

3.
1, 1953

In the Privy Council.

33531

ON APPEAL

FROM THE HIGH COURT OF JUSTICE
PROBATE DIVORCE AND ADMIRALTY DIVISION
(IN PRIZE)

FEB 1954

INSTITUTE
LEGAL

10

HULL 507
HULL 508
FLENDERWERKE 347
FLENDERWERKE 348
M.V. "HERMES"

BETWEEN

SCHIFFFAHRT-TREUHAND, G.m.b.H., LÜBECKER
FLENDERWERKE A.G. and DAMPSCHIFFFAHRTS-
GESELLSCHAFT "NEPTUN" *Appellants*

AND

HER MAJESTY'S PROCURATOR GENERAL *Respondent.*

Case for the Respondent.

RECORD.

20 1. These are appeals brought by the above-named Appellants
against decrees by The Right Honourable the President of the Probate,
Divorce and Admiralty Division of the High Court of Justice sitting in
Prize, who on the 10th May, 1951, pronounced the partly built vessels
Nos. 507 and 508, and Nos. 347 and 348 and the motor vessel "Hermes"
to be enemy property and as such liable to confiscation by the Crown
and condemned the same as good and lawful Prize. The learned President
admitted these appeals subject to the provision of security for the costs
thereof. p. 119.

30 2. At the time of the unconditional surrender of Germany on the
8th May, 1945, Nos. 507 and 508 were partly built and were on the stocks
at Flensburg. As regards No. 507, her ribs were up and half the plating
was completed. As regards No. 508, the double bottom had been laid
and half the ribs were up. Nos. 507 and 508 were being built at Flensburg
by the Flensburger Schiffsbau Gesellschaft for the Appellants, their owners,
p. 61, l. 21 *et seq.*
p. 7, Ll. 34-36.
p. 17, Ll. 21-23.
p. 7, Ll. 16-20.
p. 17, Ll. 4-8.

p. 26, Ll. 19-23.

p. 34, Ll. 18-23.

p. 26, Ll. 8-12.

p. 34, Ll. 5-9.

p. 41, Ll. 36-39.

p. 42, Ll. 7-9.

Ibid., l. 20.

the Schiffahrt-Treuhand G.m.b.H. These Appellants are also referred to in the evidence as "the Shipping Trust Company Limited." Nos. 347 and 348 were also partly built at this time and were on the stocks at Lübeck. The former (No. 347) was almost ready for launching, but had not been painted. About 70 per cent. of the work on the hull of the latter (No. 348) had been completed, but the outer sides and decks were only partly rivetted. Nos. 347 and 348 were being built at Lübeck by the Appellant owners, the Lübecker Flenderwerke A.G. At this time likewise the m.v. "Hermes," owned by the Appellants, the Dampschiffahrts-Gesellschaft "Neptun," was lying in the harbour in Emden. About 10 four-fifths of her construction had been completed.

p. 85, Ll. 9-10.

p. 79, Ll. 32-33.

Ibid., Ll. 24-25.

p. 79, Ll. 3-4.

p. 89, Ll. 19-24.

3. The port of Flensburg was occupied by British naval and military forces on the 10th May, 1945. The port of Lübeck was occupied by British military forces on the 2nd May, 1945, and by British naval forces on the 3rd May, 1945, and the port of Emden by combined British naval and military forces on the 6th May, 1945.

In Pocket.

In Pocket.

p. 11, Ll. 25-30.

p. 29, Ll. 5-6.

p. 48, Ll. 33-35.

4. Following upon the Declaration regarding the defeat of Germany and the assumption of Supreme Authority with respect to Germany by the governments of the United Kingdom, United States of America, Russia and France of the 5th June, 1945, and the Protocol of the Proceedings of the Berlin Conference between the Heads of Government of the U.S.S.R., United States and United Kingdom of the 2nd August, 1945 (also known as the Potsdam Agreement), orders were given on the 5th August, 1945, by the British Naval Officer in Charge, Flensburg, to the Flensburger Schiffsbau-Gesellschaft to complete Nos. 507 and 508 and on the 27th August, 1945, the British Base Engineer Officer at Lübeck ordered the Appellants, the Lübecker Flenderwerke A.G., to complete Nos. 347 and 348. On the 8th December, 1947, the British Ministry of Transport representative at Hamburg arranged for the completion of the m.v. "Hermes" by Deutsche Werft of Hamburg and she was subsequently 30 towed from Emden to Hamburg for this purpose.

p. 3, Ll. 20-38.

p. 14, Ll. 20-40.

p. 22, Ll. 19-39.

pp. 31 and 47.

p. 1, Ll. 20 *et seq.*

p. 13, Ll. 22 *et seq.*

p. 21, Ll. 18 *et seq.*

pp. 30 and 37.

