Privy Council Appeal No. 35 of 1921.

In the matter of the tug "Anichab" and other vessels and craft.

His Majesty's Procurator-General - - - - *Appellant*

v.

The Woermann Linie Actien Gesellschaft - - - - *Respondents*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1921.

Present at the Hearing:

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

[*Delivered by* LORD PARMOOR.]

This is an appeal against the decree of the Prize Court releasing certain craft, namely, sixteen lighters, and one launch and certain rope fenders, the property of the respondents, captured at Otavi and Omaruru, then in German South-West Africa, by His Majesty's military forces. No case was presented on behalf of the respondents, and the appeal of His Majesty's Procurator-General was heard *ex parte*.

The question to be decided on the appeal is whether at the time of their capture the said craft had ceased to be the subject of maritime prize, and were private property seized on land by His Majesty's military forces. His Majesty's military forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Luderitzbucht (Luderitz Bay

on the 19th September, 1914, and Swakopmund on the 14th January, 1915. A number of vessels, craft, and accessories seized at Luderitzbucht and Swakopmund were condemned by the learned President as good and lawful prize, and against this decision there is no appeal. The learned President has found in accordance with the evidence of Sir Oswyn Murray that the craft in question in this appeal were found and seized, partly at Omaruru, 148 miles inland, when Omaruru was occupied on the 20th June, 1915, and partly at Otavi, 310 miles inland, when Otavi was occupied on the 1st July, 1915. There are no rivers in South-West Africa on which the said craft could have been or were intended to be used, and they had been dispatched up the railway line at the request of the respondents, under the authority of a German officer, in order to prevent them falling into the hands of the British forces. It is not disputed that they were property the subject of maritime prize at the declaration of the war, and at that time liable to seizure. The craft were first taken on rail to Richtofen, 12½ miles inland, during August and September, 1914, and were then taken by rail to Usakos, 94 miles inland, during October, 1914, where they remained till March, 1915. They were forwarded to Omaruru and Otavi during April, 1915, and were left standing on rail near the railway stations. There is no doubt but that they were intended to be returned to the coast for naval use.

Sir Oswyn Murray, Secretary to the Admiralty, states in his affidavit that His Majesty's forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Luderitzbucht and Swakopmund at the dates above mentioned, and that in the course of their operations the said forces occupied the northern section of the railway lines from Swakopmund to Otavi, and found and seized the lighters and craft in question at the dates mentioned. The learned President has found that there was no evidence before him that the forces in South Africa were "getting on as fast as they could after this craft to try and get them," and that it is just as consistent on the evidence before him that the first operations might have ceased for a time, and a new operation have begun. He states :—

> "All I know is, that after the first taking possession of the ports there is an interval of about six months, and then these craft are taken at places respectively 150 and 300 miles up the country, and are taken on land by the military forces. It does not seem to me in those circumstances that they are the subject of maritime prize."

Their Lordships see no reason for not accepting the findings of fact on which the learned President based his decision, but two points were raised on behalf of the appellant. In the first place it was argued that the craft had not ceased to be liable to capture as maritime prize, when they had only been removed inland in order to escape pursuit at the time when other craft of a similar character were seized at Luderitzbucht and Swakopmund. It is no doubt accurate to say that property, the subject of maritime prize at the outbreak of war, may be lawfully seized

as maritime prize in certain circumstances, although the actual seizure takes place on land. It was held by their Lordships in the case of "*The Roumanian*" [1916] (1. A.C. 124) that the test of ashore or afloat was no infallible test as to whether goods could or could not be seized as maritime prize, and that it was perfectly clear that enemy goods, for instance, seized on enemy territory by the naval forces of the Crown, might lawfully be condemned as prize. It was held that the petroleum on board "*The Roumanian*," having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable, merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe custody, and that its seizure there as prize was lawful. The fact, therefore, that in the present case the craft were not captured until after they had been carried inland is not conclusive against the case of the appellant; but the learned President has found that there was no evidence before him that after the enemy had succeeded "in getting ashore and running away with his property," the belligerent who was trying to capture it did pursue and take the craft in the course of such pursuit, and that in this respect the facts of the present case did not come within the principle accepted by their Lordships in "*The Roumanian.*" The learned President further held that the capture should be regarded as a capture of property on land by the military forces of the Crown. The capture of property on land by military forces under these conditions would not subject such property to condemnation as maritime prize, and, as already stated, their Lordships see no reason for differing from the learned President in his conclusion of fact.

In the second place the appellant argued that the craft were the subject of maritime prize, on the ground that when they came into possession of their lawful owners they would be applied again to naval purposes. If the property is to be regarded as property on land, seized by the military forces of the Crown, it is not material that it might subsequently be used under conditions, which would subject it, if so used, to condemnation as maritime prize. It is not necessary, in the opinion of their Lordships, to refer to Article 53 of the 4th Convention of The Hague, 1907, or to go further than to say that in their opinion the learned President was right in his decision that the craft were not subject to condemnation as maritime prize.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared, there will be no order as to costs.

In the Privy Council.

In the matter of the tug "Anichab" and other vessels and craft.

HIS MAJESTY'S PROCURATOR-GENERAL

v.

THE WOERMANN LINIE ACTIEN GESELLSCHAFT.

DELIVERED BY LORD PARMOOR.

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