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International Law Decisions and Notes

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it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defense of treaty obligations, against the breach of such obligations by the invaders, was a complete surprise even to their Government.

Documents and facts which throw light upon the history of the days I have been dealing with between July 24 and August 4, 1914, are, I think, admirably collected and stated in a work called the History of Twelve Days, by Mr. J. W. Headlam.

Decision. On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. And I decree the release to them respectively of the net proceeds of the sale of their respective goods, which are now in court.

THE "GLITRA."

July 30, 1915.

1 Entscheidungen des Oberprisengerichts, 34.

In the prize matter concerning the English steamer *Glitra*, with Leith as her home port, the imperial superior prize court in Berlin, at its sitting of July 30, 1916, has found as follows:

Decision. The appeals lodged by the plaintiffs under Nos. 9 to 12 of the decision are rejected as inadmissible; the appeals of the remaining plaintiffs are denied as unfounded.

The costs of the proceedings in appeal are to be borne by the plaintiffs.

REASONS.

Statement of the case. On October 20, 1914, the steamer *Glitra*, belonging to the firm of Salversent & Co., of Leith, with a general cargo on the way from Leith to Stavanger, was brought to by a submarine, and after the crew had left the ship she was sunk, together with her cargo.

German prize regulations. In answer to the summons of the prize court issued in accordance with section 26 of the prize court regulations, the 13 parties interested in the cargo submitted claims for compensation for damages due to the destruction of their merchandise. The plaintiffs are members of Norwegian firms; the plaintiff figuring in claim No. 2 alone

is a Danish insurance company which presents the claims of its Norwegian policyholders.

The prize court has found that the ship which was sunk was subject to seizure and has denied the claim.

The appeal lodged against this decision is not well founded.

Destruction necessary.

The prize court has, in the first place, impartially established that the *Glitra* was an English ship, and that, given the circumstances of the case, the destruction of the ship was necessary, in order to insure the capture. The prize court did not concern itself with the question as to whether or not the merchandise, on account of which claims for compensation were submitted, was neutral merchandise, because it came to the conclusion that even if such had been the case there would be no cause for a claim to compensation for damages. In justification of this conclusion it was stated that the question thus brought up had not been decided either in the prize regulations or in any international treaties, and, especially, it had not been decided in the London declaration, as is evidenced by its text and the history of its origin. It was said that opinion had been divided. It was stated that by the French memoir neutral cargoes were not entitled to claims for damages, because, when the captor, for military reasons, holds the destruction of the prize to be necessary, such a situation presents a military measure; while, on the other hand, the English memoir admits the claim, provided the case does not involve contraband, because a permissible cargo on board an enemy ship is not subject to seizure. The question formulated as a guide for the preliminary discussion:

Declaration of London.

Neutral merchandise.

In view of the principle that neutral merchandise under enemy flag is not subject to seizure, will the owner of the merchandise, in case of the destruction of the ship, have to be indemnified, or is, in such case, the destruction of a ship a military action which does not obligate the belligerent to make indemnification?

had been discussed without bringing about an understanding. The prize court observed that during these negotiations the question mainly dealt with was the admissibility of the destruction of *neutral* ships, subject to seizure. Confining herself to this particular matter, Germany had expressed herself in favor of compensation for neutral goods not subject to seizure. Japan alone had declared herself with regard to the matter of neutral mer-

chandise on an *enemy ship* which was destroyed, and that in the sense of England. Nothing indicated that, as matters stood, Germany had meant to establish in the prize regulations a principle to the effect that when an *enemy ship* was destroyed, the neutral cargo was entitled to a claim for indemnification. In this sense at most an argument could be deduced from article 114 of the prize regulations, in so far as it was here presupposed that in destroying any ship compensation must be made for the incidental destruction of that part of the cargo not subject to seizure. The argument was considered, however, not sufficiently conclusive. It might readily be assumed that article 114 referred only to the destruction of *neutral ships*, in view of the fact that the preceding and the following provision of the prize regulations dealt only with such case.

