International Law Studies – Volume 22

International Law Decisions and Notes

U.S. Naval War College (Editor)

voyage spécialement en vue du transport de passagers individuels incorporés dans la force armée ennemie;

Considérant qu'il résulte de l'instruction que le vapeur *Federico* n'est pas un paquebot faisant régulièrement le transport des voyageurs; que, lorsqu'il a été capturé en mer, il voyageait spécialement en vue du transport, de Barcelone à Gênes, de nombreux passagers allemands et austro-hongrois, dont la grande majorité appartenaient par leur âge aux classes mobilisées par leurs gouvernements respectifs et voyageaient pour repondre à cet appel; que, dans ces circonstances, ces passagers devaient être regardés comme incorporés au sens de l'article 45 précité, et qu'ainsi le navire était, aux termes dudit article, passible de confiscation.

Decision. DECIDE:

La prise du vapeur espagnol *Federico*, y compris les agrès, apparaux et accessoires, est déclarée bonne et valable pour la valeur nette en être adjugée aux ayants droit, conformément aux lois et règlements en vigueur.

Délibéré à Paris, les 15 et 16 mars 1915, où siégeaient: MM. Mayniel, président; René Worms, Rouchon-Mazerat, Gauthier, Fuzier, Lefèvre et Fromageot, membres du Conseil, en présence de M. Chardenet, commissaire du Gouvernement.

En foi de quoi la présente décision a été signée par le Président, le Rapporteur et le Secrétaire-greffier.

Signé à la minute:

E. MAYNIEL, *président;*
RENE WORMS, *rapporteur;*
G. RAAB D'OËRRY, *secrétaire-greffier.*

Pour expédition conforme:

Le Secrétaire-greffier,
G. RAAB D'OËRRY.

Vu par nous, Commissaire du Gouvernement.

P. CHARDENET.

THE "ZAMORA."

[PRIVY COUNCIL.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

April 7, 1916.

[1916] 2 A. C. 77.

Statement of case. Lord Parker of Waddington, in delivering the considered judgment of the board, said that on April 8,

1915, the *Zamora* was stopped by one of his Majesty's cruisers and was taken to the Orkney Islands and thence to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course was placed in the custody of the marshal of the prize court. It was admitted on the one hand that the copper was contraband of war, and on the other hand that the steamship was ostensibly bound for a neutral port. On May 14, 1915, a writ was issued by His Majesty's procurator general claiming confiscation of both vessel and cargo, and on June 14, 1915, the president, at the instance of the procurator general, made an order under Order XXIX, rule 1, of the prize court rules, giving leave to the war department to requisition the copper, subject to an undertaking in accordance with the provisions of Order XXIX, rule 5. The present appeal was from the president's order.

It would be convenient first to consider the terms of Order XXIX. Though the order in terms applied to ships only, it was by virtue of Order I, rule 2, of the prize court rules equally applicable to goods. The first rule of Order XXIX provided that where it was made to appear to the judge on the application of the proper officer of the Crown that it was desired to requisition a ship in respect of which no final decree of condemnation had been made, he should order that the ship be appraised and on an undertaking's being given in accordance with rule 5 of the order the ship should be released and delivered to the Crown. The third rule of the order provided that where in any case of requisition under the order it was made to appear to the judge on behalf of the Crown that the ship was required for the service of his Majesty forthwith, the judge might order the vessel to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown was to be fixed by the judge under rule 4 of the order.

The fifth rule of the order provided that in every case of requisition under the order an undertaking in writing should be filed by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship or of the amount fixed under rule 4 of the order as the case might be, at such time or times as the court should declare that the same or any part thereof was required for the purpose of payment out of court.

The first observation which their lordships desired to make on this order was that the provisions of rule 1 were prima facie imperative. The judge was to act in a certain way whenever it was made to appear to him that it was desired to requisition the vessel or goods on his Majesty's behalf. If that were the true construction of the rule, and the judge was, as a matter of law, bound thereby, there was nothing more to be said, and the appeal must fail. If, however, it appeared that the rule so construed was not, as a matter of law, binding on the judge, it would have, if possible, to be construed in some other way. Their lordships proposed, therefore, to consider in the first place whether the rule, if construed as an imperative direction to the judge, was to any and what extent binding.