5. Affidavits relating to capture and ship's papers were sworn at various dates in June, July and August, 1947, viz., No. 507 on 30th June, 1947, No. 508 on 29th September, 1947, No. 347 on 22nd July, 1947, No. 348 on 26th August, 1947, and m.v. "Hermes" on 21st July, 1947. Writs in all five cases were issued as follows, viz., No. 507, 22nd July, 1947, No. 508, 23rd August, 1947, No. 347, 6th August, 1947, No. 348, 1st September, 1947, and the m.v. "Hermes," 13th August, 1947, and subsequently were duly served. All the said Writs were amended at the trial so as to read that each ship had been seized and taken as prize by 40 His Majesty's naval or military or naval and military forces in the particular port in which they each were lying on the date of the capture of that port.

In Pocket.

6. On the 29th April, 1948, Nos. 507 and 508 (hereinafter together referred to as the Flensburg structures), Nos. 347 and 348 (hereinafter together referred to as the Lübeck structures) and the m.v. "Hermes," included in a group of eight partly built ships, came before the learned President for condemnation. The applications were not formally opposed

but at the hearing in respect of No. 348 a letter from a Dr. Ihde of Lübeck, setting out various grounds of protest on behalf of the Appellants, the Lübecker Flenderwerke A.G., was read. As a result of this letter the learned President then cancelled such condemnations of vessels in the said group as had already been made and intimated that he would require full argument of the right to claim condemnation in the circumstances.

pp. 50 and 51.

7. On the 1st March, 1949, Appearances were duly entered on behalf of the Appellants, the Schiffahrt-Treuhand G.m.b.H. (also known as "the Shipping Trust Company Limited") and the Appellants, the Lübecker Flenderwerke A.G. On the 3rd May, 1949, an Appearance was duly entered on behalf of the Appellants, the Dampschiffahrts-Gesellschaft "Neptun." On the same dates claims in similar terms were filed on behalf of all these Appellants for and on behalf of themselves, the true lawful and sole owners of the said ships, their tackle, apparel and furniture at the time they were taken and seized as Prize; for the said ships and for all such loss, costs, charges, damages and expenses as may have arisen and been incurred, or shall or may arise or be incurred by reason of the capture and detention aforesaid.

p. 5, Ll. 8-21.

p. 15, l. 26.

p. 24, Ll. 8-23.

p. 32, l. 12.

p. 40, Ll. 1-17.

p. 5, l. 22 *et seq.*p. 15, l. 15 *et seq.*p. 24, l. 25 *et seq.*p. 32, l. 15 *et seq.*p. 40, l. 18 *et seq.*

8. The grounds of the said claims, as shown by the indorsements, included (in effect) the following:—

(1) That the seizures were unlawful—

(A) Because hostilities with Germany had ceased on or about the 8th May, 1945.

(B) Because at the time of the said seizures the relations between the United Kingdom and Germany were such as to preclude the exercise of a right of seizure in Prize at that time.

(C) Because the Declaration dated the 5th June, 1945, and the Allied Control Council for Germany, Proclamation No. 2 dated 20th September, 1945, are inconsistent with the continuance of a right of seizure in Prize at the date of the said seizures.

And in respect of the Lübeck structures and the Flensburg structures the further grounds:—

(2) That at all material times up to the dates when orders were given for their completion the said ships were only built in part and were private property on land and were accordingly protected from seizure and confiscation by reason of Article 46 of the Hague Convention IV concerning the Laws and Customs of War on Land, 1907; that the building of the said ships was completed between the said dates and the dates of the said seizures by reason of the compulsion of the Allied Military Government which on the said dates gave orders for the completion of the said ships; and that in the premises it would be contrary to just and proper legal principles to permit the assertion of a right of Prize in respect of the said ships.

The Appellants the Dampshiffahrts-Gesellschaft "Neptun" also based their claim upon the grounds that the "Hermes" was at all material times private property on land and accordingly

protected from confiscation by virtue of the provisions of Article 46 of the Hague Convention IV concerning the Laws and Customs of War, 1907. This allegation was, however, expressly abandoned on behalf of these Appellants at the trial when it was also expressly admitted that the "Hermes" had at all material times acquired the character of a ship.

p. 55.

