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No. 6 of 1952.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF JUSTICE, PROBATE
AND ADMIRALTY DIVISION.
(IN PRIZE.)

UNIVERSITY OF LONDON
W.C.1.
DIVORCE FEB 1954
INSTITUTE OF ADVANCED
LEGAL STUDIES

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

BETWEEN

SCHIFFFAHRT-TREUHAND, G.m.b.H., LUBECKER
FLENDER-WERKE A.G. and DAMPSCHIFFFAHRTS-
GESELLSCHAFT "NEPTUN" *Appellants*

and

HIS MAJESTY'S PROCURATOR GENERAL

Respondent.

RECORD OF PROCEEDINGS.

FRESHFIELDS,
1, Bank Buildings,
Princes Street,
London, E.C.2,
Solicitors for the Appellants.

TREASURY SOLICITOR,
Storey's Gate,
St. James's Park,
London, S.W.1,
Solicitor for the Respondent.

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ON APPEAL

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

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

10

Between

SCHIFFFAHRT-TREUHAND, G.m.b.H., LUBECKER
FLENDER-WERKE A.G. and DAMPSCHIFFFAHRTS-
GESELLSCHAFT "NEPTUN" - *Appellants*

and

HIS MAJESTY'S PROCURATOR GENERAL

Respondent.

RECORD OF PROCEEDINGS.

No. 1.

20

Writ of Summons—Hull 507.

Amended pursuant to the Order of the President dated the
6th day of February, 1951.

No. 1.

Writ of
Summons—
Hull 507.
22nd July, 1947,
Amended 6th
February,
1951.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(In Prize.)

Writ of Summons—Ship.

No. 2355.

s.s. "507."

30 GEORGE THE SIXTH, by the Grace of God, of Great Britain,
Ireland, and of the British Dominions beyond the Seas King, Defender
of the Faith.

No. 1.
 Writ of
 Summons—
 Hull 507.
 22nd July, 1947,
 Amended 6th
 February,
 1951,
 (continued).

To the owners and parties interested in the ship s.s. "507" of no Port of Registry seized and taken as prize by Our Ship of war "~~Royal Harold~~", ~~Captain Hubert Victor Perry McClintock Commander~~ naval or military or naval and military forces whilst lying at Flensburg at the time of the capture of Flensburg on 10th May, 1945.

We command you that within thirty days after the service of this writ, inclusive of the day of such service, you do cause appearances to be entered for you in the Registry of Our said Court in a cause instituted on Our behalf by Our Procurator General or other the proper officer of the Crown against the said ship for the condemnation thereof as good and lawful prize. 10

And take notice that in default of your doing so Our said Court may proceed therein and judgment may be given in your absence.

WITNESS, WILLIAM ALLEN VISCOUNT JOWITT, Lord High Chancellor of Great Britain, this 22nd day of July in the year of Our Lord One thousand nine hundred and forty-seven.

This WRIT was issued by the said Procurator General of and whose address for service is Storey's Gate, St. James's Park, London, S.W.1.

This WRIT was served by me Lieutenant Walter Charles Maynard of H.M.S. Royal Harold on the ship s.s. 507 (Empire Towy) by nailing or affixing this original writ for a short time on the fore mast of the said vessel, and on taking off this writ by leaving a true copy thereof nailed or fixed in its place at Kiel, Germany at 0800 hours on Wednesday, the 30th day of July, 1947. 20

Indorsed the 30th day of July, 1947.

(Signed). W. C. MAYNARD,
 Lieutenant, Royal Navy.

No. 2.**Order giving leave to Amend Writ—Hull 507.**

In the High Court of Justice,
 Probate, Divorce and Admiralty Division.
 (Admiralty),
 (In Prize).

No. 2355.

Lord Merriman, President.

“Hull 507.”

10 On the application of the Attorney General on February 6th, 1951, in the above case, the President ordered that the Writ herein issued on July 22nd, 1947, be amended by striking out the words “ship of war ‘Royal Harold’ Captain Hubert Victor Perry McClintock (Commander)” and inserting the words “our Naval or Military or Naval and Military Forces whilst lying at Flensburg at the time of the capture of Flensburg on the 10th May, 1945” and directed that the affidavit of seizure was to stand.

Dated the 10th day of April, 1951.

No. 3.**Affidavit of M. D. Dawson—Hull 507.**

20 THE s.s. “507”. Mr. A. RIDLEY, OWNER’S REPRESENTATIVE.

I, MILES DELWAIDE DAWSON, Lieutenant in His Majesty’s Navy and of His Majesty’s Ship of War “ROYAL HAROLD,” whereof Hubert Victor Perry McClintock, Esq., is commander, make oath and say as follows:—

1. I was present at the capture of the said ship “507” whereof Mr. A. Ridley was the Owner’s representative, and lately taken by His Majesty’s Ship of War.

2. No ship papers of any sort were delivered up or found on board the said ship or elsewhere at the time of the seizure or afterwards.

30 3. Ship is still in the course of construction.

Sworn by the said Miles Delwaide
 Dawson this 30th day of June, 1947
 Before me, Hubert Victor Perry
 McClintock, Captain, Royal Navy
 of His Majesty’s Ship “Royal
 Harold”

(Signed) MILES DAWSON,
 Lieutenant, Royal Navy.

(Signed) H. V. P. McCLINTOCK,
 Captain, Royal Navy.

No. 2.

Order giving
 leave to Amend
 Writ—Hull 507.
 10th April,
 1951.

No. 3.

Affidavit of
 M. D. Dawson—
 Hull 507.
 30th June, 1947.

No. 4.

Affidavit of
W. G. R.
Douglas—
Hull 507.
14th January,
1948.

No. 4.

Affidavit of W. G. R. Douglas—Hull 507.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(In Prize.)

No. 2355.

Hull 507.

I, WILLIAM GEORGE RINTOUL DOUGLAS of Alstereck, Jungfernteig, Hamburg, representative in Germany of the Ministry of Transport, make oath and say as follows:—

This vessel was found partly built in Flensburg when that port 10 was occupied by the Allies. It was built on the order of Schiffahrt Treuhand Gessellschaft, Hamburg, by Flensburger Schiffbau Gessellschaft, Flensburg. In accordance with orders given by the Ministry of Transport through the Control Commission for Germany, the vessel was completed and sailed to the United Kingdom on the 30th July, 1947. It was named "EMPIRE TOWY" and registered in London.

Sworn at 53 Davies Street, Berkeley }
Square, W.1. this 14th day of } (Sgd.) W. G. R. DOUGLAS.
January, 1948 }

Before me,

(Sgd.) F. A. CARLTON SMITH.

20

No. 5.

Licence to
Schiffahrt-
Treuhand
G.m.b.H. to
prosecute
claims—
Hulls 507 &
508.
18th February,
1949.

No. 5.

Licence to Schiffahrt-Treuhand G.m.b.H. to prosecute claims—Hulls 507 & 508.

Secretary of State,
Home Department.

Whereas Messrs. Schiffahrt-Treuhand G.m.b.H. of Hamburg, are in contemplation of law an alien enemy company:—

Now I, the Right Honourable James Chuter Ede, one of His Majesty's Principal Secretaries of State, by virtue of a Warrant under His Majesty's Royal Sign Manual dated the first day of April, One 30 thousand nine hundred and forty-four, authorising me in this behalf, do hereby grant licence and permission to the said Messrs. Schiffahrt-Treuhand G.m.b.H. to enter an appearance in proceedings intituled respectively.

s.s. 507 In Prize No. 2355

s.s. 508 In Prize No. 2370

and to prosecute in the said proceedings a claim for the release of the said vessels or for any other relief to which the said company may be entitled in Prize in respect of the vessels.

Given under my hand at Whitehall this eighteenth day of February, 1949.

(Sgd.) J. CHUTER EDE.

No. 5.
Licence to
Schiffahrt-
Treuhand
G.m.b.H. to
prosecute
claim,
18th February,
1949,
(continued).

No. 6.

Appearance—Hull 507.

In the High Court of Justice.

10 Admiralty Division.
(In Prize.)

Ship: s.s. "507."

Claimants: Schiffahrt-Treuhand G.m.b.H.

Enter an Appearance for above-named Claimants in respect of:—
their claim to be the true lawful and sole owners of the above-named Vessel s.s. 507.

