Privy Council Appeal No. 6 of 1952

Schiffahrt-Treuhand, G.m.b.H., and Others - - - *Appellants*

v.

Her Majesty's Procurator General - - - - - *Respondent*

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 12TH JANUARY, 1953

Present at the Hearing:

VISCOUNT SIMON
LORD PORTER
LORD NORMAND
LORD COHEN

[*Delivered by* VISCOUNT SIMON]

These are consolidated appeals brought by the respective former German owners of five objects against decrees of 10th May, 1951, made by Lord Merriman sitting in a Court of Prize, which dismissed the respective claims of the Appellants and pronounced the respective objects to be liable to confiscation by the Crown and condemned the same as good and lawful prize. The issues in the Appeal are complicated and have been admirably presented and argued before the Board by Counsel on either side.

The objects affected by the decrees are as follows:

(1) Hulls 507 and 508, which were under construction on the stocks at Flensburg in May, 1945, and were not yet ready for launching.

As regards 507, her ribs were up and half the plating was completed. As regards 508, the double bottom had been laid and half the ribs were up.

The learned President conveniently referred to them as "the Flensburg structures". The first named Appellant claims these objects as its property.

(2) Numbers 347 and 348, which were still on the stocks at Lübeck.

347 was almost ready for launching save that she had not been painted. About 70 per cent. of the building of 348 was completed, but the outer sides and decks were only partly riveted.

The learned President referred to these as "the Lübeck structures". The second Appellant Company claims the Lübeck structures as its property.

(3) The motor vessel *Hermes*, which had been launched but was not completely constructed in May, 1945.

At the outbreak of the late war she was lying partly built in the Vulkan shipyards in Bremen-Vegesack. As the work could not be completed there owing to the outbreak of war, she was taken in September, 1942, to Bolnes, near Rotterdam, where she lay, still incomplete, at the time of the Allied landings in Normandy. In

October, 1944, her owners, the third Appellant, decided to have her towed to Emden for completion. While lying in Emden harbour she suffered considerable bomb damage in the course of an air-raid. She did not sink in consequence of this damage, but was lightly grounded as a precautionary measure and holes in her below the water-line were provisionally stopped. She lay in the harbour in Emden damaged, grounded, and still incomplete, in May, 1945.

The third Appellant admits that the *Hermes* had acquired the character of a ship, but claims her as its property.

Proceedings were instituted in the summer of 1947 in the Prize Court by the Procurator General for the condemnation of the above as good and lawful prize. By this date the construction of all of them had been completed by the claimants, who had obtained from the occupying powers authority to do so, and the Crown subsequently paid for the work done. In the case of Hull 507, the Writ was dated 22nd July; in the case of 508, the Writ was dated 23rd August; in the case of 347, the Writ was dated 6th August; in the case of 348, the Writ was dated 1st September; and in the case of the *Hermes*, the Writ was dated 13th August. In each case the writ was served by affixing it, or a copy of it, on a portion of the vessel.