The prize court rules derived their force from orders of his Majesty in council of April 29, 1915. These orders were expressed to be made under the powers vested in his Majesty by virtue of the prize court act, 1894, or otherwise. The act of 1894 conferred on the King in council power to make rules for the procedure and practice of the prize courts. So far, therefore, as the prize court rules related to procedure and practice, they had statutory force and were undoubtedly binding. But Order XXIX, rule 1, construed as an imperative direction to the judge, was not merely a rule of procedure or practice. It could only be a rule of procedure or practice if it were construed as prescribing the course to be followed if the judge was satisfied that according to the law administered in the prize court the Crown had, independently of the rule, a right to requisition the vessel or goods, or if the judge was minded in the exercise of some discretionary power inherent in the prize court to sell the vessel or goods to the Crown.

If, therefore, Order XXIX, rule 1, construed as an imperative direction, were binding, it must be by virtue of some power vested in the King in council, otherwise than by virtue of the act of 1894. It was contended by the attorney general that the King in council had such a power by virtue of the royal prerogative, and their lordships would proceed to consider this contention.

Power of King in council.

The idea that the King in council, or indeed any branch of the Executive, had power to prescribe or alter the law to be administered by courts of law in this country was not in harmony with the principles of our constitution.

It was true that, under a number of modern statutes, various branches of the Executive had power to make rules having the force of statutes, but all such rules derived their validity from the statute which created the power, and not from the executive body by which they were made. No one could contend that the prerogative involved any power to prescribe or alter the law administered in courts of common law or equity. It was, however, suggested that the manner in which prize courts in this country were appointed and the nature of their jurisdiction differentiated them in this respect from other courts.

Prize jurisdiction.

Before the naval prize act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission under the great seal at the beginning of each war. The commission, no doubt, owed its validity to the prerogative, but it could not on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The courts of common law and equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the court of admiralty was always substantially the same. Their lordships would take that quoted by Lord Mansfield in Lindo *v.* Rodney (2 Doug. 613) as an example. It required and authorized the court of admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships or goods that are or shall be taken, and to hear and determine according to the course of admiralty and the law of nations."

If those words were considered there appeared to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a court of prize suggested strong grounds why it should not.

In the first place, all those matters on which the court was authorized to proceed were, or arose out of, acts done by the sovereign power in right of war. It followed that the King must, directly or indirectly, be a party to all proceedings in a court of prize. In such a court his position was in fact the same as in the ordinary courts of the realm on a petition of right which had been duly fiated. Rights based on sovereignty were waived

and the Crown accepted for most purposes the position of an ordinary litigant. A prize court must, of course, deal judicially with all questions which came before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

Municipal and international law.

In the second place, the law which the prize court was to administer was not the national, or, as it was sometimes called, the municipal law, but the law of nations—in other words, international law. It was worth while dwelling for a moment on that distinction. Of course, the prize court was a municipal court and its decrees and orders owed their validity to municipal law. The law which it enforced might, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law was well defined. A court which administered municipal law was bound by and gave effect to the law as laid down by the sovereign State which called it into being. It need inquire only what that law was, but a court which administered international law must ascertain and give effect to a law which was not laid down by any particular State, but originated in the practice and usage long observed by civilized nations in their relations with each other or in express international agreement.

It was obvious that, if and so far as a court of prize in this country was bound by and gave effect to orders of the King in council purporting to prescribe or alter the international law, it was administering not international but municipal law; for an exercise of the prerogative could not impose legal obligation on anyone outside the King's Dominions who was not the King's subject. If an order in council were binding on the prize court such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There was yet another consideration which pointed to the same conclusion. The acts of a belligerent power in right of war were not justiciable in its own courts unless such power, as a matter of grace, submitted to their jurisdiction. Still less were such acts justiciable in the courts of any other power. As was said by Mr. Justice Story in the case of the *Invincible* (2 Gall. 43), "acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign,

and the parties to such acts are not responsible therefor in their individual capacity." It followed that, but for the existence of courts of prize, no one aggrieved by the acts of a belligerent power in times of war could obtain redress otherwise than through diplomatic channels and at a risk of disturbing international amity. An appropriate remedy was, however, provided by the fact that, according to international law, every belligerent power must appoint and submit to the jurisdiction of a prize court, to which any person aggrieved had access, and which administered international as opposed to municipal law—a law which was theoretically the same, whether the court which administered it was constituted under the municipal law of the belligerent power or of the sovereign of the person aggrieved, and was equally binding on both parties to the litigation. It had long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent power cognizable in a court of prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the prize courts of the belligerent power.