Dated the 1st day of March, 1949.

(Signed) FRESHFIELDS,

of and whose address for service is 1 Bank Buildings, Princes Street,
20 E.C.2.

Solicitors for the Claimants.

No. 6.
Appearance—
Hull 507.
1st March,
1949.

No. 2355.

No. 7.

Claim of Schiffahrt-Treuhand G.m.b.H.—Hull 507.

In the High Court of Justice.

Probate, Divorce & Admiralty Division.
(In Prize.)

Ship s.s. "507".

Claimants Schiffahrt-Treuhand G.m.b.H.

The Claim of Schiffahrt-Treuhand G.m.b.H. of Ferdinandstr. 56,
30 III, Hamburg, 1, a company incorporated in Germany, for and on

No. 7.
Claim of
Schiffahrt-
Treuhand
G.m.b.H.—
Hull 507.
1st March,
1949.

Writ No. 2355.

No. 7.
 Claim of
 Schiffahrt-
 Treuhand
 G.m.b.H.—
 Hull 507.
 1st March,
 1949,
 (continued).

behalf of themselves the true lawful and sole owners of the said ship, her tackle, apparel and furniture at the time she was taken and seized as prize, by His Majesty's Ship "Royal Harold", Captain Hubert Victor Perry McClintock, Commander, whilst lying at Flensburg; for the said ship and for all such loss, costs, charges, damages and expenses as may have arisen and been incurred, or shall or may arise and be incurred by reason of the capture and detention aforesaid.

Dated the 1st day of March, 1949.

FRESHFIELDS,

1, Bank Buildings, Princes Street, London, E.C.2, 10
 Solicitors for the above-named Claimants.

The grounds for the said claim are:—

1. That the seizure was unlawful:—

(a) because hostilities with Germany had ceased on or about the 8th May, 1945;

(b) because at the time of the said seizure 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 Potsdam Declaration dated the 5th June, 1945, and the Allied Control Council for Germany Proclamation No. 2 20 dated the 20th September, 1945, are inconsistent with the continuance of a right of seizure in prize at the date of the said seizure.

2. That at all material times up to the 5th August, 1945, the said ship was only built in part and was private property on land and was 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 ship was completed between the 5th August, 1945, and the date of the said seizure by reason of the compulsion of the Allied Military Government which on the 5th August, 1945, gave orders for the completion of the said ship; 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 ship. 30

No. 8.**Affidavit of W. O. Vogler in support of claim and two Exhibits thereto.**

In the High Court of Justice.
 Probate, Divorce & Admiralty Division.
 (In Prize.)

No. 2355

No. 8.
 Affidavit of
 W. O. Vogler
 in support of
 Claim—
 Hull 507.
 9th February,
 1949.

s.s. "507".

I, WOLF OSCAR VOGLER, of Hamburg, Sierchstra, 173, make oath and say as follows:—

1. I am Managing Director of Schiffahrt-Treuhand G.m.b.H.
 10 (hereinafter called "the Shipping Trust Company Limited") and am duly authorised to make this affidavit on their behalf.

2. The Shipping Trust Company Limited are a company incorporated in Germany in accordance with German Law.

3. The Shipping Trust Company are the true owners of the ship s.s. "507".

4. By a contract in writing dated 18th/20th November, 1943, the Flensburger Schiffsbau-Gesellschaft (hereinafter called "the Flensburg Shipbuilding Company") agreed to build for the Shipping Trust Company Limited at a price of R.M. 2.5 million a freight steamship of 5,000
 20 tons dead weight. The ship s.s. "507" is the ship contracted to be built under the said contract. A translation of the said contract is now produced to me marked "A.1" and is exhibited to this affidavit.

5. Article 13 of the said contract provided that the Flensburg Shipbuilding Company should transfer to the Shipping Trust Company Limited the materials ordered for the construction of the ship and the parts built therewith, and that the Flensburg Shipbuilding Company should have possession of these materials and of the various completed parts of the ship as bailee for the Shipping Trust Company Limited, the bailor. I am advised that the effect of the said provision
 30 is that the Shipping Trust Company Limited acquired a right of ownership in the materials and in the individual parts of the ship as the same were completed.

6. In pursuance of the said contract, the Flensburg Shipbuilding Company commenced to build the said ship and at the time of the German surrender on 8th May, 1945, the ribs of the said ship were up and half the plating was completed. At the time of the said surrender and throughout the year 1945 the said ship was on land at Flensburg on the stocks of the Flensburg Shipbuilding Company. Notwithstanding the said surrender, the Flensburg Shipbuilding Company continued

No. 8.
 Affidavit of
 W. O. Vogler
 in support of
 Claim—
 Hull 507.
 9th February,
 1949,
 (continued).

with the building of the said ship until the month of July 1945 when deliveries of certain materials ceased.

7. The Declaration regarding the defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic (hereinafter called "the Potsdam Declaration") dated 5th June, 1945, provided by Article 5, as follows:—

"(a) All or any of the following articles in the possession of "the German armed forces or under German control or at German disposal will be laid intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe: 10

"II all merchant shipping, whether afloat, under "repair or construction, built or building."

The Allied Control Council for Germany Proclamation No. 2 dated 20th September, 1945, required that the German authorities should place at the unrestricted disposal of the Allied Representatives the entire German shipping, shipbuilding and ship repair industries, and all matters and facilities directly or indirectly relative or ancillary thereto, and should provide the requisite labour and specialist services. The said Article stated that the requirements of the Allied Representatives would be specified in instructions which would from time to time be communicated to the German authorities. 20

8. By a communication dated the 5th August, 1945, the Naval Officer in Charge, Flensburg, instructed the Flensburg Shipbuilding Company to complete the construction of the ship s.s. "507". A copy of the said communication is now produced to me marked "A.2" and is exhibited to this affidavit.

9. On the 1st April, 1947, the Flensburg Shipbuilding Company obtained the licence of the Government of the Land Schleswig Holstein for the carrying out of the further building ordered by the said communication of 5th August, 1945. A copy of the said licence is now produced to me marked "A.3" and is exhibited to this affidavit. 30

10. The Flensburg Shipbuilding Company subsequently completed the ship s.s. "507". I have read what purports to be a copy of an affidavit of Lieutenant Miles Delwaide Dawson, R.N., sworn in these proceedings and dated the 30th June, 1947. The said affidavit states that the said ship was seized as prize by His Majesty's ship of war "Royal Harold" shortly before the said 30th June, 1947. On the 10th July, 1947, the said ship having satisfactorily completed her trials was handed over by the Flensburg Shipbuilding Company to the British Ministry of Transport and was named s.s. "Empire Towy". 40

11. In pursuance of the contract referred to in paragraph 4 hereof the Shipping Trust Company Limited paid to the Flensburg Shipbuilding Company instalments on the contract price of the said s.s. "507" amounting in all to R.M. 1.5 million, viz.:—

On 8th December, 1943	...	R.M. 500,000
On 11th September, 1944	...	R.M. 500,000
On 19th February, 1945	...	R.M. 500,000

No. 8.
Affidavit of
W. O. Vegler
in support of
Claim—
Hull 507.
9th February,
1949,
(continued).

At the time of the cessation of building in the month of July, 1945, the sum of R.M. 749,000 had been spent by the Flensburg Shipbuilding Com-
10 pany on the construction of the said ship.

12. The Flensburg Shipbuilding Company have received from Public Authorities of the Land Schleswig Holstein in respect of the said s.s. "507" sums equal to the total building cost of the said ship and have repaid to the Shipping Trust Company Limited the instalments referred to in paragraph 11 hereof.

13. The market value of the said s.s. "507" is greatly in excess of both the price for which the said ship was contracted to be built and the total building cost of the said ship.

14. Article 947 of the German Civil Code provides:—

20 (1) If moveable things are joined together in such a way as to become parts of one whole thing, the previous owners become owners in common of this thing; the shares are proportionate to the values of the things when they were joined together.

(2) If one of the things is to be considered as the principal thing, its owner acquires sole property.

15. The Shipping Trust Company Limited contend that they are the true owners of the ship s.s. "507" by virtue of the contract referred to in paragraph 4 hereof alternatively that the portion of the said ship completed by July, 1945, is to be considered as the principal thing, and
30 that the said company are the sole owners of the said ship by virtue of the provisions of Article 947 (2) of the German Civil Code.