The procedure in a British Prize Court is regulated by the Naval Prize Act, 1864, and by Prize Court rules made by Order-in-Council under Section 53 of that Act: the Rules which applied in these proceedings were the Prize Court Rules, 1939 (S.R. & O. No. 1466 of 1939). By Order XV of the Rules, Paragraph 2 (*b*), a cause for the condemnation of a ship is to be heard upon evidence provided by affidavits of the officers of the ship concerned in the capture. Accordingly, the Procurator General presented, in support of his claim, affidavits by naval officers asserting that they were present at the captures of these objects in 1947 and 1948 and that no ship's papers were found on board at the time of the seizure. The affidavits follow a common form, which was presumably prepared beforehand, but it is noteworthy that they do not in some cases state the precise date of capture alleged. For example, in respect of the Flensburg structure 507, the Lieutenant who swears the affidavit, on the 30th June, 1947, merely says that he was present at the capture of 507 "lately taken by His Majesty's Ship of War". In the case of Flensburg structure 508, the same Lieutenant is more specific and swears, on the 29th September, 1947, that he was present "at the capture of the said ship 508 and lately taken by His Majesty's Ship of War *Royal Harold* at Flensburg on the 21st August, 1947". In the case of the Lübeck structure 347, another Lieutenant of the Royal Navy swears, on the 22nd July, 1948, an affidavit in which he says that he was "present at the capture of the said ship *s.s. Flenderwerke No.* 347 . . . lately taken by His Majesty's Ship of War *Royal Harold*". And the same Lieutenant, in reference to 348, swears, in an affidavit dated the 26th August, 1947, that he was present at the capture of *s.s. Flenderwerke* No. 348 "lately taken by His Majesty's Ship of War". The Crown in putting forward these affidavits in support of their claim presumably overlooked the proposition that an enemy ship can only be captured as prize in time of war, and when this was pointed out in a letter to the Admiralty Registry written on 28th October, 1947, by the German lawyer acting for the second Appellant, the German lawyer's letter was very properly placed by the Crown before the learned President. Finding that the Order for condemnation, which he had pronounced on 29th April, 1948, against all these structures, except 348, had not been drawn up, the President thereupon cancelled the Order which he had made and directed a new hearing. On the re-hearing, it was admitted by the Crown that the right to seize in prize in connection with the late war expired on 5th June, 1945, the date of the Berlin Declaration, when the Allied powers assumed for the time being powers of government over the whole of Germany. It thus became obvious that the claim made on behalf of the Navy that these objects were seized as prize in the summer of 1947 failed, and the seizure hitherto relied on and sworn to was invalid to give the Crown any rights in the Prize

Court. The Procurator General therefore revised his claim and contended that the occupation or seizure of the ports of Flensburg, Lübeck and Emden constituted *ipso facto* the seizure of the five structures which were found therein, and this is the basis upon which the Respondent now reconstructs his case. The Writs were amended on 6th February, 1951, to claim that the Flensburg structures were "seized and taken as prize by our naval or military or naval and military forces whilst lying at Flensburg at the time of the capture of Flensburg on 10th May, 1945", and that the Lübeck structures were similarly seized and taken as prize whilst lying at Lübeck at the time of the capture of Lübeck on the 2nd and 3rd May, 1945, while in the case of the *Hermes*, the Writ was amended to claim that she was "seized and taken as prize by our naval or military or naval and military forces whilst lying at Emden at the time of the capture of Emden on the 6th May, 1945". New affidavits were sworn by Vice-Admiral Baillie-Grohman on the 22nd January, 1951, to establish the capture of Flensburg and Lübeck on the dates named, and by Mr. Kent, the Assistant-Solicitor in the Treasury Solicitor's Department, who had the conduct of the proceedings, to establish that the port of Emden was occupied by His Majesty's Canadian Army on the 6th and 7th May, 1945. An affidavit by a naval officer, sworn on 5th February, 1951 (the day of the resumed hearing), confirmed this. It stated that the port of Emden was surrendered to the Allied Forces on the morning of 6th May, 1945; that the port was controlled by the Navy with the assistance of military guards and the port area was cleared of Germans other than those in guarded camps and was later enclosed in a barbed wire fence: that no German could enter the port precincts without a pass; that it was impossible for the Germans to do anything to their ships or go aboard them. "No German was permitted to board a German ship or enter the shipyards without authority".

It was on this revised basis that the issues between the parties were argued in a hearing before the learned President which began on 5th February, 1951. Lord Merriman, in his judgment of 10th May, defined the questions for decision as follows:—

> "(1) Were the ports in question respectively occupied in circumstances and at a time which permitted the exercise of any belligerent rights of prize therein?
>
> "(2) If the ports were captured when they were respectively occupied, was their capture of such a nature as, *ipso facto*, to effect the capture of these objects respectively?
>
> "(3) Were the Lübeck and Flensburg structures a proper subject of maritime prize, or were they merely private property on land and, therefore, protected from confiscation by virtue of Article 46 of Hague Convention No. IV?
>
> "(4) In any event, assuming that for any of the above reasons any one or more of these objects is not liable to condemnation as good and lawful prize and therefore must be released, ought they nevertheless to be released to the Crown and not to the claimants because, as was said in a letter of the 8th July, 1949, they have in consequence of the assumption of the government of Germany by the Declaration of 5th June, 1945, and of what is the equivalent of German legislation thereunder, become the property of the Crown?"

