Privy Council Appeals Nos. 123 *and* 124 *of* 1918.

(*In the matter of the Steamship "Leonora" and Cargo.*)

Stoomvaart Maatschappij "Leonora" - - - - *Appellants*

v.

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

G. & L. Beijer Import and Export A/B. and others - - *Appellants*

v.

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

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1919.

Present at the Hearing:

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

[*Delivered by* LORD SUMNER.]

The "Leonora," a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on the 16th August, 1917, by His Majesty's torpedo-boat F77, outside territorial waters and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council, dated the 16th February, 1917, and both the shipowners and the cargo owners appeal.

Their Lordships are satisfied that the cargo was " of enemy origin," within the meaning of paragraphs 2 and 3 of that Order. The term had been used in the Order of the 11th March, 1915, paragraph 4, and, owing to doubts as to the effect of the word " enemy " therein, a further Order was made on the 10th January, 1917, which applied the term " enemy origin," as used in that paragraph, to goods " originating in any enemy country." In the present case, the question is one of the interpretation of the third Order, that of the 16th February, 1917, which, beyond saying that it is supplemental to the above-mentioned Orders, makes no further express reference to them, but from the recital as to the recent proceedings of the German Government, it is plain that the Order of 1917 dealt with a wider mischief and was intended to have a wider scope than the previous Order. It is therefore necessary to have regard to the system of exploitation then in force in Belgium for the advancement of German interests, in order to appreciate the full effect of the words " enemy origin." It is not necessary to inquire whether, within the terms of the Order, a Belgian origin could, as such, be regarded as an " enemy " origin for this purpose, or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The collieries, from which this coal came, were included in the German " Kohlenzentrale," a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting German commercial transactions with neutral countries, especially Holland and Sweden. In particular the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne, by an official of the Kohlenzentrale in his own name, nor is it proved that he was, in fact, selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kroner in a Stockholm Bank to the credit of the Kohlenzentrale. It is stated in the German regulations that " the amount realised by the sale will be paid to the vendors," whoever they may have been. Perhaps this may have been so, for, if no money at all reached the colliery, presumably the getting of coal there would come to an end, but whatever crumbs may have been allowed to fall from the masters' table, the fact is clear that these coals were won, sold and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term " of enemy origin," as used in this Order, would be pedantic. The Order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct by crippling or preventing trade in goods, which in a broad but very real sense he made his own. It does not employ this expression " of enemy origin " as a mere geographical term, nor as merely descriptive of the nationality of the original owners of the coal, who were

involuntary and probably reluctant victims of the German system. Upon this point the view of their Lordships is that the learned President's conclusion was right.

The appellants' main case was that the Order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them it could not be held to fall within such right of reprisal as a belligerent enjoys under the Law of Nations. A subordinate part of their argument was, that in its application to the "Leonora" the Order was bad, because no British port had been appointed at which she would call for the examination of her cargo. In so far as this circumstance forms part of the general hardship to neutrals it will be dealt with presently. As a separate point their Lordships think that it fails, for the language of the Order in Council does not constitute the appointment of some British port for examination of the cargoes, either of this ship or of ships in general, a condition precedent to the application of the Order. The proviso relieving vessels, which call at an appointed port, operates not as a prescription of the circumstances under which alone such application is admissible, but merely as a mode of mitigating the stringency of the Order. The evidence discloses no reason why the appointment of a convenient port should not have been applied for to facilitate the "Leonora's" voyage, and a difficulty cannot be relied on as a circumstance of excessive inconvenience to neutrals, which it was in their power to remove by such simple means.

Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the Order purported to create an offence, namely failure to call at a British or Allied port, which is unknown to the Law of Nations, and to impose punishment upon neutrals for committing it: in both respects it was said that the Order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

In the "*Stigstad*" [1919] 1 A.C. 279, their Lordships had occasion to consider and to decide some at least of the principles, upon which the exercise of the right of retaliation rests and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full re-examination of the whole subject, and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later

Order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in the "*Stigstad,*" think that they have neither ground to modify, still less to doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general re-statement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the Law of Nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode, in which the right is exercised, consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence *motu proprio;* he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes, by which the Law of Nations as applicable to maritime warfare is enforced. Statutes and International

Conventions may invest the Court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention. In the terms of the present Order, which says that a vessel (para. 2) shall be "liable to capture and condemnation" and that goods (para. 3) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The Order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court. That a rebuttable presumption is to be deemed to arise under paragraph 1, and that a saving proviso is added to paragraph 2, are modifications introduced by way of waiver of the Sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent, who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the Law of Nations, in its application to maritime warfare, which at the same time recognises the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the Court of Prize to condemn, if it finds the capture justified, unless that right has been reduced by Statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the Sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a Court of Prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions *arguendo*, beg the question. Undoubtedly the right of retaliation exists. It is described in the "*Zamora*" [1916] 2 A.C. 77; it is decided in the "*Stigstad*," as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience.

This latter contention has already been negatived in the "*Stigstad.*" The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact, that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory Order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights, which the Law of Nations recognises as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such, as to be invalid by reason of the burden, which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally, which the German Government announced and carried out at the beginning of 1917, is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and of 1917, and their Lordships take the recitals of the latter Order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience, to which the trade of neutrals was in fact subjected by the enforcement of that Order. They do not think it necessary to criticise theoretic applications of the language of the Order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a Retaliatory Order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of Retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the "Leonora" was engaged, and they have sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to

fair-minded and reasonable neutrals and to dismiss the righteous indignation, which might well become those, who recall only the crises of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the " Leonora " in difficulties, partly of a commercial and partly of a military character. Her voyage and with it the ordinary expenses of her voyage, would have been enlarged and the loss of time and possibly the length of the voyage might have been added to by the fact, that no port or class of ports of call had been appointed for the purpose of the Order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight and, neither by itself nor in connection with other and more serious matters, should this kind of inconvenience be rated high.

It is important to observe that the Order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril and that peril, so far as condemnation is concerned, may be averted, if she calls at an appointed port. The shipowner, no doubt, would say, that, if his ship is to make the call, he will never be able to ship the cargo, for its chance of escape would be but small, and that, if he is to get the cargo, he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed, where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the Order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number, they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders and the risk of its loss need not be regarded as of great moment.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that

such a deviation, as would be required by a call at a British port, should be made by a Dutch ship, which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international Court can be curtailed by local rules, which forbid particular nationals to comply with the Order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the Order.

Further, it is pointed out that, with the exception of France, the other Allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the Order of 1915 also, the consequences involved in a disregard of the Order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a Court of Prize ought to accept as sufficient proof the public declarations of the responsible Executive, but in any case the special maritime position of His Majesty in relation to that of his Allies affords abundant ground for refusing to regard a different course pursued by those Allies as a reason for invalidating the Order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an Order, which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent not a concession by the neutral. It is enjoyed by law and not on sufferance ; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly, the most material question in this case is the degree of risk, to which the deviation required would subject a neutral vessel, which sought to comply with the Order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade ; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the Order itself would fail ; and that the deviation, which the " Leonora " must have undertaken, would have involved crossing and re-crossing the area of peril.

Their Lordships recall and apply, what was said in the "*Stigstad.*" that in estimating the burden of the retaliation account must be taken of the gravity of the original offence, which provoked it, and that it is material to consider not only the burden, which the neutral is called upon to bear, but the peril

from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an Order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for, the matter being one of degree, it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact, that calling at a British port would have taken the "Leonora" across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the "Leonora" did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.

In the Privy Council.

(*In the matter of the Steamship "Leonora" and cargo.*)

STOOMVAART MAATSCHAPPIJ "LEONORA"

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