16. Article 46 of the Hague Convention IV concerning the Laws and Customs of War on Land provides that private property cannot be confiscated.

17. The Shipping Trust Company Limited contends:—

(i) that at all material times up to the giving of the instructions dated the 5th August, 1945, the ship s.s. "507" was private property on land and accordingly not liable to confiscation;

40 (ii) that the purported seizure of the said ship in the month of June, 1947, is incompetent (a) because hostilities with Germany

No. 8.

Affidavit of
W. O. Vogler
in support of
Claim—
Hull 507.
9th February,
1949,
(continued).

terminated on or about the 8th May, 1945, and the situation obtain-
ing with regard to Germany in the month of June, 1947, precluded
the assertion of a right of prize at that date; further or alternatively
(b) because the Potsdam Declaration and the Allied Control Council
Proclamation No. 2 are inconsistent with a continuing right of prize;

(iii) that if, contrary to their contention, a right of prize might
lawfully be asserted in the month of June, 1947, it would be contrary
to just and proper legal principles to permit the assertion of such a
right in the case of the ship s.s. "507" because (a) the said ship was
private property on land and accordingly not liable to confiscation 10
prior to the giving of the instructions dated the 5th August, 1945,
and (b) the said ship would have remained private property on land
and so protected from confiscation but for the compulsion of the
Military Government exercised by the said instructions.

Sworn at His Britannic Majesty's
Consulate-General at Hamburg in
Germany this Ninth day of
February, 1949,

WOLF OSCAR VOGLER

Before me,

O. C. ALLEN,
British Vice Consul,
A Commissioner for Oaths.

Seal
British Consulate
General.

20

No. 8(a).

Exhibit "A.1"
to Affidavit of
W. O. Vogler—
Hull 507.
Sworn 9th
February, 1949.

No. 8(a).

Exhibit "A.1" to Affidavit of Wolf Oscar Vogler.

TRANSLATION.

AGREEMENT.

Germany
5,000 tonner.

Between

Schiffahrt-Treuhand G.m.b.H. Hamburg,
(hereinafter referred to as "the Shipowner") of the one part
and the Flensburg Shipbuilding Company, Flensburg,
hereinafter referred to as "the Shipbuilder" of the other part 30
the following agreement is made:

Clause 1.

Subject-Matter of the Delivery:

The Shipbuilder undertakes to build for the account of the
Shipowner and to deliver at the building site

one freight steamship
of 5,000 tons D.W.
bearing the Job Number 507

in accordance with the drawings to be supplied for the purposes of the present Agreement by the Bremer Vulkan, Bremen-Vegesack, and the specifications relating to the said drawings.

* * * * *

Clause 13.

Transfer of Property:

10 The Shipbuilder transfers to the Shipowner the property in the materials procured for building the ordered ship and the parts of the construction built therewith. The materials shall be separated by the Shipbuilder from his own stock or otherwise earmarked. The Shipbuilder shall have possession of such materials and the parts of the construction built therewith as bailee for the Shipowner as bailor.

Notwithstanding the transfer of property the legal relationship according to Article 651 of the Civil Code shall continue. In particular, the right of the Shipowner to reject the ship on account of defects shall not be affected by the transfer of property. The Shipbuilder shall have a lien in accordance with Article 647 of the Civil Code for so much of his expenditure as is not covered by instalments paid to him.

* * * * *

20 Hamburg, the 18th
November 1943.
Shipping Trust Co. Ltd.
2 signatures.

Flensburg, the 20th
November 1943.
Flensburg Shipbuilding Co.
2 signatures.

No. 8(b).

Exhibit "A.2" to the Affidavit of Wolf Oscar Vogler.

From: Naval Officer in Charge, Flensburg.
Date: 5th August, 1945. No. FB49/755.
To: Flensburger Schiffsbau-Gesellschaft.
Steel Shipbuilding Material.

30 With reference to your letter dated 14th July, 1945, instructions have now been received that ships Nos. 606, 506, 507, 508 are to be completed.

2. Materials for No. 512 are to be used if required for the above work.

B. O. BELL-SALTER,
(B. O. Bell-Salter),
Captain, Royal Navy.

No. 8(a)
Exhibit "A.1"
to Affidavit of
W. O. Vogler—
Hull 507.
Sworn 9th
February, 1949.
(continued).

No. 8(b).
Exhibit "A.2"
to the Affidavit of
W. O. Vogler—
Hull 507.
Sworn 9th
February, 1949.

No. 9.

Affidavit of
Ove Lempelius—
Hulls 507 &
508.
11th January,
1951.

No. 9.

Affidavit of Ove Lempelius.

In the High Court of Justice.
Probate, Divorce & Admiralty Division.
(In Prize.)

No. 2355.

Hull "507".

Claimants Schiffahrt Treuhand G.m.b.H.

No. 2370.

Hull "508".

10

Claimants Schiffahrt Treuhand G.m.b.H.

I, OVE LEMPELIUS of Flensburg, Gertrudenstr. 1, a Director of the Flensburger Schiffsbau-Gesellschaft of Flensburg, Germany (hereinafter referred to as "the Company") make oath and say as follows:—

I have examined the books and records of the Company relating to the building of Hulls 507 and 508 and say that practically the whole of the steel required for completing the construction of these two vessels had been procured by the Company at the time of the Surrender of Germany in May, 1945, and was at the shipbuilding yard of the Company separated from other stocks.

20

Sworn at His Britannic Majesty's
Consulate-General in the City of
Hamburg in Germany, this
Eleventh day of January, 1951,

OVE LEMPELIUS.

Before
C. F. O. GIBSON,
H.M. Consul.

Stamp 7s. 6d.
Consulate Stamp
11 Jan. 51.

No. 10.**Completion Certificate—Hull 507.**

At Sea, 10th July, 1947.

Completion Certificate.

No. 10.

Completion
Certificate—
Hull 507.
10th July,
1947.

This is to certify that

S. S. "Empire Towy".

built by the Flensburger Schiffsbau-Gesellschaft, Flensburg, New
Construction No. 507, has today completed trials satisfactorily and has
been delivered to the British Authorities in British controlled waters
10 at 16.30 hours on Thursday the tenth day of July, 1947.

For the British Ministry of Transport.

A. RIDLEY,

(per J. H. Biles & Co.).

For Flensburg Schiffsbau-Gesellschaft:

LEMPELIUS.

F. BURNS, Master:

Shipbuilding Branch

T. & I.D.V., C.C.,

11 Jul. 1947

Flensburg.

20

Jock Young Co.

No. 11.**Writ of Summons—Hull 508.**Amended pursuant to the Order of the President dated the 6th day of
February, 1951.

Writ of Summons—Ship.

In the High Court of Justice.

Probate, Divorce and Admiralty Division

In Prize.

No. 2370.

No. 11.

Writ of
Summons—
Hull 508.
2nd August,
1947.
Amended
6th February,
1951.

"Hull 508".

30 GEORGE THE SIXTH, by the Grace of God, of Great Britain,
Ireland, and of the British Dominions beyond the Seas King, Defender
of the Faith, To the owners and parties interested in the ship "Hull 508"
of no port of Registry seized and taken as prize by Lieutenant M. D.
~~Dawson, R.N., Commander,~~ naval or military or naval and military
forces whilst lying at Flensburg at the time of the capture of Flensburg
on the 10th May, 1945.

Writ of
Summons—
Hull 508.
23rd August,
1947.
Amended
6th February,
1951,
(continued).

Witness, William Allen Viscount Jowitt, Lord High Chancellor of Great Britain, this 23rd day of August in the year of Our Lord One thousand nine hundred and forty-seven.

This WRIT was issued by the said Procurator General of and whose address for service is Storey's Gate, St. James's Park, London, S.W.1.

This WRIT was served by me Miles Delwaite Dawson, Lieutenant of His Majesty's Ship "Royal Harold" on the Hull 508 by nailing or affixing this original writ for a short time on a bulkhead (no mast being fitted) of the said vessel, and on taking off this writ by leaving a true copy thereof nailed or fixed in its place at 16.20 hours on Monday, the 10 eighth day of September 1947.

