preferred through diplomatic channels to His Majesty's Government for examination and redress.

The facts that the Court found itself regularly in possession of the "Dusseldorf," and subsequently made a regular order giving leave to requisition her, are at once the foundation of

the jurisdiction and the occasion of the Norwegian Government's appearance. It is a fortunate circumstance that the ancient practice, by which Courts of Prize entertain litigious claims of this kind made on behalf of neutral Powers, led long ago to the submission of one class of international questions, at any rate, to a judicial determination instead of to the arbitrament of arms, and so provided for a solution of vexed questions at once peaceful, honourable and friendly. It may therefore well be that the rules, which apply to capture on the high seas, are by no means closely applicable to capture in neutral territorial waters. On the high seas, if there is reasonable ground for detention, the risk of it is one, which even a neutral must run, and the appropriate remedy is the release of the ship in this country. In neutral waters, on the other hand, no capture should be made at all, and rules applicable to the high seas are not *in pari materia.* Simple release of the ship in this country to the claimant Sovereign may be an inadequate redress. The fact that the Court has duly received into its charge and jurisdiction a ship, which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant is for a *restitutio in integrum,* so far as the Government of Norway are concerned; but that, naturally as their Lordships would incline to a treatment of it as liberal and ungrudging as possible, they are still bound to act judicially and to follow legal principles and the decisions already given in Prize cases.

The authorities prior in date to the recent war are few in number and are somewhat indeterminate. In cases between captors and private owners the jurisdiction to award damages and costs against the former on the ground of their misconduct, or to refuse to give them in favour of the latter, where their conduct had been suspicious or irregular, was long ago well recognised, but the language used in stating the grounds of it was not uniform. Sometimes Sir William Scott spoke of such decrees as giving compensation to the suffering owners, whether the misconduct of the captors was intentional or not; sometimes they were made avowedly as a punishment to deter others, generally privateers, from the repetition of offences. In the " *Ostsee* " (M.P.C. 150) the Privy Council laid it down that the former is the better view, though, if so, it is not easy to appreciate the relevancy of inquiring whether the captors acted under a reasonable mistake. From such a jurisdiction little guidance is to be obtained in the present case. Of actual " claims of territory " but few are reported. There are three decisions of Sir William Scott—the " *Twee Gebroeders* " (3 C. Rob. 162), the " *Vrow Anna Catharina* " (5 C. Rob. 15), and the " *Anna* " (5 C. Rob. 373)—and during the present war, in addition to the present case, there have been the " *Lokken* " (26th July, 1918), the " *Valeria* " (1920, P. 81), and the " *Pellworm* " (21st April, 1920). No point has been argued in the present case as to the effect of the provisions of the Treaty of Versailles, such as was discussed in the " *Pellworm.*"

In the " *Vrow Anna Catharina* " Sir William Scott observes :—

> " The sanctity of a claim of territory is undoubtedly very high. . . . . When the fact is established it overrules every other consideration. The capture is done away, the property must be restored notwithstanding that it may actually belong to the enemy, and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment."

In the " *Twee Gebroeders* " the same great authority condemned the conduct of the captors as having been in violation of a neutral Sovereign's rights ; but held that, as they had not intended to commit any wrong, and as it was not easy for them to have ascertained where the neutral boundary ran, they ought not to be held liable in damages and costs. On the other hand, in the " *Anna,*" which was the case of a privateer and not of a regular King's ship, there had been deliberate abuse of the territorial waters of the United States, and in a claim of territory restitution of the captured vessel was accompanied with a decree for payment of damages and costs. It does not appear what the measure of these damages was, or whether the Government of the United States had been put to actual expense by the conduct of the privateer.

In the present case there can be no doubt that the appellant was entitled to have the " Dusseldorf " (and the proceeds of the cargo) released to him on behalf of His Majesty the King of Norway. Had the naval officer's error been brought to the notice of the British Government forthwith, before the " Dusseldorf " was brought before the Prize Court, her prompt return to Norway on behalf of the Crown, with suitable expressions of regret and regard, would, it can hardly be doubted, have been an ample satisfaction to the King of Norway for the unintentional wrong done. In the event, which has happened, of the ship's being placed in the Prize Court, the question now is what further relief, if any, should be accorded to the claimant.