p. 58, l. 26 *et seq.*

9. In order that (*inter alia*) the issues might be more closely defined the Respondent wrote two letters to the Appellants' Solicitors; firstly, in respect of the "Hermes," on the 8th July, 1949, and secondly, in similar terms, on the 20th January, 1951, in respect of the Flensburg and Lübeck structures. These letters stated, in effect, that (*inter alia*) the Respondent, while not admitting the validity of the grounds of claim, set out in paragraph 9 (1) hereof, would not rely on any seizures which took place in 1947; that the Crown would contend that all the vessels in question were seized in Prize when the ports in which they lay were occupied; that, contrary to the grounds of claim alleging that the said ships were private property on land, the Respondent would contend that they were not private property on land but were, at the material time, the proper subject of seizure in Prize. Lastly, that by reason of the surrender of Germany and the Allied Declarations and other instruments relating to the German surrender as well as the decision of the Allied Military Control acting as Sovereign authority for Germany, these vessels became in any event the property of His Majesty's Government and could only be released to His Majesty's Government. The Respondent will, if necessary, contend that quite apart from any seizure in Prize the vessels became the property of His Majesty's Government and so remain. 10

10. These cases were heard in the Prize Court on the 5th, 6th, 7th, 8th and 9th February, 1951, and the 14th, 15th, 16th and 19th March, 1951, and the 3rd and 4th April, 1951.

11. In the course of the proceedings before the Court it was stated on behalf of the Respondent that the Respondent would not seek to assert that belligerent rights of Prize subsisted after the Declaration of 5th June, 1945. 30

12. In these circumstances, four questions arose for decision by the Court. The learned President on the 10th May, 1951, in his Judgment stated them as follows:—

p. 95, l. 41-p. 96,
l. 11.

"(I) Were the ports in question respectively occupied in circumstances and at a time which permitted the exercise of any belligerent rights of Prize therein? (II) 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? (III) 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 Art. 46 of Hague Convention IV? (IV) 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 40

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 the letter of July 8, 1949, already quoted, they have in consequence of the assumption of the Government of Germany by the Declaration of June 5, 1949, and of what is the equivalent of German legislation thereunder, become the property of the Crown ? . . . ”

13. With regard to the first question, the Appellants concede that as the occupation of the port of Lübeck on the 2nd and 3rd May, 1945, was effected at a time prior to any surrender, the exercise of belligerent rights in Prize was then permissible.

With regard to the port of Emden, the occupation of this port on the 6th May, 1945, took place two days after the signing at Luneburg by Field Marshal Montgomery and representatives of the German Command of an Instrument of Surrender of part of the German armed forces namely those in Holland, in north-west Germany, including all islands, in Schleswig-Holstein, and in Denmark. This area includes the port of Emden. The Appellants contend that this Surrender operated to abrogate the exercise of belligerent rights in Prize within the said area. To this the Respondent replies that belligerent rights in Prize were in no way abrogated on that account as the Surrender only applied to part of the German armed forces.

With regard to the port of Flensburg, the occupation of this port on the 10th May, 1945, took place two days after the German High Command had surrendered unconditionally to the Allies all the German forces on land, on the sea or in the air by two Acts of Military Surrender, dated 7th and 8th May, 1945, and signed respectively at Rheims and at Berlin. On this point the Appellants' contentions were summarised by the learned President in two passages of his Judgment 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 these rights be permissible after a total surrender, which involves an absolute cessation of hostilities. . . . it is said further that a total surrender whereby the vanquished enemy is obliged to cease hostilities imports an implied contract on the part of the victors to cease hostilities likewise ; and that it follows therefrom that from the moment of surrender capture in Prize cannot properly take place.”

To these contentions the Respondent says that an Armistice and an unconditional surrender are two things of an essentially different nature and that, until the 5th June, 1945, no rights in Prize were lost by reason of total surrender ; for this surrender, being unconditional, contained no limiting terms such as may be imported into an Armistice. In the course of his judgment the learned President paraphrased a passage from Lord Sumner's judgment in *The "Pellworm"* (3 B. & C. P.C. 1053) as follows :—

“ What the commanders of the German armed forces sought to intimate by acts signifying surrender was, first and foremost, that they ceased to fight and submitted to being taken prisoner,

and in relation to their ports, to intimate that they meant to do as they were told and that the maritime property therein might be captured in Prize although those in charge of it were not made prisoners or placed under personal restraint."

14. In answer to the second question the Appellants assert that even assuming that all three ports were occupied in circumstances and at times which permitted the exercise of belligerent rights in Prize yet such occupation would not, in the circumstances, include the capture of the m.v. "Hermes" and the Lübeck and Flensburg structures. Capture, the Appellants say further, must be an act of conscious volition and this, they say, was lacking in all five cases until the seizures which took place in 1947, that is to say, after the date 5th June, 1945, as from which the Respondent did not seek to argue that the right of capture *jure belli* continued to be exercisable. With regard to the Lübeck and Flensburg structures the Appellants further maintain that at all material times they were in shipbuilding yards and on the stocks and that whilst a ship-repairing yard may be, a ship-building yard is not part of a port at all. 10

In reply to the first of these contentions the Respondent contends that if a port is captured and if at the time of capture ships or other things which constitute proper objects of maritime Prize are within the port, no act of conscious volition is necessary to constitute the capture as a capture or capture in Prize of the said objects. With regard to the seizures which took place in 1947 the Respondent further contends that there is a well recognised distinction between an original capture and a procedural seizure at some later date and the Respondent submits that the said seizures in 1947 are of the latter character. To quote from a passage in Lord Stowell's Judgment in *The "Progress"* (Edwards 210) cited by the learned President in the course of his Judgment:— 20

p. 106, Ll. 36-44.