Indorsed the Eighth day of September 1947.

(Signed) MILES DAWSON,
Lt. R.N.

Order giving
Leave to
Amend Writ—
Hull 508.
10th August,
1951.
(Not printed).

Order giving Leave to amend Writ—Hull 508.

(not printed).

In similar terms to Document No. 2.

Affidavit of
M. D. Dawson—
Hull 508.
29th September,
1947.

Affidavit of M. D. Dawson—Hull 508.

20

In the High Court of Justice.

No. 2370.

Probate, Divorce and Admiralty Division.

(In Prize). "Hull 508."

I, MILES DELWAIDE DAWSON, Lieutenant in His Majesty's Navy and of His Majesty's ship of War "Royal Harold" whereof Captain Hubert Victor Perry McClintock is Commander make oath and say as follows:—

1. I 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.

30

2. No ship papers of any sort were delivered up or found on board the said ship or elsewhere at the time of seisure or afterwards.

3. The said ship is uncompleted and there are no ship papers.

Sworn by the said Miles Delwaide
Dawson at Kiel on the 29th day of
September, 1947.

(Sgd.) MILES DAWSON.

Before me,

D. R. C. HODSON,
Commander Royal Navy for
Senior Naval Officer
Schleswig-Holstein.

40

No. 14.

Affidavit of W. G. R. Douglas—Hull 508.

No. 14.

Affidavit of
W. G. R.
Douglas—
Hull 508.
14th January,
1948.

No. 2370.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(In Prize).

Hull 508.

I, WILLIAM GEORGE RINTOUL DOUGLAS of Alstereck,
Jungfernstieg, Hamburg, representative in Germany of the Ministry of
10 Transport, make oath and say as follows:—

This vessel was found partly built in Flensburg when the port
was occupied by the Allies. It was built on the order of Schiffahrt
Treuhand Gesellschaft, Hamburg, by Flensburger Schiffbau, A. G.,
Flensburg. The vessel is still completing in accordance with orders
given by the Ministry of Transport through the Control Commission for
Germany at Flensburg, and is named "Empire Frome".

Sworn at 53 Davies Street Berkeley }
Square, W.1, this 14th day of } W. G. B. DOUGLAS.
January, 1948. }

20 Before me,
F. A. CARLTON SMITH,
A Commissioner for Oaths.

No. 15.

Appearance—Hull 508.
(not printed).

In similar terms to Document No. 6.

No. 15.

Appearance—
Hull 508.
1st March,
1949.
(Not printed).

No. 16.

Claim of Schiffahrt-Treuhand G.m.b.H.—Hull 508.

Writ No. 2370.

No. 16.

Claim of
Schiffahrt-
Treuhand,
G.m.b.H.—
Hull 508.
1st March,
1949.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(In Prize).

30

Ship: Hull 508.
Claimants: Schiffahrt-Treuhand G.m.b.H.

The Claim of Schiffahrt Treuhand G.m.b.H. of Ferdinandstr. 56,III,
Hamburg, 1, a company incorporated in Germany, for and on behalf of
themselves, the true lawful and sole owners of the said ship, her tackle,
apparel and furniture at the time she was taken and seized as prize by

No. 16.
 Claim of
 Schiffahrt-
 Treuhand,
 G.m.b.H.—
 Hull 508,
 1st March,
 1949,
 (continued).

Lieutenant M. D. Dawson R.N. Commander, whilst lying at Flensburg; for the said ship 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.

Dated the 1st day of March, 1949.

FRESHFIELDS,
 1, Bank Buildings, Princes Street,
 London, E.C.2,
 Solicitors for the above-named Claimants.

The grounds for the said claim are:—

1. That the seizure was unlawful:—

10

(a) because hostilities with Germany had ceased on or about the 8th May, 1945;

(b) because at the time of the said seizure 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 Potsdam Declaration dated the 5th June, 1945, and the Allied Control Council for Germany Proclamation No. 2 dated the 20th September, 1945, are inconsistent with the continuance of a right of seizure in prize at the date of the said seizure.

20

2. That at all material times up to the 5th August, 1945, the said ship was only built in part and was private property on land and was 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 ship was completed between the 5th August, 1945, and the date of the said seizure by reason of the compulsion of the Allied Military Government which on the 5th August, 1945, gave orders for the completion of the said ship; 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 ship.

30

No. 17.

Affidavit of
 W. O. Vogler
 in support of
 Claim—
 Hull 508,
 9th February,
 1949.

No. 17.

Affidavit of W. O. Vogler in support of claim & Exhibit thereto.

In the High Court of Justice.

No. 2370.

Probate, Divorce and Admiralty Division.

(In Prize).

Hull 508.

I, Wolf Oscar Vogler of Hamburg, Sierchstra 173 make oath and say as follows:—

1. I am Managing Director of Schiffahrt-Treuhand G.m.b.H. (hereinafter called "the Shipping Trust Company Limited") and am duly authorised to make this affidavit on their behalf.

40

2. The Shipping Trust Company Ltd. is a Company incorporated in Germany in accordance with German law.

3. The Shipping Trust Company are the true owners of Hull 508.

4. By a Contract in writing dated 18/20th November, 1943, the Flensburger Schiffsbau-Gesellschaft (hereinafter called "the Flensburg Shipbuilding Company") agreed to build for the Shipping Trust Company Ltd. at a price of R.M. 2.5 million a freight steamship of 5,000 tons dead weight. Hull 508 is the ship contracted to be built under the said contract. A translation of the said Contract is now produced to me marked "B.1" and is exhibited to this affidavit.

10

5. Article 13 of the said Contract provided that the Flensburg Shipbuilding Company should transfer to the Shipping Trust Company Ltd. the materials ordered for the construction of the ship and the parts built therewith and that the Flensburg Shipbuilding Company should have possession of these materials and of the various completed parts of the ship as bailee for the Shipping Trust Company Ltd., the bailor. I am advised that the effect of the said provision was that the Shipping Trust Company Ltd. acquired a right of ownership in the materials and in the individual parts of the ship as the same were completed.

20

6. In pursuance of the said Contract the Flensburg Shipbuilding Company commenced to build Hull 508 and at the time of the German surrender on 8th May, 1945, the double bottom had been laid and half the ribs were up. At the time of the said surrender and throughout the year 1945 the said Hull 508 was on land at Flensburg on the stocks of the Flensburg Shipbuilding Company. Notwithstanding the said surrender, the Flensburg Shipbuilding Company continued with the building of the said Hull 508 until the month of July, 1945, when deliveries of certain materials ceased.

30

7. The declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with regard to Germany by the Governments of the United Kingdom the United States of America the Union of Soviet Socialist Republics and the Provisional Government of the French Republic (hereinafter called "the Potsdam Declaration") dated the 5th June, 1945, provided, by Article 5, as follows:—

"(a) All or any of the following articles in the possession of
"the German armed forces or under German control or at German
"disposal will be held intact and in good condition at the disposal
"of the Allied Representatives, for such purposes and at such times
"and places as they may prescribe:—

40

"II. all merchant shipping whether afloat under
"repair or construction built or building."

The Allied Control Council for Germany Proclamation No. 2 dated 20th September, 1945, required that the German authorities should place at the unrestricted disposal of the Allied Representatives the entire

No. 17.

Affidavit of
W. O. Vogler
in support of
Claim—
Hull 508.
9th February,
1949.
(continued).

No. 17.
 Affidavit of
 W. O. Vogler
 in support of
 Claim—
 Hull 508.
 9th February,
 1949,
 (continued).

German shipping shipbuilding and ship repair industries and all matters and facilities directly or indirectly relative or ancillary thereto and should provide the requisite labour and specialist services. The said Article stated that the requirements of the Allied Representatives would be specified in instructions which would from time to time be communicated to the German Authorities.

8. By a communication dated 5th August, 1945, the Naval Officer in Charge, Flensburg, instructed the Flensburg Shipbuilding Company to complete the construction of Hull 508. A copy of the said communication is now produced to me marked "B.2" and is exhibited to this affidavit. 10

9. On 1st April, 1947, the Flensburg Shipbuilding Company obtained the licence of the Government of the Land Schleswig-Holstein for the carrying out of the further building ordered by the said communication of 5th August, 1945. A copy of the said licence is now produced to me, marked "B.3" and is exhibited to this affidavit.

