

Privy Council Appeal No. 70 of 1920.

In the matter of the Steamship "Valeria."

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 25TH JANUARY, 1921.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

This is a "claim of territory" made by the appellant on behalf of His Majesty the King of Norway. It is preferred in a cause in prize instituted by the Procurator-General in order that all outstanding questions as to the "Valeria" might be disposed of. On the 19th March, 1918, H.M.S. "Glendale" captured the "Valeria," a German vessel, about 50 yards within the limits of the territorial waters of Norway. The captors had no intention of intruding on those waters and believed, though erroneously, that they were outside of them, nor was their mistake due to negligence or rashness. The "Glendale" proceeded to escort the "Valeria" towards Lerwick, but encountered very bad weather, and had to take the officers and crew off the prize and to abandon her. As a derelict she would have been a danger to navigation and she was properly sunk by gunfire. This is common ground between the parties to the appeal. It must be taken that the ship was lost by natural causes, and not by the conduct of the captors, though she was sailing under their direction. The personal claim of the Norwegian pilots is to be dealt with elsewhere and is not now in dispute. Accordingly the sole question raised is one of law.

The appellant's case is that, having done wrong in seizing the ship, the captors ought to restore her *in specie*. As they cannot do that they must restore her in money. This involves the proposition

that, having seized her in neutral territorial waters, they became insurers of her against all risks and in all events whatsoever for the benefit of the neutral Sovereign. The appellant's counsel did not shrink from putting this case.

Both authority and principle were appealed to. For the former the *Dusseldorf* [1920], A.C. 1034, was relied on. In that case their Lordships observed :—

“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” (who was the same official as the appellant in the present case) “is for a *restitutio in integrum* so far as the Government of Norway are concerned.”

From this the conclusion was drawn that *restitutio in integrum* involved the payment of money, in case of the fortuitous loss of the ship. Their Lordships do not agree. No such consideration arose in the *Dusseldorf*. There the ship existed *in specie* and the right of the claimants to her release was uncontested. What was in debate was, whether it was sufficient to place the ship at the disposal of the Norwegian Government in a British port, or whether, as the equivalent of returning her to the waters from which she had been taken, the cost of transporting her from England to Norway should be paid. If this were not done, however venial and trivial the captors' original error might have been, the Government of Norway might be put to unmerited inconvenience and expense by reason of an act, of which they had the right to complain. This was the connection in which the expression *restitutio in integrum* was used. The case had no analogy to the technical *restitutio in integrum* of Roman law, nor to the measure of damages for injury to property, wilfully or carelessly inflicted, nor were such matters considered. The plain fact is that no money can restore this ship and to claim money, with which to buy another ship, or as a *solatium* for her loss, is to shift the ground of the claim from restitution to reparation.

The judgment in the *Dusseldorf* further observed :

“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.”

One of such rules, apart from questions of probable cause for the original seizure, is that the Court does not hold captors liable for damages and costs, where their dealings with the prize have been reasonable and prudent and where, if she has been lost, it has not been through their neglect or default. The passage above quoted does not imply that, in case of a claim of territory the exact opposite must be the rule, and that the captors must be decreed to pay for the ship, if, however excusably, they are unable to produce and return her. Their Lordships find in the language used in the *Dusseldorf* no warrant for the present contention.

Although this matter arises virtually, if not formally, between Sovereign and Sovereign, their Lordships, as a Court, are bound

to act judicially. It may be right that such claims should be encouraged, so that all sense of grievance in neutral Sovereigns may be peacefully and regularly removed, but their Lordships, however disposed to the fullest liberality of treatment, must be guided by settled rules and decisions. Anything in excess of this must be sought, if at all, through diplomatic channels. The Government of Norway had no property or interest in this ship; they had no possession of her nor, so far as appears, have they come under any liability or incurred any expenses, other than costs, in respect of her capture. Alike in vindication of their Sovereign's territorial right and of his high obligations of impartiality as a neutral in time of war, they claim on his behalf that the steps which the captors took should be retraced, that what was done should be undone, and that the belligerent should retain no advantage from the captor's mistaken action. This is His Norwegian Majesty's right, but compensation in money for the loss of the ship under circumstances such as these can only be asserted in the interest of the owners of the vessel. It is not as though Great Britain had profited by what happened. If the Norwegian Government be really entitled to recover money, no one is entitled to inquire into the use to which they may choose to put it; but, for the purpose of testing the right, it is germane to ask in what title that money would be recovered. Even though it is measured and described as the value of the vessel, it is money still, and would be recovered only on behalf of the German shipowners, who have no rights in the matter. The appellant conceded that the decision in the *Dusseldorf* precluded any claim for damages, as such, in a case where the captors were not guilty of any intentional offence or of any negligence or want of skill, and, in this case, between restoration and damages there is no middle term. It is argued that, if so, in spite of the fact that within the territorial waters of Norway no capture should have been made at all, the claimant will under the circumstances of the case have no more redress than in the case of an honest but mistaken capture on the high seas. It may be so. In the latter case the claimant shipowner is met by the rights which attach to the captor's *bonâ fide* possession and can vindicate his ownership only by obtaining the release of the ship, unless the misconduct of the captors give him exceptionally a claim for costs and damages. In the former, the same result is reached by a different road. The rights of the territorial Sovereign, vindicating neither ownership nor possession but his claims of territory only, are satisfied in the absence of such misconduct by the restitution of the ship herself, in the sense and under the conditions laid down in the *Dusseldorf*. He has, as a Sovereign, no alternative or additional claim to receive another ship or the means of buying one. If the ship had been neutral-owned, the owner could have made his claim directly and in his own name, and the Norwegian Government would have been independent claimants in another and separate right. From the fact that there was an enemy owner they can be no better off. In his own name the enemy owner cannot

be heard, nor in his name or in his behalf can the Norwegian Government be heard either, but only on behalf of the Norwegian Crown.