"I think I may consider it as decided in fact, that the French had captured these ships, and were actually in possession of them; it is not necessary to shew 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. It is likewise clear in point of principle, that it is not necessary that it should be primarily the intention of the captor to recover the property." 30

In answer to the second of these contentions the Respondent says that the authorities do not support the contention that a vessel in a building yard in course of construction cannot be seized in Prize. Further, as to the contention of the Appellants that the places in which the said structures were found when the ports were occupied are not within the said ports, this is an issue of fact, and the affidavits of Mr. W. G. R. Douglas, the representative in Germany of the Ministry of War Transport, filed on behalf of the Respondent, afford *prima facie* evidence that such places were within the said ports and there is no evidence to the contrary in the affidavits filed on behalf of the Appellants. 40

p. 4, Ll. 1-20.

p. 15, Ll. 1-22.

p. 23, Ll. 1-23.

p. 31, l. 26 *et seq.*

p. 38, l. 22 *et seq.*

15. With regard to the third question the Appellants contend that the right to seize in Prize is limited either to ships afloat or on the high seas or in port, or to merchandise of maritime character, i.e., cargoes, either on board ship, or on land if they then retain their character of cargo because they are either still within the limits of the port or, if they have been removed elsewhere, are so situated as not to have lost the character of cargo. The Appellants consequently maintain that partly-built vessels such as the Lübeck and Flensburg structures were incapable of becoming the subjects of Prize, as ships, until they had been launched
 10 or had at least reached such a stage of construction as to be capable of being launched and floating. Further, the Appellants also contend, that these structures were not "goods" falling either within the definition submitted above or that to be found in Section 2 of the Naval Prize Act, 1864, nor were they "ships" within the definition also to be found in Section 2 of the said Act; the relevant portions of which are as follows:—

2. . . . The term "ship" includes vessel and boat, with the tackle furniture and apparel of the ship, vessel or boat: . . .

The term "goods" includes all such things as are by the course of Admiralty and law of nations the subject of adjudication as prize (other than ships).
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The Respondent, on the other hand, contends that these structures were maritime property and were things which by the course of Admiralty and the law of nations were subject to adjudication in Prize. They were captured by naval or naval and military forces. They were ships in course of construction. It is submitted that the definitions in Section 2 of the Naval Prize Act, 1864, do not exclude these structures, for the definitions in the said Act are not expressed as being exhaustive and, in any event, the said Act is one for regulating procedure in Prize and not for declaring Prize law. The Respondent further submits that in
 30 order to ascertain if property is seizable as Prize no hard and fast rule exists but the situation, character and potentialities of the property in question have to be considered to discover if capture is in principle permissible, and a justifiable means of coercing the enemy in the maritime part of his enemy activities.

The learned President at two points in the course of his Judgment said:—

40 "Assuming these objects to be private property, can there be any doubt that they were of such a character and were so situated as to make their capture, in principle, a justifiable means of coercing the enemy? Can it be disputed that the enemy had an interest in these structures which were available to him for the purposes of war? And that he had such an interest because they were at least convertible property within his control . . ." and

"It is the convertibility to war-like use that matters . . . These structures are convertible to war-like use by the even simpler process of continuing the building upon lines already laid down."
 p. 115, Ll. 11-16.

16. The learned President decided these three questions in favour of the Respondent and granted decrees of condemnation in all five cases. The

fourth question was, by agreement, not dealt with by the learned President, but would arise for argument and decision in the event of any of the said structures or of the said m.v. "Hermes" not being subject to condemnation.

17. The Respondent therefore submits that these appeals be dismissed with costs for the following among other

REASONS

- (1) BECAUSE the ports of Lübeck, Emden and Flensburg were captured at times and in circumstances which permitted the exercise of belligerent rights in Prize 10 therein.
- (2) BECAUSE the capture of the ports of Lübeck, Emden and Flensburg was of such a nature as *ipso facto* to effect and in fact did effect the capture of the Lübeck structures, the m.v. "Hermes" and the Flensburg structures respectively all of which were at all material times within the said ports.
- (3) BECAUSE in the month of May 1945 the Lübeck and Flensburg structures were of such a character and captured in such circumstances and so situated as to 20 be the proper subjects of Prize.
- (4) BECAUSE the judgment of the learned President was right.

HARTLEY SHAWCROSS.

C. T. LE QUESNE.

MAURICE E. C. RENA.

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