Privy Council Appeal No. 100 of 1921.

In the matter of part cargo ex steamship "New Sweden."

The Topken Company - - - - - - - - *Appellants*

v.

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

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER, 1921.

Present at the Hearing:

LORD SUMNER.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

On the 16th May, 1916, the steamship "New Sweden," a Swedish vessel outward bound from Christiania to Newport News, put into Kirkwall by her owners' orders and delivered to the Surveyor of Customs there 157 bags containing postal packages. This was done in pursuance of the Reprisals Order in Council of the 11th March, 1915. According to the practice in force, these bags were placed in the hands of the Postal Authorities in the same condition in which they were received and were despatched by rail to London, in order that they might be searched there for goods, which were of enemy origin or were otherwise liable to be detained under the Order. Such a search at Kirkwall would have been impracticable.

By some accident, unexplained and probably inexplicable, the van containing these bags took fire while the train was passing

through Perthshire. 95 bags were destroyed altogether and only 62 reached London intact, but 7 more were salved in a damaged condition. The mail-bags had contained 301 parcels of leather gloves of German manufacture, which belonged to neutral owners, the appellants, but only 113 reached London. Upon examination of the bags there these parcels were discovered and were formally seized on the 9th June, 1916 by the Surveyor of Customs, who placed them in the custody of the Marshal of the Prize Court. By decree, dated the 12th November, 1917, they were pronounced to be of enemy origin and ordered to be sold. The net proceeds—£1,073 17*s.* 3*d.*—were ordered to be released to the appellants' solicitors by consent of the Procurator-General on the 6th May, 1921, and thereafter the appellants moved for an order that the Procurator-General should pay them damages for the gloves lost. The President dismissed this motion and the present appeal was then brought.

Persons who claim the release of goods in Prize or of money lodged in court to represent them, may charge the Procurator-General, in virtue of his office, as the person liable to answer for the shortcomings either of officials, who have dealt with the goods before they were placed in the custody of the Marshal, or of the Marshal himself. It is plain that it was no part of the duty of those, who brought the "New Sweden" in or received what she discharged, to place goods in the custody of the Prize Court which were neither enemy goods nor goods of enemy origin. Equally little was it the function of the Marshal to take charge of such goods. Before any delivery could be made to him examination and discrimination were indispensable, and the case must therefore be considered both in regard to events happening before the seizure and in regard to those happening after it. As no actual neglect or default is alleged in connection with the way in which the goods were dealt with, the appellants' contention is either that some or all of these officials stand towards the owners of the goods in the position of insurers and are answerable for their safety and ultimate return in all events, or that they were under some obligation towards the appellants to effect policies of insurance for their benefit.

There has been from time to time some difference of opinion as to the exact degree of care which is required of captors, but their obligation has always been recognised as being one of care and prudence. It has never been placed so high as that of insuring or answering in all events for the safety of the prize, whether by protecting it from all hazard or by providing through policies of insurance a fund to make good its loss. The law is now well settled that it is for unreasonable action, for negligence and for wilful wrongdoing, that captors are liable from the time of seizure to the time when the *res* is placed in the custody of the Prize Court. If the obligation went beyond that of reasonable care and abstention from wilful wrong, most of the discussions and decisions on this subject would have been wholly beside the mark. There is neither principle nor authority for placing the

responsibility of those who exercise a lawful right of search, or who act in accordance with the terms of a Reprisals Order, any higher than that of actual captors. On the other hand, insurance of the owners' interest is clearly a matter for the owners themselves. In this particular case the length of time elapsing between the Order in Council and the shipment in question raises the presumption, that the owners were fully alive to the possibility and even the probability that the "New Sweden" would put into Kirkwall and that the goods, after being removed from the ship, would be despatched to London. It may be that they actually insured against the risks thereby incurred: it certainly does not appear that such an insurance was impracticable.

