JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

THE ZAMORA

(Part Cargo Ex)

REPORT OF THE ARGUMENT

BEFORE

LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL,

On the hearing of the

Appeal from the judgment of Sir Samuel Evans,

in the above Case, and of the

JUDGMENT OF THE BOARD

delivered by

LORD PARKER.

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Judicial Committee of the Privy Council. (Lord Parker, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Arthur Channell.) | 1916. April 7.

THE ZAMORA (PART CARGO EX).*

International Law—Prize—Requisition by Crown—Order for delivery—Prize Court Rules, 1915—*Order XXIX., Rules* 1, 2, 5.

Order XXIX., rule 1, of the Prize Court Rules, which was authorized by an Order in Council dated March 23, 1915, provides that "Where it is made to appear to the Judge . . . that it is desired to requisition on behalf of his Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with rule 5 of this order the ship shall be released and delivered to the Crown."

By rule 3, where the vessel is required for the service of the Crown forthwith the Judge may order the vessel to be delivered to the Crown forthwith without appraisement, the amount payable by the Crown to be fixed under rule 4. By rule 5 in cases of requisition under the order the Crown is to undertake to pay into Court the appraised value or the amount fixed under rule 4. By Order I., rule 2, the above order is equally applicable to goods.

In April, 1915, a Swedish vessel, when on a voyage from New York to Stockholm, with a cargo partly consisting of copper claimed by the appellants, who were a Swedish company, was stopped by a British cruiser and taken to Barrow, where the vessel was seized as prize and the copper was requisitioned by the War Office. The Procurator-General then issued a writ claiming confiscation of both vessel and cargo, and the Prize Court made an order under the above rules giving leave to the War Department to requisition the copper, subject to an undertaking being given in accordance with rule 5, but made no order condemning it. It was admitted by the appellants that the copper was contraband of war and by the Crown that the vessel was ostensibly bound for a neutral port.

Held, that Order XXIX., rule 1, if construed as an imperative direction to the Prize Court, was not binding upon it, that though

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

the Crown had, subject to certain limitations, the right to requisition vessels or goods in the custody of the Prize Court, yet as there was no evidence before the Prize Court that the copper was urgently required for national purposes, the Prize Court was not justified upon the evidence before it in making the order giving the War Department leave to requisition the copper, and that the appellants should have leave in the event of their ultimately succeeding in the proceedings for condemnation to apply to the Prize Court for such damages (if any) against the Crown, or the officer who in the proceedings represented the Crown, as they might have suffered in consequence of the order of the Prize Court.

Decision of Evans, P. (31 *The Times* L.R., 513), reversed.

This was an appeal from an order of the President of the Admiralty Division of the High Court in Prize of June 14, 1915 (31 *The Times* L.R., 513), by which it was ordered that the War Department should be at liberty to requisition on behalf of his Majesty 400 tons of copper, part of the cargo of the Swedish steamship *Zamora* subject to appraisement in accordance with Order 29 of the Prize Court Rules.

Sir Robert Finlay, K.C., Mr. Leslie Scott, K.C., Mr. Roche, K.C., Mr. Balloch, and *Dr. T. Baty* were counsel for the appellants; *the Attorney-General, the Solicitor-General,* and *Mr. Branson* for the Crown.

The appellants were the Swedish Trading Company, of Stockholm. The copper was bought in America from an American company and was stored there for some months. It was shipped in the *Zamora* at New York in March, 1915. The vessel while on the voyage to Stockholm was stopped by a British cruiser and was taken, first, to Kirkwall and then to Barrow, where the copper, without condemnation, was requisitioned by the War Office. It was alleged that the copper was contraband of war and was enemy property and had an enemy destination. The President made the order now appealed against.

Sir Robert Finlay, in opening the case, said that the whole question in the appeal was whether requisition could be made before condemnation. The cargo of the *Zamora,* according to the ship's papers, was consigned to a Swedish port, and a guarantee was given that no part of it should reach Germany directly or indirectly. If that case had proceeded to trial the question raised would have been, Was the copper consigned to a Swedish port only with the intention of getting it into Germany, or was it

the *bona fide* property of a Swedish subject ? That question the appellants would give every facility to have tried. But the question before the Board was whether there could be requisition before condemnation.

LORD PARMOOR.—Your point is one of procedure and practice ?

SIR ROBERT FINLAY.—Yes.

LORD PARKER.—You say that a neutral ship destined for the enemy can in no case be requisitioned ?

SIR R. FINLAY.—Only where she is carrying naval stores.