The learned President, Lord Sterndale, before whom this question was hardly sufficiently argued, decided, on the authority of the " *Twee Gebroeders,*" that there was no ground for decreeing such costs and damages to the claimant as it has been the practice to grant where the violation of neutrality has been high-handed, negligent or designed. If this were the sole ground on which the matter could be put, there can be no doubt that his decision ought to be affirmed.

It is, however, now on fuller argument contended that, as the right of the Norwegian Government is at least for restoration, this involves either the physical re-delivery of the " Dusseldorf " in Norwegian waters, which is not really asked for, or the payment of the costs of her return voyage. The ground is that, if this be not so, the Norwegian Government must either pay this expense, and so suffer pecuniarily for the error of a British officer, or leave the German owners to navigate the vessel for themselves. In any case as between the Norwegian Government and persons

whose property at the time of the seizure was within the territorial jurisdiction of the King of Norway and *sub protectione regis*, this would place his Government in the invidious position of leaving them without any redress at all for a seizure, which occurred notwithstanding their claim to the protection of the Norwegian Crown. There is a further matter for consideration, which is this. If the hearing had been completed and the release had been decreed, *flagrante bello*, as might have been the case, and if the Norwegian Government, to avoid expense and responsibility for which they would receive no recompense, had forthwith handed the " Dusseldorf " over to her owners before she had reached the security of neutral waters, she might have been captured again. In that case the Government of His Majesty the King of Norway might have been exposed to the observation that their proceedings resulted merely in the vindication of the public sovereignty of the Kingdom of Norway without advantage or redress to the private rights, which had suffered interference while within the limits of that realm.

Their Lordships think that this argument is well founded, and that, alike from the necessity of performing and paying for the voyage to Norway at their own expense, and from the possibility of being exposed to any such reflection, the Norwegian Government ought to be protected. They are therefore entitled to costs of the voyage to Norway paid and borne by them. The claim for repayment of the Marshal's fees and other similar sums rests on a different footing. Here the important points are that the ship came regularly into the custody of the officers of the Court and, but for the requisitioning, which also was a regular proceeding, would have remained throughout in its charge, and so would have had the benefit of care and protection, which would enure to enhance the vessel's value or avert depreciation. Even in the hands of the Admiralty, she has necessarily had the benefit of a certain amount of upkeep in the ordinary course of user, and there is no suggestion of ill-usage, neglect or wilful deterioration. Although, as now appears, the captors had no legal right to possession, they were in fact in possession in all good faith, and, in placing the ship and cargo in the custody of the Marshal, they acted in discharge of an obligation of a very binding character, from the observance of which it would be most inexpedient to deter persons in their position in any way. Further, in a matter of costs it is particularly necessary to observe settled rules of practice, for costs are always somewhat artificial matters and dependent on the practice of the Court. It has been laid down in the " *Franciska* " (10 M.P.C., p. 73) by their Lordships' Board that such costs as those now in question are properly charges on the property itself, because it is for the benefit of whom it may concern that the ship and cargo should be placed in the care and custody of the Marshal of the Court. This decision is, of course, binding upon their Lordships, and they therefore think that these charges form a proper charge against the ship and fall

to be discharged by those to whom she is delivered up, nor is it necessary or appropriate to inquire under what form or by what process, if any, they may be recovered over from the German owners.

It is possible that some part or the whole of the costs of transferring the " Dusseldorf " to neutral waters has been paid, or contracted to be paid, by her owners, and so has not fallen, or, if they perform their contract, will not ultimately fall, on the Government of Norway. In such a case the appellant will not recover them in these proceedings. In the result the appeal will be allowed with costs, and the decree of the President will be varied by directing that the appellant is entitled to be paid such expenses of removing the " Dusseldorf " from British waters to Norwegian or other neutral waters as may have fallen, or will ultimately fall, on the Government of Norway, but otherwise the decision of the President will be affirmed. The case will be remitted to the Prize Court to make the necessary formal decree and to direct a reference to the Registrar. Their Lordships will humbly advise His Majesty to this effect.

In the Privy Council.

In the matter of the Steamship "Düsseldorf."

WALDEMAR ECKELL (ON BEHALF OF THE NORWEGIAN GOVERNMENT)

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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