International Law Studies – Volume 22

International Law Decisions and Notes

U.S. Naval War College (Editor)

2° Le voilier ayant été détruit pour les motifs ci-dessus indiqués, il n'y a lieu d'en attribuer la valeur;

3° La somme représentant la valeur de 10 tonnes d'orge, de 50 bidons d'huile et de beurre et de 11 sacs de farine remis par le capteur au consul de France à Alexandrie, sera attribuée aux ayants droit, conformément aux lois et règlements en vigueur.

Délibéré à Paris, dans la séance du 29 novembre 1915, où siégeaient: MM. Mayniel, président, René Worms, Fuzier, Fromageot et de Ramey de Sugny, membres du Conseil, en présence de M. Chardenet, commissaire du Gouvernement.

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

Signé à la minute:

E. Mayniel, *président;*
Fuzier, *rapporteur;*
G. Raab d'Oërry, *secrétaire-greffier.*

Pour expédition conforme:
Le Secrétaire-greffier,
G. Raab d'Oërry.

Vu par nous, Commissaire du Gouvernement,
P. Chardenet.

THE "INDIAN PRINCE."

February 17, 1916.

I Entscheidungen des Oberprisengerichts, 87.

In the prize matter concerning the English steamer *Indian Prince*, Newcastle her home port, the imperial superior prize court in Berlin, in virtue of the proceedings of its sitting of February 17, 1916, has found as follows:

Decision.

"The appeals from the decision of the Prize Court in Hamburg, July 3, 1915, are refused."

REASONS.

Statement of the case.

On September 4, 1914, the English steamer *Indian Prince*, with sundry merchandise on board, and on the way from Santos by way of Trinidad, to ports of the United States of North America, at 7° south and 31° west, was brought to by a German war vessel, and, in view of the fact that the taking of the prize to port was impossible, was sunk on September 9, after passengers and crew had left the ship. The steamer was the property of the Prince Line (Ltd.), Newcastle.

Upon the announcement on the part of the imperial prize court in Hamburg, 30 parties interested in the cargo presented claims for compensation for damages for 37 shipments that were destroyed.

Compensation for damage to neutral merchandise.

The court has confined the matter to the sole question as to whether or not compensation for damages for neutral merchandise that was on board an enemy ship and sunk along with the latter must be made, and has found as follows:

"Both the ship and the cargo that were sunk were subject to seizure. The claims from 1 to 10, from 12 to 36, and 38 are refused as being unfounded."

The plaintiffs have appealed from the decision of the prize court as regards Nos. 2 to 10, 12 to 26, and 38.

The appeal had to be refused.

In the prize matter of the *Glitra* the competent court has decided that when an enemy prize is lawfully destroyed, neutral merchandise found on board such enemy ship and destroyed along with her is not entitled to claim compensation for damages. This decision is to be followed with regard to the contrary assertions made in the present case.

German prize regulations.

From generally accepted principles, no such right can be deduced, because the act through which the cargo was ruined is not unlawful, but is, on the contrary, lawful. Nor has a right been established to compensation for damages by any positive provision of the prize regulations. This applies also to article 110 of the prize regulations together with article 8 of the same, to which the plaintiffs have referred. For however correct in itself the conclusion may be, if the captain is not authorized even to take neutral merchandise from an enemy ship in order to make use of it, he may by no means do so in order to destroy it without using it, this fact is in itself no help in the consideration of the question with which we are dealing. The question we are here considering is as to whether or

Lawful destruction.

not, in accordance with international law, the commander is obligated to refrain from the lawful destruction of an enemy ship merely for the purpose of not destroying at the same time neutral merchandise on board such ship, and in particular, as to whether or not he is obligated thereto when it is impossible to take the ship to port. After having repeatedly considered the question, the competent court must hold to a denial of such obligation. In this connection one need only make reference to the pre-

vious statement of justification. In particular, it is not correct that the said decision was based upon the ground that the shippers, by lading their merchandise on an enemy ship, had assumed the risk of seizure and destruction and, therefore, were not entitled to compensation.[53]

On the contrary, in that decision, the idea that the neutral was free to expose or not to expose his merchandise on board the enemy ship and to the dangers connected therewith was considered only in a general way; and that for the purpose of showing that the refusal of an indemnification was not only obligatory from a purely legal point of view, but that it could not be regarded as unfair.

Cargo.

