

THE POLLENZO

The Supreme Court (Prize Jurisdiction)

McDougall, C.J.

9 November 1945

Prize — detention before outbreak of war — whether anticipatory embargo. International law — days of grace after detention and search — Hague Convention, art. 2.

Prize — acquiescence — whether mere delay shows waiver of right to ask for condemnation.

Prize — when seizure takes effect.

The Pollenzo was an Italian ship arrested 3 days before the outbreak of war with Italy. She carried a cargo of scrap iron. The Crown sought condemnation of ship and cargo. For the Italian Government it was argued that there should be no condemnation but only detention.

Held: (i) There was no undue delay in searching the ship and her detention until after the declaration of war did not amount to an anticipatory embargo.

(ii) There was no obligation to allow days of grace after completion of the search in which to depart.

(iii) The delay in seizing the ship and delivering her to the Marshal was not enough by itself to amount to a waiver of the right to condemnation.

(iv) The seizure of the ship should be deemed to have taken place on the outbreak of war with Italy, not when the writ was issued.

Cases referred to in the judgment

The Chile, (1914) 1 Lloyd Pr. Cas. 8.

The Turul, (1919) 8 Lloyd Pr. Cas. 449.

The Pomona, (1942) 168 L. T. 222.

The Blonde, (1922) 126 L.T. 769.

The Susana, (1805) 6 Ch. Rob. 48.

The Roumanian, (1916) 2 Lloyd Pr. Cas. 378.

The Schlesien, (1916) 4 Lloyd Pr. Cas. 324.

The Feliciana, (1915) 3 Lloyd Pr. Cas. 418.

Cause

In this cause, the Crown asked for the condemnation of an Italian ship that had been seized and of her cargo. The Italian Government opposed the request.

The Attorney General (A. McKisack) for the Crown.

A.R. Isola for the Italian Government.

A. C. Carrara for salvage claimants.

28 November 1945: The following judgment was read —

On 6 June 1940 the Pollenzo arrived at Gibraltar. On the following day a detention notice was served on the master of the ship.

On the night of 10/11 June Italy declared war on Great Britain. The Pollenzo was then still in Gibraltar. The Crown asks for the condemnation of ship and cargo.

There is no appearance for the owners, but Mr. Isola represents the Italian Government and has submitted that the ship and cargo should not be condemned but merely detained until the end of the war, as in the case of *The Chile*¹.

¹ (1914) 1 Lloyd Pr. Cas. 8.

From the ship's papers it appears that the Pollenzo is an Italian ship registered at Genoa. At the material time she was on a voyage from Savannah, Georgia, U.S.A. to Genoa laden with a cargo of scrap iron consigned to Endiro, Milan.

Scrap iron is clearly within the contraband list. According to the affidavit of Mr. Facio, the Detaining Officer here, he took possession of the ship and cargo on 13 November 1944, on which date the writ was issued.

Now the first ground on which Mr. Isola for the Italian Government opposes the demand for condemnation is that the detention of the ship 3 days before the outbreak of war amounted to an anticipatory embargo.

The Crown's reply is that no anticipatory embargo was put upon the ship, its detention was in exercise of the right of visit and search.

From the evidence I am satisfied that in view of the number of ships detained here at the time, for the purpose of visit and search, and of the fact that strict searches were being made there was no undue delay in searching the Pollenzo and that 3-4 days was a reasonable period of detention.

As, therefore, in my view the Pollenzo's detention until Italy's declaration of war is reasonably explainable on the ground of visit and search I do not think it can be said that its detention amounted to an anticipatory embargo.

The second ground set up against condemnation is that under art. 2 of the Hague Convention the Pollenzo should have been allowed days of grace after completion of the search in which to depart. It was urged that even though the Hague Convention had itself been denounced by Great Britain the law as to days of grace was a part of international law and still in force. *The Turul*¹ was cited. That case however was decided when Great Britain was bound by art. 2 of the Hague Convention.