Mr. Diplock discussed the questions involved in a different order and formulated them thus:—

> (*a*) Is conscious volition or intention on the part of a captor necessary to constitute capture or seizure in prize?
>
> (*b*) Are structures not capable of floating, such as the Lübeck and Flensburg structures, capable in their nature of being maritime prize?

He conceded that the *Hermes* was a " ship ".

(*c*) Did rights of seizure in prize continue after the 8th May, 1945, when the act of military surrender was signed at Berlin on behalf of the German High Command? The contention that no seizure in prize was possible after this date affects only Hull 507 and Hull 508, since Flensburg was captured on 10th May, 1945.

Their Lordships find it convenient to deal with the issues raised in the order formulated by Mr. Diplock.

(*a*) The form in which the first question is framed implies that the captor who has laid hands on an enemy ship has an option to decide whether to claim her as a prize as from the date of seizure or to use her for his own purposes in the first place with a right to seize her as a prize at a later date. There can be no doubt that this was the assumption made by the Combined Chiefs of Staff of the Allies in reference to captured German ships before the surrender of Germany. There is in evidence an affidavit, made on 18th January, 1951, in these proceedings by Mr. H. D. Samuel, an Assistant Secretary in the Admiralty and the Head of the Naval Law Branch of the Secretary's Department, which paraphrases the signals sent in cypher on this subject as follows:—

" 4. I have read the signals and can say that in December, 1944, the Combined Chiefs of Staff agreed on the following policies concerning enemy ships captured before the surrender of Germany:

" (*a*) For operational purposes Supreme Commanders were to have first claim on enemy ships taken in ports within their commands just as they had on ex-Allied ships.

" (*b*) When Supreme Commanders had no further need for Military operations of enemy merchant ships captured or found in ports within their commands these were to be transferred to representatives of the Combined Shipping Adjustments Board. Arrangements for manning and operation would then be made within the combined shipping pool, but such ships were to remain subject to all claims including salvage claims and were to be accounted for in the final shipping settlement.

" 5. On the 14th May, 1945, instructions were sent by the Combined Chiefs of Staff to General Eisenhower that unless otherwise directed the policies referred to in paragraph 4 hereof should be applied to all German shipping, captured by Forces under General Eisenhower's Command in German ports before the surrender or declaration of defeat of Germany.

" 6. Further instructions were given on this date to General Eisenhower that captured ships were to be seized as prize except for fishing-craft, inland water craft and vessels needed for local service with German crews. Seizure was to be effected in Bremen and Bremerhaven by the United States Navy and in other ports by the Royal Navy.

" 7. Further instructions were to follow regarding the treatment of shipping falling into the hands of the Allied Expeditionary Force upon surrender or declaration of defeat. On the 8th June, 1945, instructions were sent by the Admiralty to the Naval Authorities in Germany referring to the seizure of German ships in prize. A paraphrase of this signal is annexed to this Affidavit and is marked ' A '."

The Exhibit A is as follows:—

Date 8.6.45.

" To:

Flag Officer-in-Charge, Hamburg.
Flag Officer-in-Charge, Kiel.
Flag Officer, Norway.
Flag Officer, Western Germany.
Flag Officer, Denmark.

" Info.A.N.C.X.F.

C. in C. Rosyth.
F.O.I.C. Humber.
N.O.I.C. Methil.

" From Admiralty.

DEFERRED.

" Subject German ships seized in prize. Vessels are if possible to be seized in ports of Germany or in ports occupied recently.

" Vessels to be accompanied to U.K. with Affidavits of seizure in hands of Officer Commanding Armed Guard. These affidavits to be delivered to N.O.I.C. at arrival port. At such port affidavit to be delivered by N.O.I.C. to Customs Officer. Vessels not to be seized until at point of departure for U.K. by reason uncertainty regarding arrangements for refitting."