10. The Flensburg Shipbuilding Company subsequently completed Hull 508. I have read what purports to be a copy of an affidavit of Lieutenant Miles Delwaide Dawson R.N. Sworn in these proceedings and dated 29th September, 1947. The said affidavit states that the said Hull 508 was seized as prize by His Majesty's Ship of War "Royal Harold" at Flensburg on 21st August, 1947. On 14th January, 1948, the said Hull 508 having satisfactorily completed her trials, was handed over by the Flensburg Shipbuilding Company to the British Ministry of Transport and was named "s.s. Empire Frome". 20

11. In pursuance of the Contract referred to in Paragraph 4 hereof the Shipping Trust Company Ltd. paid to the Flensburg Shipbuilding Company instalments on the Contract price of the said Hull 508 amounting in all to R.M. 1 million viz:—

On 8th December, 1943	...	...	...	...	RM. 250,000	30
On 15th July, 1944	...	...	...	...	RM. 250,000	
On 11th December, 1944	...	...	...	...	RM. 500,000	

At the time of the cessation of building in the month of July, 1945, the sum of RM. 572,000 had been spent by the Flensburg Shipbuilding Company on the construction of the said Hull 508.

12. The Flensburg Shipbuilding Company have received from public authorities of the Land Schleswig-Holstein in respect of the said Hull 508 sums equal to the total building cost thereof and have repaid to the Shipping Trust Company Ltd. the instalments referred to in Paragraph 11 hereof. 40

13 The market value of the said Hull 508 is greatly in excess of both the price for which the said Hull 508 was contracted to be built and the total building cost of the said Hull 508.

14. Article 947 of the German Civil Code provides:—

(1) If movable things are joined together in such a way as to become parts of one whole thing, the previous owners become owners in common of this thing; the shares are proportionate to the value of the things when they were joined together.

(2) If one of the things is to be considered as the principal thing, its owner acquires sole property.

15. The Shipping Trust Company Ltd. contend that they are the true owners of Hull 508 by virtue of the Contract referred to in Paragraph 5 hereof; alternatively, that the portion of the said ship completed by July, 1945, is to be considered as the principal thing and that the said Company are the sole owners of the said Hull 508 by virtue of the provisions of Article 947 (2) of the German Civil Code.

16. Article 46 of Hague Convention IV concerning the Laws and Customs of War on Land provides that private property cannot be confiscated.

17. The Shipping Trust Company contend:—

(i) that at all material times up to the giving of the instructions dated 5th August, 1945, Hull 508 was private property on land and accordingly not liable to confiscation;

(ii) that the purported seizure of the said Hull 508 on the 21st August, 1947, is incompetent (a) because hostilities with Germany terminated on or about 8th May, 1945, and the situation obtaining with regard to Germany in the month of August, 1947, precluded the assertion of a right of prize; further or alternatively (b) because the Potsdam Declaration and the Allied Control Council Proclamation No. 2 are inconsistent with a continuing right of prize;

(iii) that if contrary to their contention a right of prize might lawfully be asserted in the month of August, 1947, it would be contrary to just and proper legal principles to permit such a right to be asserted in the case of the said Hull 508, because (a) the said Hull 508 was private property on land and accordingly not liable to confiscation prior to the giving of the instructions of the Military Government dated 5th August, 1945, and (b) the said Hull 508 would have remained private property on land and so protected but for the compulsion of the Military Government exercised by the said instructions.

Sworn at His Britannic Majesty's
Consulate-General at Hamburg in
Germany this 9th day of February,
1949.

WOLF OSCAR VOGLER.

Before me,
O. C. ALLEN,
British Vice Consul.
Seal
British Consulate-General
Hamburg

No. 17.
Affidavit of
W. O. Vogler
in support of
Claim—
Hull 508.
9th February,
1949,
(continued).

No. 17(a).

Exhibit "B.1"
to Affidavit of
W. O. Vogler
in support—
Hull 508.
Sworn 9th
February, 1949.

No. 17(a)

Exhibit "B.1" to Affidavit of W. O. Vogler.

(Copy)

Translation

Germany
5,000 tonner.

AGREEMENT.

Between

Schiffahrt-Treuhand G.m.b.H., Hamburg, (hereinafter referred to as "the Shipowner") of the one part and the Flensburg Shipbuilding Company, Flensburg, hereinafter referred to as "the Shipbuilder" of the other part the following agreement is made: 10

Clause 1.

Subject-Matter of the Delivery:

The Shipbuilder undertakes to build for the account of the Shipowner and to deliver at the building site:—

One freight steamship of 5,000 tons D.W. bearing the Job Number 508.

in accordance with the drawings to be supplied for the purposes of the present Agreement by the Bremer Vulkan, Bremen-Vegesack, and the specifications relating to the said drawings. 20

* * * * *

Clause 13.

Transfer of Property.

The Shipbuilder transfers to the Shipowner the property in the materials procured for building the ordered ship and the parts of the construction built therewith. The materials shall be separated by the Shipbuilder from his own stock or otherwise earmarked. The Shipbuilder shall have possession of such materials and the parts of the construction built therewith as bailee for the Shipowner as bailor.

Notwithstanding the transfer of property the legal relationship according to article 651 of the Civil Code shall continue. In particular the right of the Shipowner to reject the ship on account of defects shall not be affected by the transfer of property. The Shipbuilder shall have a lien in accordance with article 647 of the Civil Code for so much of his expenditure as is not covered by instalments paid to him. 30

* * * * *

Hamburg, the 18th November, 1943.

Shipping Trust Co. Ltd.

2 signatures.

Flensburg, the 20th November, 1943.

Flensburg Shipbuilding Co.

2 signatures. 40

No. 18.**Completion Certificate—Hull 508.**

FLENSBURGER SCHIFFSBAU-GESELLSCHAFT

At Sea,

14th January, 1948.

COMPLETION CERTIFICATE.

This is to certify that s.s. "Empire Frome"

built by the Flensburger Schiffsbau-Gesellschaft, Flensburg, New
 Construction No. 508, has today completed trials satisfactorily and has
 10 been delivered to the British Authorities in British controlled waters at
 16.30 hours on Wednesday, the fourteenth day of January, 1948.
 For the British Ministry of Transport:—

A. RIDLEY,

For FLENSBURGER SCHIFFSBAU-GESELLSCHAFT,
 Lempelius.

D. G. TAYLOR,
 Master.

No. 18.

Completion
 Certificate—
 Hull 508.
 14th January,
 1948.

No. 19.**Writ of Summons—s.s. Flenderwerke 347.**

Amended pursuant to the Order of the President dated the
 6th day of February, 1951.

20 In the High Court of Justice. Writ of summons—Ship.
 Probate, Divorce and Admiralty Division.
 (In Prize.)

No. 2356.

s.s. "FLENDERWERKE NUMBER 347"

GEORGE THE SIXTH, by the Grace of God, of Great Britain,
 Ireland and of the British Dominions beyond the Seas King, Defender
 of the Faith.

To the owners and parties interested in the ship "Flenderwerke
 Number 347" of no Port of Registry seized and taken as prize by
 30 ship of war "Royal Harold" Captain Hubert Victor Perry McClintock
 Commander naval or military or naval and military forces whilst lying
 at Lubeck at the time of the capture of Lubeck on 2nd and 3rd May, 1945.

WITNESS, WILLIAM ALLEN VISCOUNT JOWITT, Lord High
 Chancellor of Great Britain, this 6th day of August in the year of Our
 Lord One thousand nine hundred and forty-seven.

No. 19.

Writ of
 Summons,
 6th August,
 1947—Flender-
 werke 347.
 Amended
 6th February,
 1951.

No. 19.

Writ of
Summons,
6th August,
1947—Flender-
werke 347.
Amended
6th February,
1951,
(continued).

This WRIT was issued by the said Procurator General of and whose address for service is Storey's Gate, St. James's Park, London, S.W.1.

This WRIT was served by me Lieutenant Christopher Howard Highton, R.N., of His Majesty's Ship of War Royal Harold on the ship Flenderwerke No. 347 by nailing or affixing this original writ for a short time on the main mast of the said vessel, and on taking off this writ by leaving a true copy thereof nailed or fixed in its place at Lubeck on Tuesday, the 26th day of August, 1947.