It is unnecessary to re-examine the authorities generally, which were so recently discussed in the *Dusseldorf*. In the case of the *De Fortuyn*, in 1760, cited from Marsden's collection of Burrell's Reports, p. 175, it may be pointed out that the violation of neutral waters was intentional, the claimant himself was before the Court in his own proprietary right, and the prize was apparently still existent *in specie* in the hands of the captors or of purchasers from them. It has therefore no bearing on the present appeal.

Two points, however, were made upon expressions to be found in the decided cases, which ought to be briefly considered. In the *John* (2 Dodson, at page 339), Lord Stowell distinguishes cases of unjustifiable seizures, which have been made in an ignorance which is "vincible," from those in which the ignorance is "invincible," and it is said that, at this point at least, decisions upon capture on the high seas ought to apply in favour of claims of territory, and the error of the present captors, being due to "vincible" ignorance, ought to be compensated with costs and damages, as if the capture had been on the high seas. The coast of Norway was fixed and three miles to seaward from that coast could have been fixed too. There was no uncertainty in the limits of the territorial waters, but only in the navigating officer's mind. He was ignorant of the fact of his precise position, not because it was doubtful but because he was. With better charts or better instruments his ignorance would have been vincible. Their Lordships think that this argument is a mere metaphysical subtlety. The invincible ignorance spoken of by Lord Stowell arises, at any rate when a captor, making reasonable use of all the means of information at his disposal, is yet misled. He was discussing cases, where it is impossible to tell from the ship's register, sea pass or bills of lading on board what her national character or what not may be. How is the proposition any less applicable when it is impossible with the ordinary charts and instruments to tell exactly how many scores of yards distant the shore may be? If there is no want of diligence and skill in using the instruments or other means of observation at their disposal officers are just as invincibly ignorant or the reverse, when they investigate the geographical position as when they investigate the legal status of a ship under search. There seems therefore to be nothing in this distinction.

The other point arises out of the use of the word "indemnification" in the *Hendrick and Jacob*, decided in 1790 by the Lords of Appeal. It is relied on as deciding that a general rule exists, whereby captors, who have seized a vessel wrongfully, are bound to restore her *in specie* or, if they cannot do that, to indemnify in money those who suffered wrong by her capture.

Their Lordships have made extensive inquiries in order to ascertain whether any record exists of the reasons given by the Lords of Appeal in this case, but without success. Although

collections are to be found, though by no means complete, of the printed papers laid before the Lords of Appeal by the parties in cases heard during the latter part of the XVIIIth century, and in some cases at least the original documents connected with the ship and cargo captured have been preserved in the Record Office, no note or report has been found of the reasons for the judgment, if any were given. They may well have turned on the facts of the case, for the captors alleged and the claimants denied, that those on board avowed the ship's Dutch enemy nationality when challenged, and endeavoured to destroy some of the ship's papers. What is known of them is to be found in Sir W. Scott's judgment in the *Betsey* (1 C. Rob. at p. 96) and this account was probably taken from one of the M.S. collections, formed by advocates practising in prize cases from time to time, and possibly from the notes of Sir W. Scott himself, as he signed the respondents' case on the appeal. The actual decree is thus endorsed on the appellant's case in the Library of Lincoln's Inn—"the Lords pronounced against the seizure and decreed the value to be paid to the claimants for the use of the owner."

The case is one of a vessel taken on the high seas without any justification. On demand for restitution by her owners against the original British captors the Lords of Appeal decided that the owners were entitled to restitution from some quarter and, as the ship had been lost when in the justifiable possession under prize of French re-captors, that quarter could only be the original British captors. The ship no longer existed *in specie* so that it could be followed into French hands, and since that claim was absolutely extinguished by the loss, the proprietor was entitled to his indemnification from the original captor.

Without discussing this case, their Lordships need only point out that it is distinguishable. It was a case of capture on the high seas of a ship supposed to be an enemy but really a neutral ship, so that the only wrong was one to her owners, and that a wrong in respect of proprietary right. In the present case the capture was within territorial waters and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway. Whether indemnity be an apt term or not in the case of captures, it is at any rate plain that it is a term which would preclude the appellant from recovering anything in respect of the proprietary interest in the ship. Restitution of the vessel is a restoration of the *status quo*, but payment of her value in money would either leave in the hands of the Norwegian Government a profit on the whole transaction, which is a contradiction of the whole idea of indemnity, or would constitute them agents or trustees for the German owners, who on receipt of the money would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from.

Their Lordships are, therefore, of opinion that the appeal fails, and should be dismissed with costs, and so they will humbly advise His Majesty.

In the Privy Council.

In the matter of the Steamship "Valeria."

WALDEMAR ECKELL (ON BEHALF OF THE
NORWEGIAN GOVERNMENT)

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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