SIR ROBERT FINLAY, continuing, said that the only liability that neutral ships on the high seas were under was to be brought in for condemnation, except in the one special case of a cargo of naval stores and provisions bound for an enemy port. Then there was power of requisition existing at Common Law and confirmed by statute. He would be able to show that the power to requisition was confined to a British vessel, and it would be startling to the last degree, and would have an important bearing on this country's relations with neutrals, if it was to be held that the mere fact of a vessel's being brought into port rendered her liable to requisition. The Crown in time of war had a general right to requisition property in this country belonging to British subjects or to neutrals who had brought it here and enjoyed it subject to the protection of British law. But that was totally different from the case of neutral goods which were on the high seas and were brought in because they were believed to be subject to condemnation.

Learned counsel cited various authorities, including the case of *The Broadmayne* (32 *The Times* L.R., 304). He submitted that neutral vessels by international law were entitled to trial and were subject to condemnation, but such a course as requisition which took the property away, whether the parties concerned were guilty or not, was quite a different thing.

The authorities illustrated the practice that had been adopted by this country and other nations—that cargoes belonging to neutrals going to enemy ports might be purchased. But a purchase by the Crown in the exercise of that customary right put an end to all further proceedings against the neutral, because such purchase was in mitigation of the extreme right of the captor to proceed to condemnation. A great deal of confusion was caused in the reading of old cases by the supposition that the law of contraband was as fully developed in those days as it was now. For a long time the general practice was to seize and confiscate cargoes of any kind going to an enemy port. The milder course was introduced by this country of buying the property, and the

money was paid into Court for the use of such persons as were afterwards proved to be the owners.

SIR ARTHUR CHANNELL said that he could not see why this cargo of copper could not be dealt with on the principle governing " naval stores " which was in force 150 years ago.

SIR ROBERT FINLAY replied that he did not dispute that the category " naval stores " now comprised a great many things that it did not comprise in the past. Here an element was wanting —that the cargo had been consigned to an enemy port.

LORD SUMNER said that in the reign of George III. anything was liable to seizure which could be considered a necessity for a belligerent at the time of seizure. Everybody knew that the quantity of copper now used by the Navy was enormous.

SIR ROBERT FINLAY agreed that the term " naval stores " had a wider and different meaning now than it had in the time of George III.

SIR ARTHUR CHANNELL asked whether the reason why naval stores were dealt with exceptionally was that they were of use to a belligerent. If that were so, why should they not now include anything that might be of use to the Army or the Air Service ?

SIR ROBERT FINLAY said that his argument was based on an old-established practice which was reproduced in the various statutes going back to 1779. Each one specifically mentioned " naval stores."

There still remained the other point as to enemy destination. He did not deny that anything of use to the enemy might be liable to condemnation as contraband if it had an ultimate enemy destination. But where the question of contraband was not considered, and where the goods were taken without trial, the term " naval stores " was confined to the strictly limited category pointed out in every statute to which he had referred. Anything of use to an enemy for war was contraband, and the remedy which involved no trial, but consisted in taking the goods by compulsory purchase, was confined to the limited classification.

SIR ARTHUR CHANNELL.—I fail to see why anything of use to the Army should not also be included.

SIR ROBERT FINLAY replied that there might be a case for amendment of the statutes, but a departure from general practice which the Crown sought to establish was not warranted. The only ground on which the cargo of copper could have been condemned was that its real destination was Germany. There was no evidence whatever of that, and the matter had not been tried.

SIR ARTHUR CHANNELL said that the goods were paid for.

SIR ROBERT FINLAY said that if neutral cargoes were to be seized as naval stores in accordance with what seemed to be the contention in this case Great Britain would soon be embroiled with every naval country in the world.

SIR ARTHUR CHANNELL said the President had decided that the *Zamora's* cargo was on the same footing as " naval stores."

SIR ROBERT FINLAY replied that the President had acted on the assumption that as soon as a neutral vessel was brought into port she was liable to requisition. That was an erroneous view. Exceptions had been made in the past in the case of seizures in special circumstances as distinct from normal captures, which were only considered as prize after condemnation. The test was absolute necessity or self-defence. In the case of the *Zamora* there were no " special circumstances."

Replying to LORD WRENBURY, learned counsel admitted the general principle that, for example, in a case of fire there was a recognised right to destroy adjoining property.

LORD WRENBURY.—What is that ?—common law ?

SIR ROBERT FINLAY.—Supreme necessity.

LORD WRENBURY.—Acting contrary to law ?

SIR ROBERT FINLAY.—Doing what anyone would do where there is supreme public necessity.

LORD PARMOOR.—Is it not recognised that in war there is an extreme case which does not otherwise arise ?

SIR ARTHUR CHANNELL.—It is the old question whether martial law is real law or the law of necessity.

SIR ROBERT FINLAY.—Martial law is merely an intimation that force is going to be used and is justifiable at common law if necessity arises.