Indemnification.

This view must, in effect, be approved.

German prize regulations.

The question to be settled is as to whether or not in case an enemy ship is lawfully destroyed, compensation must be made for neutral merchandise on board such ship which is destroyed at the same time. It is clear that neither the prize regulations nor the London declaration, contains an express prescription in regard to this matter. Nor has the prize regulation indirectly provided for the settlement of that matter. The plaintiff believes that such a provision is found in No. 114 of the prize regulations. The judge of first instance has justly denied this, although we can not absolutely agree with him in all the reasons he gives anent this matter. In the article referred to the commander is directed, before proceeding with the destruction of a ship, to see if the loss thereby accruing to the enemy is equivalent to the compensation for damages which must be paid for that part of the cargo not subject to seizure which is destroyed at the same time.

Destruction.

In connection with this, reference is made, between brackets, among other things to article 18 which deals with the seizure of *enemy ships* and states which part of the cargo is, at the same time, subject to seizure. This in effect, looks as though the author of the prize regulations had, when dealing with article 114, thought that in the case of the destruction of an *enemy ship* compensation must be made for the part of the cargo not subject to seizure; it must also be admitted that the said reference is opposed to the course of reasoning followed by

the first instance when it assumes that article 114, even as the preceding and the following provision, dealt only with the destruction of neutral ships. In spite of that, however, the provision can not be given such scope of interpretation as that with which the plaintiffs meant to endow it. If it were so understood, it would come into a certain material contradiction with that which the prize regulation prescribes in the immediately connecting article. As can be clearly seen from this, the prize regulation does not hold that, in every case compensation must be made for the destruction of merchandise not subject to seizure. In the case of the lawful destruction of a neutral ship, compensation is prescribed for the merchandise, not subject to seizure, destroyed along with the ship, in so far as this concerns neutral merchandise, but not in regard to enemy merchandise, although likewise not subject to seizure, under the protection of the neutral flag. We must, furthermore, bear in mind that there are also enemy ships that are not subject to seizure, and, therefore, not subject to destruction, so that, even although at some time—possibly by reason of a pardonable error—the destruction took place, it may yet be asked, whether or not a distinction should be drawn in regard to compensation for values destroyed along with the ship, between neutral and enemy merchandise, and for this reason it might have seemed advisable to direct the commanders of vessels, for such eventualities, to make the inquiry incumbent upon them according to article 114. But it is above all important to remember that article 114 is not *sedes materiae* and that, therefore, even assuming that the author of the law thought that even in case of the lawful destruction of an enemy ship claims for compensation could be presented in behalf of the merchandise of neutrals, it would be wrong to find therein a positive decision of this at least doubtful, and at all events very controverted question which, although discussed at the London Conference, was left open.

Positive law.

As Wehberg points out in Oesterreich. Zeitschrift für öffentliches Recht, Tome II, 3, page 282, Heilfron, Jur. Wochenschrift, 1915, page 486, goes too far when he attributes to the prize regulations only the importance of an order promulgated by the Emperor to the naval authorities. The prize regulations contain, to a large extent, positive law. But, with regard to the provision now under consideration, Heilfron's characterization fits

perfectly. This article 114 is, in effect, but an order to the commanders of ships. Through it only the war lord speaks, and not the legislator. It is not its purpose to establish material right and it does not do so.

Law of warfare.