The essential reason for that decision, as well as for the decision in the present case is found in the actual dependence of the cargo on the fate of the ship by reason of which the cargo must bear the loss arising from the exercise of a prize measure which is justifiably taken with regard to the ship. It can not be seen why this generally accepted principle, which is also unreservedly accepted in the memoir to article 64 of the London declaration, should only apply in case of capture and not likewise in case of the justified destruction of a ship.

Declaration of London.

Treaty between Prussia and the United States, 1828.

The only question, therefore, that arises is as to whether or not the commercial treaty between Prussia and the United States of North America offers a basis for the claim of the plaintiffs. This also must be denied.

The provisions of the said treaty with Prussia must, in view of the practice which has been confirmed mutually not only during the present war, but likewise in previous instances, be considered as governing the relations existing between the German Empire and the United States; materially, however, nothing arises from the treaty in favor of the plaintiffs.

According to Article XII of the treaty of 1828 we are only to consider Articles XII and XIII of the earlier treaties of 1785 and 1799, and Article XII in the original text of the treaty of 1785.

"Free ship, free goods."

In this Article XII the legal principle "free ship, free goods" is agreed upon. Whereas in treaties which the United States concluded about the same time with other States there is found beside this provision the principle reading "enemy ship, enemy goods," whereby an ex-

[53] The plaintiffs have asserted that this viewpoint does not apply here, because the loading had taken place even before the outbreak of the war.

ception is made only for merchandise which was unloaded before the outbreak of the war or within a definite period after the outbreak, the treaty with Prussia is silent as regards this matter, and there might be doubt as to how we are to understand that fact. Prussia may, indeed, have taken the standpoint that neutral merchandise, even on board an enemy ship, should not be subject to seizure. This may, indeed, be presumed if for no other reason than that not long thereafter the same fundamental principle was recognized in the Prussian statute book. Furthermore, in the course of the negotiations that led to the treaty of 1785 Prussia had expressed the desire—whereto the plaintiffs appropriately refer—that instead of the expression proposed in the American outline, "enemy ship, enemy goods" there should be put the contrary idea, "enemy ship, free goods." But the United States did not accept the proposition, and therefore nothing has been stipulated in regard to this point. Thereby the legal condition as provided by the treaty corresponded to that which had been sought for by the "armed neutrality" of 1780. In the latter's text only the rule "free ship, free goods" found expression, while nothing was said therein with regard to neutral merchandise on board an enemy ship. From many sources, however, this has been interpreted to the effect that no resistance would be attempted against the seizure of neutral merchandise on board an enemy ship. "By long practice it had become the custom to regard the confiscation of neutral merchandise on board enemy ships as a concession made to the belligerent in order that the latter might recognize the inviolability of enemy merchandise on board neutral ships."

[Cauchy, Le Droit Maritime International, Vol. II, p. 262.]

Treaty of 1785.

Now, it is this standpoint which the official authorities of the United States of North America took when interpreting the treaty of 1785 at the time when it was still in force. No less a man than the Secretary of State, Jefferson, who had had a personal part in the conclusion of the treaty of 1785, expressed himself to that end when in 1793 France, who was then at war with England, made complaint to the United States to the effect that England was seizing French merchandise carried in American ships, and that the United States did not make objection. In the note of Jefferson, dated July 24, 1793, by which the complaint was refused as unfounded, because ac-

cording to the general law of nations (Consolato del mar) enemy merchandise on board a neutral ship was subject to seizure, which could be modified only in case "free ship, free goods" were agreed upon by treaty, we find these words:

Jefferson's note.

> We have adopted this modification in our treaties with France, the Netherlands and Prussia, and, therefore, as to them, our vessels carry the goods of their enemies, and *we lose our goods, when in the vessels of their enemies.*

Although in the treaty with Prussia only the principle "free ship, free goods" was established, yet the Secretary of State, Jefferson, assumes that in accordance therewith, *the principle "enemy ship, enemy goods"* applied automatically with regard to Prussia.

The claimants, therefore, do not appeal to Article XII either, but to Article XIII of the treaties of 1785 and 1799. They do not deny that even from this article nothing can be gained by them in favor of their standpoint in case the French text of the treaty is considered. But they want to hold to the English text which evidences a change from which they believe they can draw the conclusion that, in all cases where merchandise of nationals of the United States of America is concerned, even if the cargo is on board an enemy ship, indemnification must be paid.