LORD SUMNER said that it must be a question of degree in each case whether the national necessity brought the case within the principle.

SIR ROBERT FINLAY then reviewed the learned President's judgment at great length, and submitted in conclusion that the order should not be construed in such a way as to bring the Court in conflict with the statutes.

Mr. ROCHE, K.C., followed. He urged that the right of a captor involved the obligation of bringing in the seized vessel for adjudication by a Prize Court, and the property was then to be either condemned or restored. As to the question of proof, the principle that should be followed was exactly contrary to that contained in the learned President's judgment.

SIR ARTHUR CHANNELL said that in many cases which had been referred to not only the question of the necessity of the captor

was considered, but also the question of preventing the cargo from reaching the enemy.

LORD PARKER said that the greater part of the arguments which had been advanced with regard to unfairness to neutrals would be met if the right which the Crown claimed in this case were limited to cases in which there were *bona fide* suspicions that the goods were designed for the enemy, and, further, that the British Government *bona fide* required the goods.

Mr. ROCHE denied that there were any grounds for suspecting that the 400 tons of copper in this case was intended for Germany.

In reply to a question by Lord Sumner, counsel said that the doctrine of requisition was absolutely distinct from the law of requirements.

The ATTORNEY-GENERAL, speaking for the Crown, said that the argument presented for the Crown by Sir Edward Carson in the Court below was founded on a much narrower base, and did not cover the wide range of topics to which their Lordships' attention had now been drawn. Sir Edward Carson took up the position that the Crown had the common law right to requisition these goods. It was important that the Crown should have a decision from the President whether, on the high Executive grounds put forward, the Crown was entitled to do that which it had done. Defining the nature of the proposition—and he submitted that it was well established—he would say that the Crown had by common law in times of public danger the prerogative right of entering upon and seizing for military or naval purposes all lands or chattels within the jurisdiction.

LORD WRENBURY.—Howsoever they come ?

The ATTORNEY-GENERAL.—Yes. I should prefer to say lawfully within the jurisdiction.

The ATTORNEY-GENERAL, continuing, said that he entirely rejected the idea that the extent or reality of military necessity could be examined by any Court of law. When the Crown used through the Executive its prerogative right in times of war or danger to seize land or chattels, it was not possible or proper for the Courts to enter into nice considerations about the degree of necessity. That would involve an inquiry how great was the necessity, what were the alternative sources of supply, and other matters which it would not be well to publish. The Crown, in making requisition, did not act wantonly or for the purpose of annoying neutral Powers. It acted on the approved grounds of public importance either to stop the goods so requisitioned on the ground that they were useful to this country, or to deprive

an enemy country of the goods. The responsibility for the defence of the realm was entrusted to the Crown.

The ATTORNEY-GENERAL, replying to questions by their Lordships, submitted that there was no reason on principle why a ship which was brought into a British port under suspicion should be in a better position than a vessel already within the jurisdiction of this country. In these days of submarines it was obvious that a search could not be made in the open sea. As the vessel had been brought into a belligerent port for mutual convenience it came within the law, and the remedy for abuse in such a case would be diplomatic, and the safeguard against abuse was that no belligerent was likely to affront a neutral country.

If the Crown's common law right to requisition was to be challenged, as argued on the other side, the Executive would become almost helpless. If any neutral desired to question the conduct of the Crown that could only be done through diplomatic channels. If the Crown did not possess the prerogative to requisition at common law the consequences would undoubtedly be extremely serious.

LORD PARKER said that there was undoubtedly a common law right to requisition, but when the matter was brought into the Prize Court surely the Crown submitted to the jurisdiction of the Prize Court, and it had to be shown that it was in accordance with international law that the right was exercised.

The ATTORNEY-GENERAL referred their Lordships to Moore's Digest of International Law, and said that for nearly 40 years the United States Government had followed the practice adopted in this case. It could not, therefore, be said that the practice was in conflict with international law. All the authorities justified many high-handed acts on the part of belligerents against neutral property. Bismarck excused it on the ground of "extreme necessity." That expression was misleading. What it really meant was that the property taken was useful to the belligerent.

LORD PARKER thought that the Attorney-General was claiming for the Crown a right in regard to the Prize Court which some of the Stuart kings claimed with regard to the common law. The Prize Court was the chief guardian of international law in time of war.

The ATTORNEY-GENERAL referred to the cases of the *Invincible* and *Maisonnaire*, and said that he had spent some time in arguing an aspect of the case which, he submitted, did not arise—namely, that there was any conflict between the Order in Council and international law. He felt confident that their Lordships at a time of grave national crisis would be slow to take up a position

which would have the effect of paralysing the Executive. If he was not right in his submission that the prerogative gave power to requisition, the whole case for the Crown disappeared.