(The Flag Officer-in-Charge for the Kiel area, which included Flensburg and Lübeck, was Vice-Admiral Baillie-Grohman.)

These " further instructions " are obviously given with a view to complying with the procedure called for by s. 16 of the Naval Prize Act 1864. The explanation of the last sentence of Exhibit A is that it was desirable to send a vessel seized as prize to the port of this Country where she could be conveniently " refitted " i.e. overhauled.

The view upon which these directions were framed was therefore that when the Allies took possession of German ports and thereby acquired control of enemy merchant shipping in them, a practical question would arise as to what was to be done with the shipping. On the one hand, the Allies might be glad to use it " for operational purposes ", for example, to move troops or to bring in supplies. The fact that merchant ships and transports belonging to the Allies had been extensively sunk by German submarines made it all the more necessary to avail themselves of means of sea-transport which fell into their hands.

On the other hand, the Allied Navies might be ambitious of taking the German shipping as prize and thereby contributing to the fund which would be available for prize-bounty. Having, as they conceived, these two alternatives before them, the Joint Chiefs of Staff adopted the policy of recognising that the first claim on the shipping was for operational use and so informed General Eisenhower and others concerned. But they contemplated that German shipping seized in German ports should in the end be dealt with so as to contribute to the Prize Funds of the victorious Navies. Thus the plan was to use the seized ships in necessary operations as long as the war was going on without being handicapped by the formalities of a Prize Court, but it was contemplated that when Germany surrendered there would still be time to bring the vessels before the Prize Court.

Those who advised this plan and gave these instructions laboured under the misapprehension that proceedings based on capture in prize, which invoked the jurisdiction of the Prize Court, could be taken after the surrender of Germany. This, in Their Lordships' opinion, was an error. And it is now conceded by the Crown that no seizure in Prize could validly take place after June 5th, 1945.

Mr. Diplock, relying on the above assumption on which the first question is based and on the view set out above of the Chiefs of Staff, contended that the instructions given by the latter to seize in prize at a later date demonstrated that there had been no seizure in prize at the

time of the capture of the ports and that there could therefore have been no intention on the part of the captors to seize the objects in prize when the ports were captured.

This argument, however, is met, in Their Lordships' opinion, by considering what is the nature of a prize-capture over which the Prize Court has jurisdiction.

The British Prize Court, constituted at the beginning of any war in which this Country is engaged involving naval action, is set up by a Commission under the Great Seal addressed by the Crown to the Admiralty The Commission under which the Prize Court sat in connection with the last war was issued under an Order in Council dated September 5th, 1939, which recited that a state of war existed between this Country and the German Reich " so that His Majesty's Fleets, Ships, and Aircraft may lawfully seize all ships, vessels, aircraft and goods belonging to the said German Reich or to the Citizens and Subjects thereof, or other persons inhabiting within any of the countries, territories, or dominions of the said German Reich, and bring the same to judgment in any such Courts as shall be duly commissioned to take cognizance thereof ", and the Commission authorised " the Commissioners for executing the Office of Lord High Admiral to will and require His Majesty's High Court of Justice and the Judges thereof for the time being to take cognizance of and judicially proceed upon all manner of captures, recaptures, seizures, prizes and reprisals of all ships, vessels, aircraft and goods that are or shall be taken, and to hear and determine the same, and according to the course of Admiralty and the Law of Nations and the Statutes, Rules, and Regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels, aircraft, and goods as shall belong to the said German Reich or to the Citizens or Subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Reich or be otherwise condemnable as Prize ". The Admiralty then executed this Commission by issuing a Warrant to the High Court requiring the Judges to act accordingly.