Indorsed the 26th day of August 1947.

(Signed) C. H. HIGHTON,

10

No. 20.

Order giving
leave to
Amend Writ—
Flenderwerke
347.
10th April,
1951.
(Not printed).

No. 20.

Order giving leave to amend Writ—Flenderwerke 347.

Order giving leave to amend Writ.

Flenderwerke 347.

(not printed).

In similar terms to Document No. 2.

No. 21.

Affidavit of
C. H. Highton—
Flenderwerke
347.
22nd July,
1948.

No. 21.

Affidavit of C. H. Highton—Flenderwerke 347.

THE s.s. "FLENDERWERKE NUMBER 347"

JOHN HENRY COLVIN, Master.

20

I, CHRISTOPHER HOWARD HIGHTON, Lieutenant in His Majesty's Navy, and of His Majesty's Ship of War "Royal Harold" whereof Hubert Victor Perry McClintock, Esq., is commander make oath and say as follows:—

1. I was present at the capture of the said ship s.s. "Flenderwerke Number 347" whereof John Henry Colvin was Master or Commander, and lately taken by His Majesty's Ship of War "Royal Harold."

2. No ship papers of any sort were delivered up or found on board the said ship or elsewhere at the time of the seizure or afterwards.

3. The ship was in course of construction.

30

Sworn by the said Christopher
Howard Highton at Kiel on the
twenty-second day of July 1948

C. H. HIGHTON,
Lieutenant, Royal Navy.

Before me, Hubert Victor Perry McClintock
Captain in His Majesty's Navy
Commanding Officer of His Majesty's Ship
"Royal Harold."

Captain,
Royal Navy.

No. 22.

Affidavit of W. G. R. Douglas—Flenderwerke 347.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(In Prize.)

No. 22.
Affidavit of
W. G. R.
Douglas—
Flenderwerke
347.
14th January,
1948.

No. 2356.

s.s. "FLENDERWERKE 347"

I, WILLIAM GEORGE RINTOUL DOUGLAS of Alstereck,
Jungfernstieg, Hamburg, representative in Germany of the Ministry
10 of Transport, make oath and say as follows:—

This vessel was found partly built in Lubeck when the port was
occupied by the Allies. It was built on the order of Hamburg Amerika
Linie, Hamburg, by Lubecker Flenderwerke, Lubeck. In accordance
with orders given by the Ministry of Transport through the Control
Commission for Germany, the vessel was completed and sailed to the
United Kingdom under the name "Empire Nene" in August, 1947, and
was registered in the port of London.

Sworn at 53 Davies Street, Berkeley }
Square, W.1, this 14th day of } W. G. R. DOUGLAS.
20 January, 1948 }
Before me,

F. A. CARLTON SMITH,
A Commissioner for Oaths.

No. 23.

**Licence to Lubecker Flender-Werke A.G. to prosecute
claims—Flenderwerke 347 & 348.**

Secretary of State.
Home Department.

No. 23.
Licence to
Lubecker
Flender-
Werke A.G.—
Flenderwerke
347 & 348.
18th February,
1948.

Whereas Messrs. Lubecker Flender-Werke A.G. are in contempla-
30 tion of law an alien enemy company:—

Now I, the Right Honourable James Chuter Ede, one of His
Majesty's Principal Secretaries of State, by virtue of a Warrant under
His Majesty's Royal Sign Manual dated the first day of April, One
thousand nine hundred and forty-four, authorising me in this behalf,
do hereby grant licence and permission to the said Messrs. Lubecker
Flender-Werke A.G. to enter an appearance in proceedings intituled
respectively

s.s. Flenderwerke Number 347 In Prize No. 2356
s.s. Flenderwerke Number 348 In Prize No. 2371

No. 23.
Licence to
Lubecker
Flender-
Werke A.G.—
Flenderwerke
347 & 348.
18th February,
1948,
(continued).

and to prosecute in the said proceedings a claim for the release of the said vessels or for any other relief to which the said company may be entitled in Prize in respect of the vessels.

Given under my hand at Whitehall this
eighteenth day of February 1949.

J. CHUTER EDE.

No. 24.
Appearance—
Flenderwerke
347.
1st March,
1949.

No. 24.

Appearance—Flenderwerke 347.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

10

Writ No. 2356.

Ship: s.s. "Flenderwerke 347"

Claimants: Lubecker Flender-Werke A.G.

Enter an Appearance for above-named Claimants in respect of:—
their claim to be the true lawful and sole owners of the above-named
Vessel s.s. "Flenderwerke 347".

Dated the 1st day of March 1949.

(Signed) FRESHFIELDS,

of and whose address for service is 1 Bank Buildings,
Princes Street,

E.C.2.

20

Solicitors for the Claimants.

No. 25.
Claim of
Lubecker
Flender-
Werke A.G.—
Flenderwerke
347.
1st March,
1949.

No. 25.

Claim of Lubecker Flender-Werke A.G.—Flenderwerke 347.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

Writ No. 2356.

Ship: s.s. "Flenderwerke Number 347"

Claimants: Lubecker Flender-Werke A.G.

30

The Claim of Lubecker Flender-Werke A.G. of Lubeck Siems,
Lubeck, a company incorporated in Germany, for and on behalf of
themselves the true, lawful and sole owners of the said ship, her tackle,
apparel and furniture, at the time she was taken and seized as prize

by His Majesty's Ship Royal Harold, Captain Hubert Victor Perry McClintock, Commander; for the said ship and for all such loss, costs, charges, damages and expenses as may have arisen and been incurred, or shall or may arise and be incurred by reason of the capture and detention aforesaid.

Dated the 1st day of March, 1949.

FRESHFIELDS,

1, Bank Buildings, Princes Street, London, E.C.2.
Solicitors for the above-named Claimants.

The grounds for the said claim are:—

1. That the seizure was unlawful:—

(a) because hostilities with Germany had ceased on or about the 8th May, 1945;

(b) because at the time of the said seizure 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 Potsdam Declaration dated the 5th June 1945, and the Allied Control Council for Germany Proclamation No. 2 dated the 20th September 1945, are inconsistent with the continuance of a right of seizure in prize at the date of the said seizure.

2. That at all material times up to the 27th August, 1945, the said ship was only built in part and was private property on land and was 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 ship was completed between the 27th August, 1945, and the date of the said seizure by reason of the compulsion of the Allied Military Government which on the 27th August, 1945 gave orders for the completion of the said ship; 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 ship.

No. 26.

Affidavit of Hermann Bunte in support of claim and Exhibit thereto.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

s.s. "Flenderwerke Number 347"

I, BUNTE, HERMANN of Lubecker Flender-Werke A.G., Lubeck-Siems make oath and say as follows:—

No. 25.

Claim of
Lubecker
Flender-
Werke A.G.—
Flenderwerke
347.
1st March,
1949.
(continued).

No. 26.

Affidavit of
Hermann
Bunte in
support of
Claim—
Flenderwerke
347.
9th February,
1949.

No. 2356.

No. 26.
 Affidavit of
 Hermann
 Bunte in
 support of
 Claim—
 Flenderwerke
 347.
 9th February,
 1949,
 (continued).

1. I am Managing Director of Lubecker Flenderwerke A.G. (hereinafter called "the Flenderwerke Company") and am duly authorised to make this affidavit on their behalf.

2. The Flenderwerke Company are a company incorporated in Germany in accordance with German law.

3. The Flenderwerke Company are the true owners of the s.s. "Flenderwerke Number 347."

4. By a contract in writing dated 6th November, 1943, the Flenderwerke Company agreed to build for the Hamburg-Amerika Line at a price of R.M. 4.2 million a freight steamship of 9,000 tons dead weight. The s.s. "Flenderwerke Number 347" is the ship contracted to be built under the said contract. A translation of the said contract is now produced to me marked "C.I." and is exhibited to this affidavit. 10

5. The said contract contained no provision for the passing of property in the said ship before delivery thereof by the Flenderwerke Company to the Hamburg-Amerika Line. The Flenderwerke Company has never delivered the said ship to the Hamburg-Amerika Line.