The SOLICITOR-GENERAL followed. He said that the property was within the kingdom, whether it was held by the Marshal or not. It was here subject to the laws of this country.

LORD PARMOOR.—Supposing that it turns out that there is no suspicion of enemy destination, and it is simply a case of a neutral vessel with non-contraband, do you say, according to the theory of the Crown's prerogative, that these goods could be requisitioned ?

THE SOLICITOR-GENERAL.—I say that in strict law they could. I don't say that they would be.

LORD PARMOOR.—And without payment ?

The SOLICITOR-GENERAL.—Yes, in strict law.

SIR ARTHUR CHANNELL.—You say the right arises from their being here in the jurisdiction. Does that jurisdiction arise simply from their being here or from the neutral's having done something which you treat as submitting to the jurisdiction ? The ordinary case is that the goods have been brought here. Is not that supposed to be the foundation of jurisdiction over neutral goods ?

The SOLICITOR-GENERAL.—I think the locality of the goods is really the test. This case follows what was done in the American cases and the case of the *Curlew*.

Continuing, the Solicitor-General said that it was for the Crown to make rules for the prosecution of war, especially in cases where there were conflicting views about international law. The highest way in which he put the case was that the supreme authority responsible for carrying on the war had the power to apply certain rules, and the duty of the Prize Court was to carry out those rules, provided that they were not contrary to national justice or settled international law. He referred to the case of the West Rand Central Gold Mining Company *v.* the King (21 *The Times* Law Reports, 562 ; [1905] 2 K.B., 391).

SIR ROBERT FINLAY, in reply, submitted that Order XXIX. did not have the effect attributed to it by the learned President and the Law Officers. The claim on behalf of the Crown was to take these goods without any hearing at all.

The Solicitor-General produced a number of Orders in Council with instructions to commanders, dating back to 1793. He said that international law was something which had grown up with the general consent of nations, but every one knew that the

German Prize Courts simply followed the instructions of the Sovereign without any regard for the laws of neutrals. If it could not be shown that the right to requisition was in itself unjust, he saw no reason why in this case the Order in Council should not be followed.

SIR ARTHUR CHANNELL said that if the Executive had merely to express the desire to requisition goods without question he did not see, for instance, what was to prevent the seizure in a neutral vessel of a picture for the purpose of placing it in the National Gallery. At all events, it struck him that when a case was taken by the Executive into the Prize Court it was submitting to that Court's jurisdiction.

SIR ROBERT FINLAY submitted that when a vessel was brought into Court for adjudication the matter had to be tried by the law of the country—and that was international law. He also submitted that this Order XXIX., so far from being a matter of procedure, had effected a substantial change in the international law to be administered in the Prize Court. The Crown claimed to take property even without paying compensation. Order XXIX. completely changed the old procedure. After requisition the proceedings were brought to an end upon payment of the value of the goods. The money might remain in Court if other claims were made. And if the goods turned out to have been intended for an enemy destination the Crown could take the money back. It was complete revolution. There must be something in the nature of a submission to the jurisdiction.

SIR ARTHUR CHANNELL.—There is no authority for that.

SIR ROBERT FINLAY.—I do not think that there is, but I am submitting it as a matter of principle.

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 29, 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 29 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 29, 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.

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 would 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.

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.

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.

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 that 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 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 :—

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, then 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 cognisance 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).

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 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., section 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 authorised 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 contained 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 section 3 of the Prize Court Act, 1894), conferring a power of making rules as to the practice of 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 cannot, 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 fulfil its function as a Prize Court, and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot 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 favour 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 authorising 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 cannot 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.)

On this part of the case, therefore, their Lordships hold that Order 29, 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 cannot, 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 cannot 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.

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 29, 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, and that somewhat similar rights are claimed by most civilised 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 recognised 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 recognised 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," Vol. III., section 29. He did not rely on the municipal law of either France or Germany.

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., section 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, 2nd 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. iii., 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.

The case to which their Lordships refer is that of *The Curlew*, *The Magnet*, &c., reported in Stewart's Vice-Admiralty cases

(Nova Scotia), p. 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 Dr. 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-defence 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 defence 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.

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 25th 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 requisitioned 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 (section 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 recognised 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 2nd 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 cannot, therefore, be released forthwith, the objection is obviated.

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

pre-emption," but in their Lordships' opinion these cases have little, if any, bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, 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 recognised 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 pre-emption" 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.

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 defence 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 defence 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 harbour 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 harbour 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 29, R. 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 cannot 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.

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 restitution 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 excepted 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 favour of the Crown, and if costs can be awarded in favour 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 favour 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.

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.

[Solicitors—Messrs. Botterell and Roche ; the Treasury Solicitor.]