We need not consider which of the two texts is the authoritative one, nor need we consider how, in case both are authoritative, a contradiction between the two might be cleared up. For, not even the English text yields any results favorable to the plaintiffs. Their view is, in the first place, controverted because it is in direct contradiction with the interpretation which the Government of the United States, as has already been shown, gave to it in 1793.

Texts of treaty.

Furthermore, even from a purely linguistic point of view, the interpretation of the English text as given by the plaintiffs, is not admissible. While the French text deals with merchandise that is laden:

"À bord des vaisseaux des sujets ou citoyens de l'une des Parties,"

we read, on the contrary, in the English text, not as it should read in literal agreement: Carried in the vessels of the subjects or citizens of either party, but "Carried in the vessels *or by* the subjects or citizens of either party."

Thereby, according to the plaintiffs, there comes under the protection of Article XIII merchandise that is shipped in American or Prussian ships, as well as merchandise that is shipped by American or Prussian nationals—in no matter what kind of ships, and, hence, also in enemy ships,—which, so it is asserted, is equivalent to merchandise that *belongs to* such nationals.

Transportation.

But the latter idea finds no expression in the treaty. "Carried by" does not refer to property relationship, but to the personality of him who undertakes the *transportation*. That, however, is the ship-owner, and not the consignor or consignee. The entire departure of the English text from the French text, therefore, amounts to an extension of the English text, to the effect that besides the ships of both nationals there are expressly named, and that in the first place, the ships of the parties to the treaty themselves, that is to say, the public ships—"the vessels of either party." For the words "of either party" must also be applied to "in the vessels," if any meaning at all is to be given to the latter expression.

It is significant, that in the French text as found in Martens, Recueil des Traités, Supplement, II, page 226, which reprints the edition of the treaty prepared by the imperial office of the interior, and which, unmistakably, presents an independent translation from the English made soon after the conclusion of the treaty of 1799, the translator has reproduced the passage in exactly this sense. The expression "elles mêmes" in the form "ou d'elles mêmes" can, for grammatical reasons, refer only to the "parties contractantes" in whose own ships the merchandise is being conveyed.

But, from material grounds as well, another interpretation is not possible.

Contraband.

Article XIII deals with contraband. To meet the controversies that are usually connected with the question as to whether or not merchandise is contraband, agreement is made that even contraband shall not be subject to seizure; in case of need it may indeed be requisitioned upon payment of its value; if the military situation so demands, it may even be seized temporarily, but even so only by compensation made for the damage thereby accruing to the shipper. These provisions of Article XIII are most closely connected with that which is

agreed upon in Article XII. As, in a general way, contraband is always excepted from the principle "free ship, free goods" so in this case, after that principle is established in Article XII for enemy merchandise in Prussian or American ships, the exceptional case is taken up in Article XIII when the merchandise on board those ships is of contraband nature or suspected of being contraband. That this is indeed meant is indicated by the provision regarding the treatment of the particular ship, by which the captain who undertakes to convey contraband to the enemy shall be free to surrender such contraband in order that he may thereafter continue his journey unmolested. Unmistakably in this connection only the ships of the contracting parties were under consideration. It seems absolutely out of the question that the matter agreed upon should also have been intended to cover the case of an enemy ship conveying weapons, ammunition, etc., to her own military forces. It can not have been the intention that the belligerent party which succeeds in capturing an enemy ship carrying weapons and ammunition, should be obligated to make compensation therefor in case it was a national of the other contracting State who caused the transportation of the weapons to the enemy, or that the enemy ship in case it has surrendered the contraband, might continue her trip unmolested.

Treaty of 1799.

Accordingly, if Article XIII of the treaty of 1799 does not refer to contraband on board enemy ships, it goes without saying that nothing can be deduced from it as regards the treatment of innocent merchandise on board such ships. The principle "enemy ship, free goods" is, now of course, also valid with regard to the United States, but its validity does not rest upon any special conventional provision, but only upon general international law as it has been recognized in the declaration of Paris of 1856 and as applicable, according to the German prize regulations, even to countries which, like the United States, have not adhered to that declaration. With regard, therefore, to the question whether in circumstances like those now under discussion, indemnification is to be made to the owners of neutral merchandise, only the same principles that apply to the nationals of other neutral countries can apply to the nationals of the United States. These principles have been recorded in the decision regarding the *Glitra*.