Diplomatic redress.

A case for such intervention arose only if the decisions of those courts were such as to amount to a gross miscarriage of justice. It was obvious, however, that the reason for that rule of diplomacy would entirely vanish if a court of prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent power.

It could not, of course, be disputed that a prize court, like any other court, was bound by the legislative enactments of its own sovereign State. A British prize court would certainly be bound by acts of the imperial legislature. But it was none the less true if the imperial legislature passed an act the provisions of which were inconsistent with the law of nations, the prize court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a prize court. Even if the provisions of the act were merely declaratory of the international law, the authority of the court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations or on the binding nature of the act itself. The fact, however, that the

National law.

prize courts in this country would be bound by acts of the imperial legislature afforded no ground for arguing that they were bound by the executive orders of the King in council.

Continuing, Lord Parker said:

Case of 1753.

In connection with the foregoing considerations, their Lordships attach considerable importance to the report dated January 18, 1753, of the committee appointed by his Britannic Majesty to reply to the complaints of Frederick II of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures, the Prussian King had suspended the payment of interest on the Silesian loan. The report, which derives additional authority from the fact that it was signed by Mr. William Murray, the solicitor general, afterwards Lord Mansfield, contains a valuable statement as to the law administered by courts of prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the report, "a subject of the King of Prussia is injured by or has a demand upon any person here, he ought to apply to your Majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the Dominions of his Prussian Majesty, he ought to apply for redress in the King of Prussia's courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in re minime dubia by all the tribunals and afterwards by the prince. When the judges are left free and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently, and all a friend can desire is that justice should be impartially administered to him as it is to the subjects of that prince in whose courts the matter is tried." The report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is given to any judge." It also

contains the following statement: "All captures at sea as prize in time of war must be judged of in the court of admiralty according to the law of nations and particular treaties, if there are any. There never existed a case where a court, judging according to the laws of England only, took cognizance of prize. * * * It never was imagined that the property of a foreign subject taken as prize on the high seas could be affected by laws peculiar to England." This report is, in their lordships' opinion, conclusive that in 1753 any notion of a prize court being bound by the executive orders of the Crown or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The attorney general was unable to cite any case in which an order of the King in council had as to matters of law been held to be binding on a court of prize. He relied chiefly on the judgment of Lord Stowell in the case of the *Fox* (Edw. 311). The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain orders in council made by way of reprisals for the Berlin and Milan decrees, though if there had been no case for reprisals, the orders would not have been justified by international law. The decision proceeded upon the principle that where there is just cause for retaliation neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in the *Lucy* (Edw. 122).

Retaliation.

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the court below, which refers to the King in council possessing "legislative rights" over a court of prize analogous to those possessed by Parliament over the courts of common law. At most this amounts to a dictum, and in their lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in the *Maria*, a Swedish ship (1 C. Rob. 340), his judgment contains the following passage: "The seat of judicial authority is indeed locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty

Lord Stowell on prize court.

of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm, to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the prize court is to take its law from orders in council. Moreover, if such a proposition were correct the court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation (see the *Franciska*, 10 Moore, P. C. 37). Moreover, in the *Lucy*, above referred to, Lord Stowell had, in effect, refused to give effect to the order in council on which the captors relied.

Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore ("Int. Law," Vol. III., sec. 436). It is said to have been approved by Mr. Justice Story in the case of Maisonnaire *v.* Keating (2 Gall. 325), but it will be found that Mr. Justice Story's remarks, on which some reliance seems to have been placed by the president in this case, are directed not to the liability of captors in their own courts of prize, but to their liability in the courts of other nations. He is in effect repeating the opinion he expressed in the case of the *Invincible*, to which their lordships have already referred. An act, though illegal by international law, will not on that account be justiciable in the tribunals of another power—at any rate if expressly authorized by order of the sovereign on whose behalf it is done.