Their Lordships have already declared their opinion that "there is no obligation on the part of the Crown or its Executive officers or the Prize Court Marshal to effect insurances against fire for the benefit of cargo-owners, whether the cargo be landed or kept on board a captured ship" (the *Sudmark*, No. 2, 1918, A.C. at p. 484; the *Cairnsmore*, 1921, 1 A.C. at p. 441), though in general the Marshal does insure goods in his custody. As against claimants, to whom goods which might have been condemned are in fact released, the premiums are not charged on them in ordinary circumstances. Where, however, the goods are detained only and cannot be condemned, it has been held (the *United States*, 1920, P. 430) that the premiums constitute an expense, which the goods must bear. On this principle a small sum was deducted for insurance in the present case in arriving at the net proceeds. Their Lordships do not understand this deduction to be challenged, but only to be used as an argument that the goods should have been insured at an earlier stage, namely, during the railway journey, when, as it proved, they ran some risk. As far as the Marshal is concerned, however, the point does not arise, for the fire took place before the bags were formally seized or were placed in his custody at all, and he could not be bound to insure goods which had not been seized, or liable for more than the goods which were delivered to him or their proceeds. The appellants' attempt to find some duty in the officers, who bring in and examine the goods, to accelerate the date of their delivery to the Marshal, in order that any policy kept afoot by him might attach and protect them at the earliest possible moment, is one not supported by any authority. It is true that, as their Lordships were informed, the President stated that he had it on high authority, apparently that of the Marshal himself, that the Surveyor of Customs at Kirkwall was one of his deputies, but not only is there no evidence that in taking possession of the bags and forwarding them that official was acting as such deputy, but the facts that he was then acting only in furtherance of a right of examination and search and that the delivery to the Marshal's custody is stated to have taken place in London after the fire, are conclusive that he was not. The loss therefore occurred before the functions of the Marshal had begun.

The appellants finally rested their case on the terms expressed

in, or to be implied from, the Order in Council itself. Its validity has already been the subject of decision by their Lordships, and it was not suggested that transmission of the mail-bags to London for examination inflicted unreasonable or unnecessary risk or loss upon neutrals. In fact, examination in London is probably as much in favour of the security of the owners as it is of the efficiency of the examination in the interests of the belligerent. It is argued that the whole scheme of the Order is to provide for temporary detention only, which implies final restoration, and that the Order, being in itself an interference with neutral property, not warranted by ordinary rights of capture but dependent on abnormal circumstances which gave rise to a right of reprisal, nothing can be held to be authorised to the prejudice of the neutral beyond that which the order expressly sanctions. This is applied in two ways. The Marshal's duty, it is said, is to be in a position, *quacunque viâ*, to restore when detention ends, and to restore in value, if not in specie; and the duty of those who act before his custody begins is to put him in a position to discharge this duty—that is, to deliver to him, at all events, all the goods brought in, so that he may thereafter be in a position to detain and to restore them. Both duties must be derived from the Order in Council.

It is true that the Order in Council provides for detention, and that in no event is condemnation in question, though it is contemplated that the ownership in the goods may be divested, since this is the result of sale, but the terms of the order are precise and unambiguous, and no extension of them by implication is involved in the deductions which their Lordships propose to make from them. Detention no doubt implies ultimate restoration, but restoration of what? As the Order expressly provides for sale of the chattels detained, the restoration is not necessarily or commonly restoration in specie. What is to be restored is the net cash proceeds. The Order requires that the goods in question:—

> "shall be placed in the custody of the Marshal of the Prize Court, and if not requisitioned for the use of His Majesty shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just."

Since nothing further is directed, the Court can but apply the same principles as it is accustomed and bound to apply in matters of prize, and there is a special provision that the ordinary practice and procedure of the Prize Court is to be followed, *mutatis mutandis*. This provision, Article V (2), is not exclusive of all other resort to the principles of Prize Law, but is inclusive of practice and procedure, such as they may be when the Order is put into force. It follows that if the Court makes an order, just in itself, with regard to the disposal of such net proceeds as the Marshal has in his hands, so as to discharge him in accordance with its ordinary principles and refuses to hold liable either its own officers

or the officials who detain, forward and search the parcels mail prior to the seizure in prize of the goods in question, no default having been proved against them, it is strictly adhering to the terms and sense of the Order in Council, and if neutral rights of property suffer, that result can be justified under the terms of the Order of the 11th March, 1915. For these reasons their Lordships think that the order appealed from was right, and that the appeal ought to be dismissed with costs, and so they will humbly advise His Majesty.

In the Privy Council.

In the matter of part cargo ex *steamship "New Sweden."*

THE TOPKEN COMPANY

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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