If, therefore, we are compelled to consider the most general principles of law in connection with the rules of the general law of warfare, it is found with absolute certainty that neutrals are not entitled to present a claim in case the destruction of the prize was, in the circumstances, justified (art. 112 of the prize regulations). The bringing to and the capture of the enemy ship is a lawful war measure against the foreign State, approved in international law. Claims for damages, either on the part of the nationals of enemy States or on the part of neutrals can not in all such cases be upheld. To be sure, according to article 3 of the Paris declaration, neutral merchandise (that is not contraband) is not subject to capture even on board an enemy ship. It is, therefore, not subject to seizure in case the prize is taken to port. But there is no suggestion that the parties interested in the cargo are entitled to present claims for compensation for damages that have arisen as a result of the ship being taken to port, of an interruption in the trip or the taking of the ship to another than the point of destination. Nor is it legitimate to present a claim for compensation in case the merchandise itself, as a result of the seizure of the ship, has sustained damage, nor, for instance, if on the further journey of the prize it is lost as a result of an accident at sea. Since the seizure is a lawful act, there is no legal principle on which a claim may be presented for the damage which the neutral has rather caused himself by intrusting his merchandise to a ship exposed to danger. Therefore, the war measure being lawful, there is no legal ground on which a claim for damages may be based in case the merchandise is lost because the war operation directed against the ship was, according to the circumstances, necesssarily directed against her cargo as well.

Damages.

The legal question that is important in this matter may arise even in the course of warfare on land. Conditions may be such and very frequently will be found to be such that, for instance, while bombarding a fortified or defended place, the property of neutrals is damaged. But even in warfare on land where private property is protected to a greater extent than in naval warfare, there

is no question of a duty on the part of the belligerent State, in such cases, to make compensation even to neutrals (art. 3 of the fourth convention of the Second Hague Conference).

Compare Geffcken in Heffter, Völkerrecht, 8th edition, §150, note 1 (incorrect, at least inadequate in that text of Heffter).
Calvo, Droit International, 4th edition, Vol. IV, §§ 2250-2252.
Bonfils, Droits des gens, 1908, § 1217.
Bordwell, Law of War, 1908, p. 212.

Declaration of Paris.

As regards the conditions of naval warfare in particular there is no protection either general or specific afforded to neutral merchandise by article 3 of the Paris declaration against the acts of the belligerent party resulting from the circumstances of the war. Article 3 referred to above is intended to afford protection against the prize law to which, up to the time of the Paris declaration, neutral merchandise in the enemy ship was exposed. Whatever the circumstances of the war demand, must be permitted to take place without regard to the fact that neutral merchandise is on board the ship. If, according to article 2 of the Paris declaration, the neutral flag protects enemy merchandise, this does not mean that vice versa the enemy ship is to be protected by neutral merchandise, protected in the first place, perhaps only against destruction, but by the same token in innumerable cases against any exercise of the prize law.

As far as can be ascertained, no one has disputed this even down to the most recent times.

Compare Resolutions of the French Conseil d'Etat, May 21, 1872.
Dalloz, Jurisprudence générale, 1871, III, No. 94, in the prize matter *Ludwig and Vorwärts*.
Dupuis, Le Droit de la guerre maritime, 1899, p. 334.
de Boeck, De la propriété ennemie privée sous pavillion ennemi, 1882, §146.
Bordwell, Law of War, 1908, p. 226.
Wheaton, International Law, 4th edition, p. 507, §359.
Oppenheim, International Law, second edition, Vol. II, p. 201 ff.
Calvo, Droit International, 4th edition, Vol. V, §§3033, 3034.
Hall, International Law, 5th edition, p. 717 ff.

French prize court decisions.

The assertion of the plaintiffs that the decision of the French prize court in the matter of the *Ludwig* and the *Vorwärts* had been almost unanimously attacked in the literature, has, apart from the quotations adduced from the most recent sources (Wehberg and Schramm; the quotation from Hall, p. 187, see above, is incomprehensible), not been supported by documents, and must,

therefore, be regarded as incorrect. Only in the most recent times, especially in Germany, has there arisen a conception of the theory which postulates the obligation to make compensation as a basic principle in all cases of the destruction of merchandise not subject to seizure generally or only in so far as neutral merchandise is concerned.