Their lordships have come to the conclusion, therefore, that at any rate prior to the naval prize act, 1864, there was no power in the Crown, by order in council, to prescribe or alter the law which prize courts have to administer. It was suggested that the naval prize act, 1864, confers such a power. Under that act the court of admiralty became a permanent court of prize, independent of any commission issued under the great seal. The act, however, by section 55, while saving the King's prerogative, on the one hand, saves, on the other hand, the jurisdiction of the court to decide judicially, and in accordance with international law. Subject, therefore, to any express provisions con-

Crown and prize court.

tained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in council are: (1) Those contained in section 13 (now repealed and superseded by sec. 3 of the prize court act, 1894), conferring a power of making rules as to the practice and procedure of prize courts; and (2) those contained in section 53, conferring power to make such orders as may be necessary for the better execution of the act.

Their lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question, the law therefore remains the same as it was before the act, nor has it been affected by the substitution under the supreme court of judicature acts, 1873 and 1891, of the high court of justice for the court of admiralty as the permanent court of prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the board by the solicitor general. It may be, he said, that the court would not be bound by an order in council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the court should subordinate its own opinion to the directions of the executive. This argument is open to the same objection as the argument of the attorney general. If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a prize court and justify the confidence which other nations have hitherto placed in its decisions.

Force of international law.

The second point requiring notice is this: It does not follow that, because orders in council can not prescribe or alter the law to be administered by the prize court, such court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favor of the enemy or

neutral, as the case may be. As explained in the case of the *Odessa* (32 The Times L. R. 103; [1916] A. C. 145), the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or Admiralty droits are now made part of the consolidated fund and do not replenish the privy purse. Further, the prize court will take judicial notice of every order in council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law. Thus, an order declaring a blockade will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it can not be assumed, until there be a decision of the prize court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established. (See Wheaton's "Int. Law," 4th English Ed., pp. 25 and 26.)

Force of order in council.

On this part of the case, therefore, their lordships hold that Order XXIX, rule 1, of the prize court rules, construed as an imperative direction to the court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the order in council, by which the prize court rules were made, conforms to the provisions of the rules publication act, 1893, and on reference to that act it will be found inapplicable to orders in council, the validity of which depends on an exercise of the prerogative. It is reasonable, therefore,

to assume that the words "or otherwise," contained in the order in council, refer to such other powers, if any, as the Crown possesses of making rules and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the court as to the sale or realization of property in its custody pending decision of the question to whom such property belongs. It can not, in their lordships' opinion, be held that the court has any such inherent power as laid down by the president in this case. The primary duty of the prize court (as indeed of all courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the court as to sale or realization is confined to cases where this can not be done, either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the court in directing a sale of the res merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

Duty of court.

It remains to consider the third and perhaps the most difficult question which arises on this appeal—the question whether the Crown has, independently of Order XXIX, rule 1, any and what right to requisition vessels or goods in the custody of the prize court pending the decision of the court as to their condemnation or release. In arguing this question the attorney general again laid considerable stress on the Crown's prerogative, referring to the recent decision of the court of appeal in this country re a petition of right (31 The Times L. R. 596; [1915] 3 K. B. 649). There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a court which administers international law. The fact, however, that the Crown possesses such a right in this country,

Right to requisition.

and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation.

In support of the former alternative, which is apparently accepted by Albrecht ("Zeitschrift für Völkerrecht und Bundesstaatsrecht," VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible and may in certain cases and for such purposes be sound. In general, property belonging to the subject of one power is not found within territory of another power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the lex loci. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of anyone whose consent might impose obligations on the owner. Nevertheless, even here, the vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became so subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs or may

differ from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own and has not recognized the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German War of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sank them in the Seine. They also seized certain Austrian rolling stock and utilized it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one of necessity," and he referred to Phillimore, "Int. Law," Volume III., section 29. He did not rely on the municipal law of either France or Germany.

Angary.

Necessity.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" ("Law of Nations," Book VI., sec. 7); and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient. ("Droits des Neutres," p. 154, 2d ed., Berlin, 1876.) It is difficult to see how the acts of the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilize Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand ("Droit maritime de l'Europe," Vol. I., c 3, art. 5). thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli ("Droit International," section 795 bis) and in the only British prize decision dealing with this point.

