

*Privy Council Appeal No. 75 of 1920.*

*In the matter of Goods ex Sailing Vessels " Cairnsmore " and " Gunda."*  
His Majesty's Procurator-General - - - - - *Appellant*  
*v.*  
Ballins Sonner and Company - - - - - *Respondents*

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 7TH DECEMBER, 1920.

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*Present at the Hearing :*

LORD SUMNER.  
LORD PARMOOR.  
LORD WRENBURY.  
SIR ARTHUR CHANNELL.

[*Delivered by LORD WRENBURY.*]

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This is the appeal of the Procurator-General from an order of the President, Sir Henry Duke, by which he pronounced the cargo owners not to be liable for the premiums or policies of insurance effected by the Marshal against fire, aircraft, and bombardment. The claimants, Messrs. Ballins Sonner and Company, of Copenhagen, were the owners of 1,425 tons of quebrachologs laden on the " Cairnsmore " and 2,400 tons of quebracho logs laden on the " Gunda " which were seized as prize in July and August, 1915, and were discharged and stored on open ground in the Albert Dock, Leith. The Crown claimed condemnation, but on the 21st and 24th July, 1916, Sir Samuel Evans ordered the goods to be released. Nevertheless, the greater part of the " Cairnsmore " shipment and the whole of the " Gunda " shipment remained stored at Leith until after the 31st July, 1919. This was due to the fact that the Danish owners were unable to get shipment for them. Ultimately all the goods were sold and removed.

At the outbreak of war the Admiralty Marshal had effected a general cover by way of insurance against fire of goods which might from time to time be placed in his custody as prize. Further, on the 23rd May, 1918, he gave notice by advertisement and by notice posted to solicitors practising in the Prize Court including the solicitors for the claimants in this case that, in addition to the cover already effected against fire, goods in his custody as prize would from that date be insured against aircraft risk and at certain places against bombardment risk. The goods in question in this case were brought under the covers thus effected. The question to be determined is whether a proportion of the premiums, amounting in the aggregate to £910 4s., is payable by the cargo owners to the Marshal on delivery of the goods as expenses chargeable by the Marshal against the owners. The learned President held that it is not.

The duties and liabilities of the Marshal as executive officer of the Crown in respect of goods placed in his custody under a claim of prize must arise either by statute or apart from statute. Section 31 of the Naval Prize Act, 1864, which relates to goods, refers back to Section 16, which relates to ships. The latter is a section which provides for delivery to the Marshal and for retention by the Marshal in his custody subject to the order of the Court. The statute defines no special statutory duties or liabilities in the matter. The duties and liabilities of the Marshal are those which the law imposes upon one who has the custody of the goods of another against the will of that other. His duty is to exercise all due care and diligence in the safe custody of the goods. This is not necessarily limited to such care and diligence as he would exercise if the goods were his own. (*The William*, 6 Ch. Rob. 316.) He might be content if the goods were his own to use less care than he owes when they belong to another. He must exercise all due care and diligence, and will be allowed the expenses attending the possession, care, and custody of the property, and those expenses will be treated as a charge upon the property itself (the *Franciska No. II*, 10, Moore, P.C. 73, 2 Eng. Prize Cases, 416; the *Dusseldorf*, 1920 A.C. 1034). But captors in cases of *bona fide* possession are not answerable for incidents not arising from any misconduct on their part (the *Franciska No. II*, 2 Eng. Prize Cases, 416, 430). This is equally or even *a fortiori* true of the Marshal. The liability of the Marshal therefore in respect of fire or like risk is a liability only for his own negligence. The duty of the Marshal to use all due care and diligence does not involve a duty owing to the owner of the goods to insure them while in his custody. It may be quite right and prudent that he should insure the goods to cover his own liability, say for the negligence of his agents, but there is no authority to insure for the benefit of the owner of the goods if they are lost without negligence on the part of the Marshal. The owner may already have covered the risk by an insurance effected on his own behalf. If so, why should he pay a second premium to insure them again? The owner being, say, a foreign neutral, may prefer to insure them in his own

country, where he has perhaps more confidence in the insurance office, or where he will pay a less premium. Or he may prefer to be his own insurer—or, in other words, to accept a risk which he thinks is not likely to result in a loss rather than pay a premium which is in any case money out of pocket. If the owner has not insured elsewhere, and the goods are lost, and the Marshal has effected an insurance which covers the risk, the owner may no doubt have the benefit of it, and can only have the benefit of it if he pays the premium. But it does not follow that he is bound to pay the premium and take the benefit.

The point is not without authority. In the *Catherine and Anna*, 4 Chr. Rob. 39, 1 Eng. Prize Cases 336, an order had been made to restore a ship on payment of the captor's expenses. The captor had insured the ship against fire. Sir William Scott held that the costs of insurance were not to be allowed as captor's expenses, meaning "expenses that are necessarily incurred by the act of capture." Sir William Scott there said :—

“Captors are generally bound for two things—for safe and fair custody, and if the property is lost or destroyed for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable ; but if an accident, or mere casualty, happens, against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged. If to secure himself against the negligence of his own agents, or to secure his own responsibility, the captor chooses to make insurance, I understand the practice of the registrar and merchants has been, not to allow it in their report, and I am not prepared to say, upon any principle which occurs to me, that such a disallowance is wrong. . . . The claimant is not bound to look further, nor to contribute to the expense which the captor, for his own security, may choose to incur.”

In that case the claimants had in fact previously effected an insurance themselves, but their Lordships do not find in this fact anything to affect the principle of the decision.

In the *Südmark No. II*, 1918 A.C. 475, 484, Lord Parker of Waddington in delivering the judgment of this Board said :—

“It was suggested that if an application had been made to the Prize Court the appellants would in some way or other have obtained the advantage of some insurance effected or to be effected by the Prize Court marshal. This may or may not be the case, but their Lordships are quite satisfied 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.”

There is in their Lordships' opinion not sufficient evidence that in this case the cargo owners, during the currency of the risk, assented to the Marshal insuring the goods on their behalf, in which case, of course, they might have been liable for the reasonable cost of such an insurance.

Their Lordships are of opinion that the President was right in holding that the premiums cannot be claimed as expenses to be recouped to the Marshal on delivery of the goods.

There is a subsidiary point in the present case which is of no general importance. On the 16th March, 1918, the solicitors for the claimants wrote to the Marshal that their clients were remitting them a sum "to pay all the charges of detention. . . ." On the 18th March, 1918, the Marshal replied acknowledging receipt of the letter of 16th March "advising me that you shortly expect a remittance to cover the charges of detention, insurance, etc." The word "insurance" is not found in the letter of the 16th March. On the 7th November the claimants' solicitors wrote to the Marshal asking "what the cost of insurance amounts to." In February, 1919, the purchasers of the goods were prepared to take delivery, but the Marshal refused to direct the Collector of Customs at Leith to give delivery until the solicitors had given their personal undertaking to pay all the Marshal's charges including the cost of insurance. On the 26th February, 1919, the solicitors gave the undertaking. This related to a first parcel of goods. On the 29th July, 1919, they gave a similar undertaking as to the second parcel. Their Lordships do not find that these facts in any way affect the question to be decided. There was no consideration and no admission or acceptance of liability in the matter. The claimants' solicitors very sensibly gave their personal undertaking to pay without which they could not get delivery, leaving the rights of the parties unaffected.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.



In the Privy Council.

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*and " Gunda. "*

HIS MAJESTY'S PROCURATOR-GENERAL

vs.

BALLINS SONNER AND COMPANY.

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DELIVERED BY LORD WRENBURY.

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