It is plain, therefore, that the Prize Court has jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy and to decide " according to the course of Admiralty and to the Law of Nations " whether it should be condemned as true and lawful Prize. "Prize", in this connection, means nothing more than " taking " or seizure. " Capture in prize " or " as prize " is not one species of capture. If a ship is captured she thereby becomes a prize subject to the jurisdiction of the Prize Court. The French equivalent for our " Prize Court " is *Cours des Prises,* and *" prise "* means " taking ". Littré defines *" prise "* as *" action de prendre un navire "*. The jurisdiction of United States courts in prize cases equally extends to all captures, as explained by Judge Story in *Notes on the Principles and Practice of Prize Courts.* It was pointed out in the course of the argument that, according to *Murray's Oxford Dictionary,* the English word " prize " in this sense, though spelt and pronounced in the same way as the word for a reward, is a distinct word and means simply a capture. The first question in every Prize case is—was the vessel " captured " by the captors who demand its condemnation as prize? Similarly, in a claim for " prize salvage " it is normally essential to prove that the rescued ship had been " captured " by the enemy. (The *Progress* 1 Edw. 210 ; the *Edward and Mary* 3 C. Rob. 305.)

This view of the matter, which is fundamental to the first and main issue in the case, is supported by the early history of Prize jurisdiction. In Roscoe's *History of the English Prize Court,* the author points out how captures of ships when an English King was carrying on a naval war were likely to lead to complaints by neutrals or allies that their ships had been seized and how the Lord High Admiral was authorised in early days by the Crown to investigate such complaints " with a delegated authority in the nature of prize jurisdiction " (op. cit. p. 4). In course

of time, a personage called the Admiral's deputy came into existence, who exercised a prize jurisdiction (*Select Pleas of the Crown in the Court of Admiralty*, vol. i, page xlii), and by the Sixteenth Century a rudimentary prize court undoubtedly existed (Roscoe p. 11). The jurisdiction was to decide about " prizes " i.e. capture of ships. At the time of the Armada, for example, Dr. Julius Caesar, " doctor of laws, the duly appointed Judge-Lieutenant of the High Court of Admiralty in England " was in 1589 pronouncing sentence of condemnation of a Spanish ship as lawful prize (*Law and Custom of the Sea* (Navy Records Society), Vol. I, p. 254).

Their Lordships therefore reach the conclusion that the physical capture of a ship is the same thing as taking her in prize and that a prize court has jurisdiction to decide " according to the course of Admiralty and the Law of Nations " the fate of every vessel so captured. The fact that captors wished or intended to make the vessel a prize at a later date is irrelevant ; she became a prize subject to the jurisdiction of the Prize Court from the moment of capture. It is the intention to seize, not the intention to seize in prize, that gives jurisdiction.

The view of Their Lordships that the physical capture of a ship is the same thing as taking her in prize, and that the jurisdiction of the Prize Court arises from the mere fact of seizure, is supported by the language of the Naval Prize Act and by the Prize Rules made thereunder. The Rules define " captor " as meaning " any person taking or seizing, or having taken or seized, any ship, aircraft or goods as prize ". It is true that Section 16 of the Act requires, as a matter of procedure, that every ship taken as prize, and brought into port within the jurisdiction of a Prize Court shall be delivered up to the custody of the Marshal, or failing him to the Principal Officer of Customs of the port, and Section 15 requires the captors " with all practicable speed " after this to bring the ship's papers into the registry of the Court. If the captor seizes a ship and does not promptly act in accordance with these sections, this does not oust the jurisdiction of the Prize Court (see the *Zamora* [1916] 2 A.C., 77 per Lord Parker at p. 104), but complaint can be made to it that this has not been done, and the Prize Court will permit those interested in the captured ship to institute proceedings before it and, in an appropriate case, to claim damages from the captor (see the *Remonstrant* [1917] 3 B. & C.P.C., 14, 87 L.J.P.C. 26, and Colombos on *The Law of Prize*, 3rd Edition, p. 310). Similarly, once a ship is captured, the Prize Court has jurisdiction to control its requisition, and to make orders to preserve the *res*.