War of 1812.

The case to which their lordships refer is that of the *Curlew*, the *Magnet*, etc., reported in Stewart's vice admiralty cases (Nova Scotia), page 312. The ships in question with their cargoes had been seized by the British authorities as prize in the early days of the war with the United States of America which broke out in 1812, and had been brought into port for adjudication. The lieutenant governor of the Province and the admiral and commander in chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Doctor Croke lays it down that though as a rule the court has no power of selling or bartering vessels or goods in its custody, prior to adjudication to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defense supersedes and dispenses with the usual modes of procedure. He held that such a case had

in fact arisen, and accordingly granted the prayer of the petitioners: (1) As to certain small arms "very much and immediately needed for the defense of the Province"; (2) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax: and (3) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into court.

Goods before court.

It should be observed that with regard to ships and goods of neutrals in the custody of the prize court for adjudication, there are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail; that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. The twenty-fifth section of the naval prize act, 1864, now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the Crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In the *Memphis* (Blatchford, 202), in the *Ella Warley* (Blatchford, 204), and in the *Stephen Hart* (Blatchford, 387), Betts, J., allowed the War Department to requisition goods in the custody of the prize court, and required for purposes in connection with the prosecution of the war. In the case of the *Peterhoff* (Blatchford, 381) he allowed the vessel itself to be similarly requisi-

tioned by the Navy Department. The reasons of Betts, J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

On March 3, 1863, after the decisions above referred to, the United States Legislature passed an act (Congress, sess. III, c. 86, of 1863) whereby it was enacted (sec. 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorized to take any captured vessel, any arms or munitions of war or other material for the use of the Government, and when the same should have been taken before being sent in for adjudication or afterwards, the department for whose use it was taken should deposit the value of the same in the Treasury of the United States, subject to the order of the court in which prize proceedings might be taken, or if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their lordships regard the passing of the act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts, J. In the second place, it tends to weaken all subsequent decisions of the United States prize courts on the right to requisition vessels or goods, as authorities on international law, for these courts are bound by the provisions of the act, whether it be in accordance with international law or otherwise. In the third place, their lordships are of opinion that the provisions of the act go beyond what is justified by international usage. The right to requisition recognized by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances

and for certain purposes only. Further, international usage requires all captures to be brought promptly into the prize court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the court and not the executive of the belligerent State to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British Government, shortly after the act was passed, protested against the provisions of the second section. The grounds for such protest appear in Lord Russell's dispatch of April 21, 1863. The first is the primary duty of the court to preserve the subject matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures known at the time when they are made to be unwarrantable by law merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the prize court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the court be exercised through the court, and be confined to cases in which there is really a question to be tried, and the vessel or goods can not, therefore, be released forthwith, the objection is obviated.

Angary.

It further appears that the United States took the opinion of their own Attorney General on the matter (10th vol., Opinions of A. G. of U. S., p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the court below upon what is known

as "the right of preemption," but in their lordships' opinion these cases have little, if any, bearing on the matter now in controversy. The right of preemption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contrabrand, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase money paid into court. It is obvious, therefore, that this "right of preemption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect the question whether the vessel or goods should or should not be condemned as prize.

Preemption.

Conclusions as to requisition.

On the whole question their lordships have come to the following conclusion: A belligerent power has by international law the right to requisition vessels or goods in the custody of its prize court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington, L. J., in the case of In re a Petition of Right, supra, at p. 666), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their lordships' opinion the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard, of course, to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the

vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

With regard to the third limitation, it is based on the principle that the jurisdiction of the prize court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the court will, at the instance of any party aggrieved, compel them so to do. From the moment of seizure, the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbor for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbor for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their lordships' opinion, the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court but because the judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the director of army contracts, following the words of Order XXIX, rule 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances, the normal course would be to discharge the order appealed from without prejudice to another application by the procurator general supported by proper evidence. But the copper in question has long since been handed over to the war department, and, if not used up, at any rate can not now be identified. No

order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure, the proper course would have been to give the appellant, in case his claim to the copper be ultimately allowed, leave to apply to the court for any damage he may have suffered by reason of its having been taken by the Government under the order.