6. In pursuance of the said contract, the Flenderwerke Company commenced to build the said ship and at the time of the German surrender on 8th May, 1945, the hull of the said ship was almost ready for launching, but had not been painted. Until the month of November, 1945, the said ship was at all times on land at Lubeck on the stocks of the Flenderwerke Company. 20

7. The Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with regard to Germany by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic (hereinafter called "the Potsdam Declaration") dated 5th June, 1945, provided, by Article 5 as follows:—

"(a) All or any of the following articles in the possession of the German armed forces or under German control or at German disposal will be laid intact and in good condition at the disposal of the Allied Representatives, for such purposes and at such times as they may prescribe:— 30

"II all merchant shipping, whether afloat, under repair or construction, built or building."

The Allied Control Council for Germany Proclamation No. 2 dated 20th September, 1945, required that the German authorities should place at the unrestricted disposal of the Allied Representatives the entire German shipping, shipbuilding and ship repair industries, and all matters and facilities directly or indirectly relative or ancillary thereto, and should provide the requisite labour and specialist services. The said Article stated that the requirements of the Allied Representatives 40

would be specified in instructions which would from time to time be communicated to the German authorities.

No. 26.

Affidavit of
Hermann
Bunte in
support of
Claim—
Flenderwerke
347.
9th February,
1949,
(continued).

8. In or about the month of September, 1945, the Flenderwerke Company received a communication from the Base Engineer, Lubeck dated the 27th August, 1945, and bearing also a Military Government stamp, which ordered the completion of the s.s. "Flenderwerke Number 347." A copy of the said communication is now produced to me marked "C.2" and is exhibited to this affidavit.

10 9. The Flenderwerke Company thereupon proceeded with the completion of the said ship. The said ship was launched in the month of November, 1945. I have read what purports to be a copy of an affidavit of Lieutenant Christopher Howard Highton, R.N. sworn in these proceedings and dated the 22nd July, 1947. The said affidavit states that the said ship was seized as prize by His Majesty's Ship of War "Royal Harold" shortly before the said 22nd July, 1947. On the 5th August, 1947, having satisfactorily completed her trials, the said ship was handed over by the Flenderwerke Company to the British Ministry of Transport and was named "s.s. Empire Nene."

20 10. The Flenderwerke Company have received from the German public authorities the approved building price of the ship, that is to say, R.M. 4,810,000. The Flenderwerke Company have also received a foreign currency bonus of \$72,000 from the Joint Export and Import Agency, in respect of the said ship.

30 11. At the time of the German surrender of 8th May, 1945, the Flenderwerke Company had received from the Hamburg-Amerika Line instalments on the contract price of the said ship amounting to R.M. 2,940,000, of which the sum of R.M. 1,730,000 had then been spent on the construction of the ship. On the 23rd March, 1948, the Flenderwerke Company repaid to the Hamburg-Amerika Line the aforesaid sum of R.M. 2,940,000.

12. The market value of the said ship is greatly in excess of the sum received by the Flenderwerke Company as the building price of the said ship.

13. Article 947 of the German Civil Code provides:—

(1) If movable things are joined together in such a way as to become parts of one whole thing, the previous owners become owners in common of this thing; the shares are proportionate to the values of the things when they were joined together.

40 (2) If one of the things is to be considered as the principal thing, its owner acquires sole property.

14. The Flenderwerke Company contend that, by virtue of the matters set out in Paragraphs 4 and 5 hereof, they are and at all times have been the true owners of the s.s. "Flenderwerke Number 347." The

No. 26.
 Affidavit of
 Hermann
 Bunte in
 support of
 Claim—
 Flenderwerke
 347.
 9th February,
 1949,
 (continued).

Company further contend that the portion of the said ship completed on the 27th August, 1945, is to be considered as the principal thing, and that accordingly the said company remain the sole owners of the said ship, by virtue of the provisions of Article 947 (2) of the German Civil Code.

15. Article 46 of the Hague Convention IV concerning the Laws and Customs of War on Land provides that private property on land cannot be confiscated.

16. The Flenderwerke Company contend:—

(i) that at all material times up to the giving of the instructions dated the 27th August, 1945, the s.s. "Flenderwerke Number 347" was private property on land and accordingly not liable to confiscation; 10

(ii) that the purported seizure of the said ship in the month of July, 1947, is incompetent (a) because hostilities with Germany terminated on or about the 8th May, 1945, and the situation obtaining with regard to Germany in the month of July, 1947, precluded the assertion of a right of prize at that date; further or alternatively, (b) because the Potsdam Declaration and the Allied Control Council Proclamation No. 2 are inconsistent with a continuing right of prize; 20

(iii) that if, contrary to their contention, a right of prize might lawfully be asserted in the month of July, 1947, it would be contrary to just and proper legal principles to permit such a right to be asserted in the case of s.s. "Flenderwerke Number 347" because (a) the said ship was private property on land and accordingly not liable to confiscation prior to the giving of the instructions of the Military Government dated 27th August, 1945, and (b) the said ship would have remained private property on land and so protected but for the compulsion of the Military Government exercised by the said instructions. 30

Sworn at His Britannic Majesty's
 Consulate General at Hamburg
 Germany this ninth day of
 February, 1949

H. BUNTE.

Before me,

O. C. ALLEN,
 British Vice Consul.
 A Commissioner for Oaths.

Seal
 British Consulate General
 Hamburg.

No. 26(a)**Exhibit "C.2" to Affidavit of Hermann Bunte.**

To:—Lübecker Flender-Werke.

Undertake the following Work on New Construction:—

Complete construction of 9,000 tons cargo-vessels, construction-nrs. 347 and 348.

(Rubber stamp) Military Government
31. VIII 1945(Rubber stamp) Base Engineer Officer
27th Aug., 1945.
LUBECK.

10

August 27th.

BASE ENGINEER OFFICER, LUBECK.**No. 27.****Record of trial trip—Flenderwerke 347.**

Record of Trial Trip.

s.s. "Empire Nene"*Builders:* Lübecker Flender-Werke, Aktiengesellschaft, Lübeck.*Builders construction No.:* 347.20 *Order originally placed by:* Hamburg-Amerika-Linie, Hamburg.

The trial trip with this ship was carried out on August 5th, 1947.

Inspection and tests of the ship showed that the ship has been built in a way suitable to purpose and acceptance of the ship was declared on August 5th, 1947 at 15.30 o'clock.

The insurance and the responsibility for the operation of the ship from the time of acceptance fall to the owners.

Representative of
British Ministry of Transport:
A. RIDLEYRepresentatives of
the Builders:
(two signatures)

30 At sea, August 5th, 1947.

The ship was handed over outside of the 3 mile limit.

Representative of
British Ministry of Transport:
A. RIDLEYRepresentatives of
the Builders:
(two signatures)

No. 26(a).

Exhibit "C.2"
to Affidavit of
Hermann
Bunte in
support of
Claim.
Sworn 9th
February, 1949—
Flenderwerke
347.

No. 27.

Record of
trial trip—
Flenderwerke
347.
5th August,
1947.

No. 28.

Writ of
Summons.
1st September,
1947—Flender-
werke 348.
Amended
6th February,
1951.

No. 28.**Writ of Summons—s.s. Flenderwerke 348.**

Amended pursuant to the Order of the President dated the 6th day of
February, 1951.

Writ of Summons—Ship.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

No. 2371.

(In Prize.)

“FLENDERWERKE 348.”

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and of the British Dominions beyond the Seas King, Defender 10
of the Faith.

To the owners and parties interested in the ship “Flenderwerke 348” of no Port of Registry seized and taken as prize by ~~Lieutenant C. H. Highton R.N.~~ naval or military or naval and military forces whilst lying at Lubeck at the time of the capture of Lubeck on 2nd and 3rd May, 1945.

WITNESS, WILLIAM ALLEN VISCOUNT JOWITT, Lord High Chancellor of Great Britain, this 1st day of September in the year of Our Lord One thousand nine hundred and forty-seven.

This WRIT was issued by the said Procurator General of and whose 20
address for service is Storey’s Gate, St. James’s Park, London, S.W.1.

This WRIT was served by me Lieutenant Christopher Howard Highton, R.N., of H.M.S. Royal Harold on the ship Flenderwerke 348 by nailing or affixing this original writ for a short time on the mast of the said vessel, and on taking off this writ by leaving a true copy thereof nailed or fixed in its place at Lübeck Travemunde (Flenderwerke) on Friday, the 3rd day of October, 1947.