When, then, did the capture of these objects take place? Allied Forces, with which the British Navy co-operated, captured Lübeck on the 2nd or 3rd of May and Naval Forces occupied Flensburg on 10th May, 1945. Naval Officers were appointed " to control the ports and the shipping in them " (Admiral Baillie-Grohman's Affidavit, para. 5). As a result " nothing could be done by the Germans with their ships whether they were completed ships or uncompleted ships building in shipyards " (same Affidavit, para. 6). " Capture ", said Lord Sumner in the *Pellworm* 3 B. & C. Prize Cases 1053 at p. 1059, " consists in compelling the vessel captured to conform to the captor's will. When that is done, *deditio* is complete ". Admiral Baillie-Grohman hoisted his flag at Travemunde, at the mouth of the river on which Lübeck lies, and the entrances there and to Kiel Harbour were controlled (paras. 3 and 8). The port of Emden, in which the *Hermes* was lying, was similarly captured and held with the co-operation of the British Navy.

The inevitable conclusion from these facts is that the ships and other objects in the ports were " captured " at the same time as the ports themselves, just as, in the *Bellaman* [1948] 2 A.E.R. 679, ships aground in Tripoli Harbour were regarded as seized when the port of Tripoli was taken. They became, in Lord Parker's phrase in the *Roumanian* [1916] 1 A.C. 138, " enemy goods seized on enemy territory by the naval forces

of the Crown". This is in accordance with Lord Stowell's view in the *Progress* (*ubi supra*) where he observes, in reference to the allegation that the French had captured shipping in the port of Oporto, "it is not necessary to show that they had taken formal possession of each individual ship, because they had possession of the port itself; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves". (p. 210.)

It may be objected that, if the seizure of a port in such circumstances involves the seizure of enemy ships within it, a ship which is in the port but which belongs to a neutral owner or is otherwise not liable to seizure is none the less seized and made prize. The answer is that this is indeed so, but the captor can put himself right by promptly releasing any vessel against which no claim of condemnation can be validly made (see para. 433 of Oppenheim Vol. II, 7th Edition, p. 868). If there is unreasonable delay in releasing such a vessel, the parties interested have the right to compensation which is awarded by the Prize Court (see Article 64 of the Declaration of London, which, though it was not ratified, embodies this rule).

To sum up, the fact which gives jurisdiction to the Prize Court is the fact that the ship was physically captured and taken out of the possession of her former owners. It is this fact which constitutes her a prize, and the intention of captors to postpone the date when the Prize Court has jurisdiction is irrelevant.

(*b*) The next question is whether the Lübeck and Flensburg structures were, at the time of their capture in May, 1945, capable in their then condition and position of being regarded as a *res* which was subject to capture as prize. As international law has developed, efforts have been made to set limits to the right of belligerents in war to capture property belonging to the enemy or to the enemy's subjects. Originally, no doubt, it was the practice of an army in invasion to seize such property on land and appropriate it and equally for a belligerent Navy to capture enemy ships and the like and their cargoes. But the rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) while it remained the Law of Nations that captures at sea by naval forces were authorised. By 1781 a distinction between land-warfare and maritime-warfare in this respect was recognised (see Lord Mansfield's judgment in *Lindo* v. *Rodney*, in a note to *Le Caux* v. *Eden* 2 Douglas 595).

The explanation of this difference may well be found in the fact that merchant-shipping is used in war for purposes of transport; so long as it belongs to the subjects of the enemy, it adds to his strength, while the capture of merchant's shipping at once reduces the enemy's power and adds to the power of the belligerent and hence becomes a legitimate operation of war. Moreover, merchant-shipping, unlike property on land, is usually found on the high seas, which belong to no particular nation. Cargoes belonging to or destined for the enemy (unless protected by the Declaration of Paris) are subject to capture by a belligerent for the same reason. The rule prohibiting the seizure by a belligerent of enemy property on land is now formulated in Hague Convention No. IV dealing with the Laws and Customs of War on Land drawn up in 1899 and revised in 1907, Article 46 of which provides that "private property cannot be confiscated". This must be understood to refer to private property which does not consist of war material or means of transport serviceable for military operations (Oppenheim, Vol. II, 7th Edition, paragraph 143); to capture and confiscate other private property in the course of land-warfare would be pillage, and this is formally prohibited by Article 47. Articles 52 and 53 deal with requisitions and the latter Article, as revised in 1907, contains the paragraph:

> "All appliances, whether on land, at sea, or in the air, adapted for . . . the transport of persons or goods apart from cases governed by maritime law, depôts of arms, and, generally, all kinds of war

> material may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace ".