It was, however, suggested that the procedure prescribed by the existing prize court rules precludes the possibility of the court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the procurator general on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. This result would, in their lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the prize court rules ought to be construed so as to avoid it, and, in their lordships' opinion, the prize court rules can be so construed.

It will be observed that, by Order I, rule 1, the expression "captor" is, for the purposes of proceedings in any cause or matter, to include "the proper officer of the Crown," and "the proper officer of the Crown" is defined as the King's proctor or other law officer or agent authorized to conduct prize proceedings on behalf of the Crown within the jurisdiction of the court.

Review of order.

It is provided by Order II, rule 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I, rule 2) goods shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II, rule 7, in a cause instituted against the "captor" for requisition or damages, the writ is to be in the form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted

against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule No. 5 of the prize court rules under the order in council dated March 11, 1915. It is not, however, necessary to decide this point.

Order V provides for proceedings in case of failure to proceed by captors. Under rules 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors or the proper officer of the Crown who ought to have instituted proceedings. Under rule 3, however, which contemplates that proceedings have been instituted, it is provided that, if the captors (which, in the case of an action for condemnation, must, of course, mean the proper officer of the Crown) fail to take any steps within the respective times provided by the rules, or, in the opinion of the judge, fail to prosecute with effect the proceedings for adjudication, the judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order VI proceedings may be discontinued by leave of the judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This again contemplates that in an action for condemnation the claimant may have a right to costs and damages and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII is concerned with releases. They are to be issued out of the registry and, except in the six cases referred to in rule 3, only with the consent of the judge. One of the accepted cases is when the property is the subject of proceedings for condemnation—that is, of proceedings in which the crown by its proper officer is

plaintiff, and when a consent to restitution signed by the captor (again by the proper officer of the Crown) has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By rule 4 no release is to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the judge. In the cases last referred to "captor" must again mean the proper officer who is suing on behalf of the Crown.

Order XLIV deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the judge. In cases of appeals from a condemnation or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favor of the Crown, and if costs can be awarded in favor of, it follows that they can similarly be awarded against the Crown.

It is to be observed that unless the judgment or order appealed from be stayed pending appeal, rule 4 of this order contemplates that persons in whose favor it is executed will give security for the due performance of such order as His Majesty in council may think fit to make. Their lordships were not informed whether such security was given in the present case.

In their lordships' opinion these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten, in Johnson *v.* The King (20 The Times L. R. 697; [1904] A. C. 817) subject to exceptions.

Decision.

Their lordships, therefore, have come to the conclusion that in proceedings to which, under the new practice, the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case is to declare that upon the evidence before the president he was not justified in making the order the subject of this appeal and to give the appellants leave in the event of their ultimately succeeding in the proceedings for condemnation to apply to the court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it.

Their lordships will humbly advise His Majesty accordingly, but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

"COMTE DE SMET DE NAEYER."

November 17, 1916.

[1] Entscheidungen des Oberprisengerrichts, 209.

Decision.

In the prize matter concerning the Belgian full-rigged ship *Comte de Smet de Naeyer*, Antwerp being her home port, the imperial superior prize court of Berlin, in the sitting of November 17, 1916, has found as follows:

"As a result of the appeal of the imperial commissary the decision of the Hamburg Prize Court of May 20, 1916, is annulled. The ship is to be condemned. The claim is refused. The plaintiff must bear the costs of both instances."

REASONS.

Statement of the case.

After the capture of Antwerp, along with other Belgian ships lying in that port, the full-rigged ship *Comte de Smet de Naeyer* was seized by the German military forces.

The ship was built of steel in 1877 and until 1906 was used as a freight ship. In the latter year she was acquired by the Belgian company, "Association Maritime Belge, S. A.," of Antwerp, with a capital of 500,000 francs, the aims and purposes of which are stated as follows:

l'armement, l'exploitation, l'affrêtement, l'achat, la location et vente de navires à voile et à vapeur et toutes les opérations de commerce, d'industrie et de finances se rattachant à quelque titre que ce soit à la navigation maritime et fluviale, etc.

Le ou les navires de la société pourront être affectés à l'enseignement professionnel maritime, etc.