A similar contention was put forward in *The Pomona*² and there rejected by the court. Following that case I also reject this contention here.

The third ground for opposing condemnation is that the Crown did not seize and deliver the ship to the Marshal till November 1944, i.e. after the conclusion of hostilities with Italy and that this acquiescence or waiver by the Crown amounts to an acquiescence to the mere detention of the ship as opposed to its condemnation.

It is true that the writ was not issued till 13 November 1944, but there is evidence that the Italian crew were removed from the ship on 10 June 1940, and a naval party put on board.

Reference was made to *The Blonde*³ for an example of waiver by the Crown — when it was held that the correspondence between the British and German Governments together with the acquiescence of the Crown in the passing of

¹ (1919) 8 Lloyd Pr. Cas. 449.

² (1942) 168 L.T. 222.

³ (1922) 126 L.T. 769.

numerous orders in the "Chile" form, i.e. for detention rather than condemnation, showed that any objection to the applicability of the 6th Hague Convention had been waived by the British Government.

But in the present case, there is nothing beyond mere delay to support the contention that the Crown had waived its right to ask for condemnation.

In *The Susana*¹ which had been seized as prize at sea and there lost and no step to proceed to adjudication taken by the Crown for 6 years it was observed by the President that "if any inconvenience is to be apprehended from delay that will be sufficiently counteracted by the opportunity which the other party has of instituting proceedings."

The Pollenzo remained at Gibraltar and all that time "the hand of the Crown" was upon it even though the writ and formal act of seizure was delayed till November 1944. A claimant could at any time after its detention have taken proceedings under Ord. V. of the Prize Court Rules, but nothing was done.

I cannot see that there is any waiver or laches on the part of the Crown — if laches can be imputed to the Crown — for "nullum tempus occurrit regi" sufficient to support the argument advanced against condemnation.

The fourth and last ground urged against condemnation is that in November 1944 when the ship was seized she was not "in delicto" because Italy had surrendered and there was an armistice in force.

Now the question arises as to the date of seizure of the ship. The Crown's contention is that seizure took place on the outbreak of war with Italy, i.e. on the night of 10/11 June 1940 even though the writ was not issued till later. The learned author of *Colombos* (2nd Ed.) at p. 278 says "under modern conditions, in all cases where the right of visit and search cannot be carried out at sea and the vessel or her cargo is brought into port, capture means detention after the right of visit and search has been concluded."

In *The Roumanian*² Lord Parker said that their Lordships were of opinion that the cargo was effectually seized as prize upon the delivery of a letter from the Custom House to the Master stating that the cargo was placed under detention, which was prior to the issue of the writ.

*The Schlesien*³ was a German ship brought into port on 7 August 1914. Some of the cargo was Austrian property: war with Austria did not break out until 12 August 1914. A writ had been issued on 11 August 1914. A second writ on 7 December 1914.

It was argued that as the first writ was issued before the outbreak of war with Austria it was ineffective. In the judgment the President observed that the hand of the Crown remained on the goods from 12 August until they were sold by consent. "In these circumstances" he says "I cannot come to

¹ (1805) 6 Ch. Rob. 48.

² (1916) 2 Lloyd Pr. Cas. 378.

³ (1916) 4 Lloyd Pr. Cas. 324.

any other conclusion but that there was a proper seizure."

It was held that as the goods were continuously in the possession of the Crown from and after 7 August 1914 there was a sufficient seizure on the outbreak of war between Great Britain and Austria.

In *The Feliciana*¹ it was held that the "first act of detention is deemed to be the seizure" — "the date of the seizure was the date on which the hand of the Crown was put on the goods when they were first detained."

It seems to me therefore that in the case now before me the conclusion to which I must come is that the seizure took place on the outbreak of war with Italy. The fourth ground set up against condemnation therefore fails and I condemn the ship and cargo as good and lawful prize. The claim for salvage remains to be heard.