The phrase " apart from cases governed by maritime law " marks the divergence between the rules of war on land, which prohibit capture of private enemy property, and the rules governing sea warfare which permit prize-capture. On which side of the dividing line do the Flensburg and Lübeck structures fall?

There is no authority or decided case exactly in point and Their Lordships agree with the learned President that the question whether the capture of any particular property is a justifiable means of coercion must be tested as a matter of principle. To use Lord Mansfield's phrase, it is necessary to consider " the reason of the thing ". Dana's note to Wheaton, 8th Edition, p. 451, under the heading of " Distinction between Enemy's Property at Sea and on Land " contains the following passage:—

> " Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea. . . . The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land."

Applying this test, it would seem to follow that an unfinished ship in course of construction can be a proper subject of prize, at any rate when captured by or with the assistance of naval forces, for its completion makes it available for war-time use. Their Lordships agree with the learned President that these structures, though not capable of floating at the time they were captured, are none the less to be regarded as " maritime property in a maritime town " and are rightly to be regarded as maritime prize.

(*c*) The third and last question in the Appeal affects only Hull 507 and Hull 508, which were under construction in the port of Flensburg when it was occupied by a datachment of the British Army and by British Naval forces on the 10th May, 1945. The appellants submitted that the seizure of these vessels was invalid because seizure in prize is an act of hostility, and because all hostilities were brought to an end on the 8th May, 1945, by the Act of Military Surrender signed at Berlin on that date on behalf of the German High Command in the presence of officers representing the Supreme Commander of the Allied Expeditionary force and the Supreme High Command of the Red Army. The Crown's submission is that the right to seize in prize persisted till the 5th June, 1945, when the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic by a declaration signed at Berlin by their representatives declared that they assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal and local government. That declaration admittedly brought to an end all hostilities between the allied powers and the German State, and it terminated the right of seizure, because thenceforward all German ships and maritime property were at the disposal of the allied powers as the supreme governing and legislative authority of the Reich. The decision of the learned President was that, though the victors might expressly and impliedly abrogate any rights that they may have *jure belli* including rights of Prize, he saw no reason for holding that the Crown had lost those rights because of anything which occurred before the declaration of the 5th June, 1945.

The Act of Military Surrender of the 8th May, 1945, by which the High Command surrendered unconditionally all forces on land, at sea and in the air which were at this date under German control is unprecedented and there is no legal decision of the Courts of the United Kingdom, nor indeed of any foreign court, which defines the consequences in relation to the victor's right of prize. The appellants therefore, in default of more direct authority, sought to base an argument on precedents which define the effects of a general armistice. The argument was summarized by the learned President as follows: "It is at the very least doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless they are expressly reserved: and seeing that an armistice is a mere suspension of hostilities, so much the less can the exercise of their rights be permissible after a total surrender, which involves an absolute cessation of hostilities." This was in substance the argument presented to their Lordships.

The argument is beset by the weakness which attends all arguments from analogy. A general armistice is the result of a negotiation in which detailed consideration is normally given to the conduct during the armistice of the armed forces of both parties, and it frequently includes as one of its terms a provision dealing with the right of seizure in prize. When that is done the agreed term regulates the right. But when there is no term in the armistice dealing with the right, then it is a question whether a provision should be implied that the right of prize is suspended, and that question will depend on the special circumstances of each case. When there are no special circumstances, the practice, or it may be better to say the tendency, of the courts varies in different countries. In France, for example, the tendency is to hold that the right of prize is suspended (see the *Santa Flavia*, Prises Maritimes, Jurisprudence Française de la Guerre 1939-45 p. 421). The German and Italian courts in obedience to their own municipal legislation have taken a contrary view. There is however no doubt that during a general armistice the right of visit and search and the right to seize contraband and neutral vessels attempting to run a blockade are not suspended. Their Lordships are of opinion that if these rights can be exercised against neutrals, *a fortiori* the British Courts would recognise the right of seizure of enemy ships. All these rights find their justification in the prevention during the armistice of the enemy's replenishment of his resources and of the increase of his warlike potentiality. If that be the sound view, the supposed analogy between a general armistice and an unconditional surrender turns against the Appellants.

