

Privy Council Appeal No. 31 of 1916.

In the matter of the steamship "St. Helena."

The Phosphate Mining Company - - - Appellants,

v.

The St. Enoch Shipping Company (Limited) - Respondents.

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 1ST AUGUST, 1916.

Present at the Hearing:

LORD PARKER OF WADDINGTON.

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

Delivered by LORD PARKER OF WADDINGTON.

The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising this jurisdiction the Court can and will deal with all incidental matters, including questions of freight or compensation in lieu of freight. In the present case the goods in question were seized as prize on the 12th August, 1914. The jurisdiction of the Court having thus attached, the onus of proving its determination must rest on those who allege it. The appellants have not, in their Lordships' opinion, discharged this onus. Though it is possible that the release of a vessel or goods seized as prize in the manner prescribed by the Prize Court Rules (Ord. xiii) may determine the jurisdiction of the Court, their Lordships do not consider that the mere handing over of the vessel or goods to the persons who claim to be entitled without any compliance with the prescribed formalities can have this effect. The real question therefore is whether the circumstances of this case justified the order under appeal.

When the present war broke out on the 4th August, 1914, the British steamship "St. Helena" was on a voyage from Tampa and Galveston to Bremen and Hamburg with a cargo consisting (*inter alia*) of phosphate rock deliverable under bills of lading at Hamburg to the order of the appellants, an American company. She arrived at the Lizard on the 7th August and, having been informed of the outbreak of war,

abandoned her voyage, which had become unlawful, and proceeded to Manchester. She arrived at Manchester on the 10th August and there discharged part of her cargo, consisting of cotton and grain. On the 12th August the phosphate rock, being still on board, was seized as prize and came into the possession of the Prize Court marshal. It had been shipped by the appellants in order to be delivered to two German companies under certain contracts c.i.f. at Hamburg and was thought to be enemy property. The ship was subsequently removed to Runcorn where the phosphate rock was discharged into the custody of the Manchester Ship Canal Company on account of the marshal. On the 8th September, 1914, the marshal's substitute, being satisfied that the property in the phosphate rock still remained in the appellants, wrote that he was authorised to release the same without presentation of documents or payment of freight, and that all transactions as regarded bills of lading and freight were to be dealt with as between ship and consignee. It appears that on the strength of this letter the Canal Company delivered the phosphate rock to the appellants against deposit in the usual way of the amount claimed by the ship for freight. The respondents, the shipowners, subsequently instituted an action in the King's Bench Division to enforce their claim to freight, but this action was dismissed with costs on the ground that the respondents, not having carried the goods to Hamburg in accordance with their contract, could not recover the agreed freight or any part thereof. The respondents thereupon applied by motion to the Prize Court asking for a declaration that they were entitled to some remuneration for the carriage of the appellants' goods, and a reference to the Registrar and Merchants to ascertain the amount. On the hearing of this motion the President made an order declaring that the respondents were entitled to claim for remuneration in respect of the carriage of the goods, and referring such claim to the Registrar and Merchants for report. Some discussion took place before their Lordships as to the precise meaning of this order. In their Lordships' opinion it cannot be regarded merely as affirming the jurisdiction of the Court to entertain the application, leaving the question whether the application should be granted for subsequent determination after report by the Registrar and Merchants. In effect it allows the application, the reference to the Registrar and Merchants being for the purpose of ascertaining the amount only. The question their Lordships have to decide is whether the order so construed was rightly made.

In their Lordships' opinion it is quite clear that as a matter of contract no freight was payable. Under the contract between the parties nothing could become due for freight until the ship had performed her part of the bargain by carrying the goods to their port of destination. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight. It is pertinent to enquire on

what ground they should be entitled to such compensation in the present case? If the goods had never been seized as prize they could have claimed nothing for freight. They abandoned the voyage on the 7th August, long before the seizure. They could not do otherwise, for the war rendered its continuance unlawful. Why should a subsequent seizure of the goods, unlawful as against the neutral owners, subject such owners to a liability from which they would otherwise have been free, or confer on the shipowners rights which these latter would not otherwise have had? Their Lordships failed to find any satisfactory answer to these difficulties in the arguments advanced or the cases cited on behalf of the respondents. In their opinion, compensation in lieu of freight may well be awarded against the captors where, by reason of a seizure *jure belli* which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which but for such seizure it could lawfully have earned. This might, for example, be the case where the ship on which the goods have been carried is a neutral ship, and as such entitled to continue the voyage. Again, it may well be that where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure. But where prior to the seizure the voyage has become unlawful, and all possibility of earning the freight has been already lost, there appears to their Lordships to be nothing for which compensation can be properly awarded. It is no part of the function of the Prize Court to alter the contractual relations between ship- and cargo-owner, and this would be the only result of allowing such compensation.

Some stress was laid by the respondents' counsel on the case of the "Friends" (Edw. 246). There, a British ship bound for the port of Lisbon, a friendly port, found it blockaded by the British Fleet during the temporary occupation of the French. After waiting some days with the blockading squadron in hopes that the blockade would terminate, she was blown out to sea and captured by a Spaniard. She was almost immediately recaptured by a British ship, and taken as prize to Madeira, where both ship and cargo were sold by the captors to pay the salvage. In adjusting the rights of ship- and cargo-owners respectively, Lord Stowell allowed the ship compensation in lieu of freight. His reason was that both ship and goods had met with a common misfortune, neither being in any way to blame, so that it was fair to divide the loss between them. In the present case there was no common misfortune, the ship was not seized as prize at all, and the seizure of the goods was unlawful. The case of the "Friends" is therefore clearly distinguishable.

In their Lordships' opinion the appeal ought to be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

(No. 31 of 1916.)

THE PHOSPHATE MINING COMPANY

v.

**THE ST. ENOCH SHIPPING
COMPANY (LIMITED).**

DELIVERED BY
LORD PARKER OF WADDINGTON.