Compare, Schramm, Prisenrecht, 1913, p. 338 ff.

Wehberg, Seekriegsrecht, 1915, p. 297, notes 3 and 4; and Oesterr. Zeitschrift für offentliches Recht., cited elsewhere.

Rehm, Deutsche Juristenzeitung, 1915, p. 454.

In all these sources the general obligation for making compensation in the above sense is unmistakably felt to be something to be taken for granted. The foundation is lacking and where it is subsequently sought to establish one, it does not appear convincing when compared with the explanations given above. Nor can anything be done against the conclusiveness of the latter expositions by pointing out that warfare on land remains locally circumscribed to the national territory of the belligerents, while the ship sails the open seas. The fact that an enemy ship on the high seas is subject to seizure, and, if necessary, to attack, rests on the condition of international law as it exists, a condition which is to be deplored, but which is, nevertheless, a condition of fact. In all other respects, so soon as the ship is on the high seas, she is a part of the territory of her State, in which the neutral, by a voluntary act on his part, has placed his merchandise, by lading it on a vessel of a belligerent country for the purpose of transportation across the sea.

German prize regulations.

In conclusion, it should be stated that it is not a defect of procedure when, as is stated in the appeal, the prize court has refrained from deciding as to whether or not the merchandise, to which the claims refer, was subject to seizure. It is the object of section 1 of the prize court regulations clearly to define the prize jurisdiction, and even although in section 2 it is prescribed to what the decision is to extend, this means that thereby a line has been drawn to which the courts must confine themselves; but nowhere is it prescribed that in any particular case a decision must be handed down with regard to the said questions even when the settlement of the claims presented does not depend thereon.

Notwithstanding the summons issued under 9 and 12, the plaintiffs have not deposited the amount necessary to cover expenses. Their legal remedy was, therefore, not to be dealt with.

THE "DACIA"

vapeur capturé en mer le 27 février 1915 par le croiseur auxiliaire Europe.[29]

CONSEIL DES PRISES.

Décision des 3 et 5 août 1915.

[1916] Décisions du Conseil des Prises, 180.

AU NOM DU PEUPLE FRANÇAIS,

Le Conseil des Prises a rendu la décision suivante, entre:

D'une part, Edward Breitung, domicilié à Marquette (Michigan, États-Unis), se disant propriétaire du vapeur *Dacia*, capturé en mer le 27 février 1915, à l'entrée de la Manche, par le croiseur auxiliaire français *Europe*, ensemble le capitaine dudit vapeur, et le Ministre de la Marine agissant pour le compte des capteurs et de la Caisse des Invalides de la Marine.

Documents.

D'autre part, vu les lettres et bordereaux du Ministre de la Marine des 30 mars, 29 avril, 15 juillet et 26 juillet 1915, enregistrés au Conseil les 29 avril, 16 et 29 juillet 1915, portant envoi du dossier concernant la capture du vapeur *Dacia* et concluant à ce qu'il plaise au Conseil déclarer bonne et valable la capture du *Dacia* et de tous ses accessoires, parmi lesquels les approvisionnements de bord de toute nature, y compris les vivres sans exception, trouvés sur le navire, même ceux réclamés comme propriété personnelle par le capitaine MacDonald, en dehors des papiers de bord;

Vu les documents constituant ledit dossier, et notamment:

1° Le procès-verbal de capture dressé en mer le 27 février 1915;

2° Les papiers de bord, parmi lesquels un acte en date à New-York du 17 décembre 1914, par lequel la Compagnie Hamburg-Amerika déclare vendre le *Dacia* à Edward N. Breitung, et un affidavit du 19 décembre 1914 dudit Breitung déclarant cette vente sincère et sans réticences; l'acte d'enregistrement américain dudit *Dacia* à Port-Arthur (Texas), le 4 janvier 1915; le manifeste de

[29] Décision insérée dans le Journal officiel du 28 septembre 1915.