But the absolute surrender of all existing military forces is not truly analogous to a general armistice, and provisions regulating the conduct of the victor's forces find no place in it and are indeed incompatible with it. It may not be correct to describe such a surrender as a unilateral act of the vanquished enemy, for, to take the present instance, the surrender was received by the victor as an acceptance of terms which he might impose. The 4th Article of the Act of Surrender of the 8th May, 1945, expressly provided that it should be "without prejudice to and would be superseded by any general instrument of surrender imposed by or on behalf of the United Nations": and the Berlin Declaration of the 5th June, 1945, was in fact the general instrument of surrender contemplated by that Article. In the interval between the 8th May and 5th June it would of course have been contrary to International Law and the dictates of humanity to attack submissive and unresisting officers and men of the German forces, and it would not be incorrect to say that abstention by the victor from acts of that kind was an inherent condition of the surrender. But there is no necessity to imply a condition that all rights *jure belli* were to be foregone by the victor. The Allies were, for example, fully entitled to order their Forces to advance further into German territory, and their Lordships have no doubt that they remained entitled to seize German vessels on the high seas in prize.

There are two specialities of the situation as it stood on the 8th May, 1945, which provide additional and independent grounds for this conclusion. The first is that there was on the 8th May, no surrender of the German Government or of the Reich itself. The Appellant's case is that the victor's rights as a belligerent were immediately replaced by rights of subjugation. Such an instantaneous transition is scarcely practicable even when it is the enemy Government that surrenders. But there was a German Government still in existence on the 8th May, and it was entitled to raise new forces, to dismiss the existing High Command, to appoint new military leaders with instructions to continue the struggle. A prolonged resistance after the defeat of the German armies had often been threatened by German leaders and on the 8th May it could not have been said that the resistance of the Reich was finally at an end. It is significant that the Berlin Declaration of the 5th June, 1945, instead of proceeding merely on the narrative that the German armed forces had surrendered, narrates also that Germany was no longer capable of resisting the will of the victorious Powers, and that the unconditional surrender of Germany had thereby been effected. By the 5th June, the chief members of the German Government had been arrested, and the passive submission of Germany to the will of the victors had become an accomplished fact. It was therefore the Declaration of Berlin that terminated all hostilities and ended the right of seizure.

The other matter is that Germany had been waging war in alliance with the Japanese Empire, and that the war with Japan continued after the surrender of the German armed forces. Their Lordships agree with the Crown's submission that when war is carried on by partners as allies the unconditional surrender of one cannot protect it against the right of seizure so long as active hostilities are continued by a partner, unless the victor consents to abrogate his right.

Their Lordships do not find it necessary to consider the opinions of writers on the effect of the unconditional surrender of Germany's armed forces on the right to seize in prize. No author was cited who had had before his mind the precise state of affairs between the surrender on the 8th May, 1945, and the Berlin Declaration of the 5th June, 1945, or the distinction between a surrender by the High Command and the surrender of the Reich, or the effect of the continuance of the war by Germany's ally, Japan.

Their Lordships find themselves in agreement with the opinion of the learned President that the victor may abrogate his rights *jure belli* including rights of Prize, not only by an express renunciation, but also impliedly by his conduct, and they would add that there may be circumstances in which unreasonable delay after an unconditional surrender in regulating the situation by a new declaration or arrangement may have a prejudicial effect on the victor's retention of his rights.

Their Lordships therefore hold that the condemnation as good and lawful prize pronounced by the Prize Court was correct and will humbly advise Her Majesty that this Appeal should be dismissed. The conclusion at which their Lordships have arrived renders it unnecessary to decide the fourth question formulated by Lord Merriman.

Inasmuch as the ultimate case for the Crown varied so widely from that first presented, there will be no costs of the Appeal.

(17901) Wt. 8096—1 100 1/53 D.L./P1/3

In the Privy Council

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AND OTHERS

v.

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DELIVERED BY VISCOUNT SIMON

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1953