Privy Council Appeal No. 27 of 1917.

In the matter of the Steamship "Hakan."

Augf. Aktiebolaget Kepler - - - - - *Appellants,*

v.

His Majesty's Procurator - - - - - *Respondent,*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 16TH OCTOBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARKER OF WADDINGTON.]

The Swedish steamship "Hakan," the subject of this appeal, was captured at sea by H.M.S. "Nonsuch" on the 4th April, 1916, having sailed the same day from Haugesund, in Norway, on a voyage to Lübeck, in Germany, with a cargo of salted herrings. Foodstuffs had as early as the 4th August, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods (see the Declaration of Paris).

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances, the first

question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion, goods which are conditional contraband can be properly condemned whenever the Court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes (the "Jonge Margaretha," 1 C.R., 189). The fact that the goods in question are on the way to an enemy base of naval or military equipment or supply would alone justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy Government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and this being so, their Lordships are of opinion that the goods were rightly condemned.

The second question their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if Article 40 of the Declaration of London be applicable, the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the

Order in Council of the 29th October, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force. But the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this Order except in so far as the Declaration of London, as modified by the Order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is necessary therefore to consider the international law with regard to the condemnation of a ship for carrying contraband apart from the Declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in the "Neutralitet" (No. 1) 3 C.R., 294: "The modern Rule of the Law of Nations is certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in the "Neutralitet" creates a third exception. It should be observed too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge; and if he sails under a false destination or with false papers, it is quite legitimate to infer

this knowledge from his conduct. In his earlier decision in the "Ringende Jacob," 1 C.R., 89, Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of the "Neutralitet." But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in the "Neutralitet." Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship, it it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in the "Ringende Jacob" rather than the reasoning on which his decision in the "Neutralitet" case was based, that was adopted by the Supreme Court of the United States in the case of the "Bermuda" (3 Wallace, 514). In that case Chase, C.J., in delivering the opinion of the Court, says as to the relaxation of the ancient rule: "It is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or at least without intent on his part to take hostile part against the country of the captors, and it must be recognised and enforced in all cases where that presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. . . . . Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contra band articles and their importance to the belligerent and the general features of the transaction must be taken into consideration in determining whether the neutral owner intended or did not intend by consenting to the transportation, to mix in the war."

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the Prize Courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Referring, for example, to the view entertained in Holland, their Lordships find that although the ship is *primâ facie* confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master knew or ought to have known that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, though there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion, the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo, but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words, they support the principle to be derived from

the reasoning in the "Neutralitet" rather than the principle which has been deduced from the dictum in the "Ringende Jacob," and developed in the "Bermuda." It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify confiscation. (See Westlake, "International Law (War)," 2nd edition, 291; Hall, "International Law," 6th edition, 666.)

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law, their Lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On the 8th January, 1916, they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal with power for the charterers to prolong this period up to the 16th May, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the Court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of the "Ringende Jacob" or "Bermuda" decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purpose of the war is, in their Lordships' opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chase, C.J., in the "Bermuda."

In their Lordships' opinion, the appeal fails and should be dismissed with costs.

In the Privy Council.

IN THE MATTER OF THE STEAMSHIP "HAKAN."

AUGF. AKTIEBOLAGET KEPLER

v.

HIS MAJESTY'S PROCURATOR.

DELIVERED BY

LORD PARKER OF WADDINGTON.

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1917.