Indorsed the 3rd day of October, 1947.

(Signed) C. H. HIGHTON.

No. 29.

Order giving
Leave to
Amend Writ—
Flenderwerke
348.
10th April,
1951.
(Not printed).

No. 29.

30

Order giving leave to amend Writ—Flenderwerke 348.*(not printed)*

In similar terms to Document No. 2.

No. 30.**Affidavit of C. H. Highton—Flenderwerke 348.**

In the High Court of Justice.
 Probate, Divorce and Admiralty Division.
 (In Prize.)

THE s.s. "FLENDERWERKE NUMBER 348"
 Arthur Ridley, Master.

10 I, CHRISTOPHER HOWARD HIGHTON, Lieutenant in His Majesty's Navy, and of His Majesty's Ship of War "Royal Harold," whereof Hubert Victor Perry McClintock, Esq., is commander, make oath and say as follows:—

1. I was present at the capture of the said ship s.s. "Flenderwerke Number 348" whereof Arthur Ridley was master or commander, and lately taken by His Majesty's Ship of War.

2. No ship papers of any sort were delivered up or found on board the said ship or elsewhere at the time of the seizure or afterwards.

3. The ship was in course of construction.

20 Sworn by the said Christopher
 Howard Highton, at Kiel on the } (Signed) C. H. HIGHTON.
 twenty-sixth day of August, 1947 } Lieutenant, Royal Navy.

Before me, Hubert Victor Perry McClintock, Captain in His Majesty's Navy, Commanding Officer of His Majesty's Ship "Royal Harold."

(Signed) H. V. P. McCLINTOCK,
 Captain, Royal Navy.

No. 31.**Affidavit of W. G. R. Douglas—Flenderwerke 348.**

In the High Court of Justice.
 Probate, Divorce and Admiralty Division.
 (In Prize.)

No. 2371.
 14th January,
 1948.

No. 30.
 Affidavit of
 C. H. Highton—
 Flenderwerke
 348.
 26th August,
 1947.

No. 31.
 Affidavit of
 W. G. R.
 Douglas—
 Flenderwerke
 348.
 14th January,
 1948.

30

s.s. "FLENDERWERKE 348"

I, WILLIAM GEORGE RINTOUL DOUGLAS of Alstereck, Jungfernstieg, Hamburg, representative in Germany of the Ministry of Transport, make oath and say as follows:—

This vessel was found partly built in Lubeck when the port was occupied by the Allies. It was built on the order of Norddeutscher Lloyd, Bremen, by Lubecker Flenderwerke, Lubeck. The vessel is still

No. 31.
 Affidavit of
 W. G. R.
 Douglas—
 Flenderwerke
 348.
 14th January,
 1948.
 (continued).

completing at Lubeck on orders given by the Ministry of Transport through the Control Commission for Germany, and is now named "Empire Ely."

Sworn at 53, Davies Street,
 Berkeley Square, W.1, this 14th day } (Signed) W. G. R. DOUGLAS.
 of January, 1948

Before me,

(Signed) F. A. CARLTON SMITH,
 A Commissioner for Oaths.

No. 32.
 Appearance—
 Flenderwerke
 348.
 1st March,
 1949.

No. 32.

10

Appearance—Flenderwerke 348.

(not printed)

In similar terms to Document No. 24.

No. 33.
 Claim of
 Lubecker
 Flender-
 Werke A.G.—
 Flenderwerke
 348.
 1st March,
 1949.

No. 33.

Claim of Lubecker Flender-Werke A.G.—Flenderwerke 348.

Writ No. 2371.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(In Prize).

Ship: s.s. "Flenderwerke 348".

20

Claimants: Lubecker Flender-Werke A. G.

The Claim of Lubecker Flender-Werke A. G. of Lubeck-Siems, Lubeck, a company incorporated in Germany, for and on behalf of themselves, the true, lawful and sole owners of the said ship, her tackle, apparel and furniture at the time she was taken and seized as prize by Lieutenant C. H. Highton R.N., for the said ship and for all such loss, costs, charges, damages and expenses as may have arisen and been incurred, or shall or may arise and be incurred by reason of the capture and detention aforesaid.

Dated the 1st day of March, 1949.

30

FRESHFIELDS,

1, Bank Buildings, Princes Street,
 London, E.C.2,

Solicitors for the above-named Claimants.

The grounds for the said claim are:—

1. That the said seizure was unlawful:—

(a) because at the time when the said seizure was made and at all times prior thereto the said ship was only built in part and was private property on land and was 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;

(b) because hostilities with Germany had ceased on or about the 8th May, 1945;

(c) because at the time of the said seizure 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;

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

2. Alternatively to 1 (a) above, if the said ship was not private property on land at the time of the said seizure, that at all material times up to the 27th August, 1945, the said ship was only built in part and was private property on land and was 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 ship was completed between the 27th August, 1945, and the date of the said seizure by reason of the compulsion of the Allied Military Government which on the 27th August, 1945, gave orders for the completion of the said ship; 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 ship.

No. 33.

Claim of
Lubecker
Flender-
Werke A.G.—
Flenderwerke
348.
1st March,
1949,
(continued).

No. 34.

Affidavit of Hermann Bunte in support of claim.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(In Prize.)

“Flenderwerke 348.”

I, BUNTE, HERMANN of Lubecker Flender-Werke A.G. Lubeck-Siems make oath and say as follows:—

1. I am Managing Director of Lubecker Flenderwerke A. G. (hereinafter called “the Flenderwerke Company”) and am duly authorised to make this affidavit on their behalf.

No. 34.

Affidavit of
Hermann
Bunte in
support of
Claim—
Flenderwerke
348.
9th February,
1949.

No. 2371.

No. 34.
 Affidavit of
 Hermann
 Bunte in
 support of
 Claim—
 Flenderwerke
 348.
 9th February,
 1949,
 (continued).

2. The Flenderwerke Company are a Company incorporated in Germany in accordance with German law.

3. The Flenderwerke Company are the true owners of the ship Flenderwerke 348.

4. By a Contract in writing dated 6th November, 1943, the Flenderwerke Company agreed to build for the North German Lloyd Shipping Company at a price of RM. 4.2 millions a freight steamship of 5,000 tons dead weight. The ship "Flenderwerke 348" is the ship contracted to be built under the said Contract. A translation of the said Contract is now produced to me marked "D.1" and is exhibited to this 10 affidavit.

5. The said Contract contained no provision for the passing of property in the ship before delivery thereof by the Flenderwerke Company to the North German Lloyd Shipping Company. The Flenderwerke Company has never delivered the said ship to the North German Lloyd Shipping Company.

6. In pursuance of the said Contract the Flenderwerke Company commenced to build the said ship and at the time of the German surrender of the 8th May, 1945, some seventy per cent. of the work on the hull of the said ship had been completed, but the outer sides and 20 decks were only partly rivetted. At the time of the said surrender and throughout the year 1945, the said ship was on land at Lubeck on the stocks of the Flenderwerke Company.

7. The Declaration regarding the defeat of Germany and the Assumption of Supreme Authority with regard to Germany by the Governments of the United Kingdom the United States of America the Union of Soviet Socialist Republics and the Provisional Government of the French Republic (hereinafter called "the Potsdam Declaration") dated the 5th June, 1945, provided by Article 5 as follows:—

"(a) All or any of the following articles in the possession of 30
 "the German armed forces or under German control or at German
 "disposal will be held intact and in good condition at the disposal of
 "the Allied Representatives, for such purposes and at such times as
 "they may prescribe:—

"II. all merchant shipping whether afloat under repair
 "or construction built or building."

The Allied Control Council for Germany Proclamation No. 2 dated 20th September, 1945, required that the German Authorities should place at the unrestricted disposal of the Allied Representatives the entire German 40 shipping shipbuilding and ship repair industries and all matters and facilities directly or indirectly relative or ancillary thereto and should provide the requisite labour and specialist services. The said Article stated that the requirements of the Allied Representatives would be

specified in instructions which would from time to time be communicated to the German authorities.

8. In or about the month of September, 1945, the Flenderwerke Company received a communication from the Base Engineer Officer Lubeck dated the 27th August, 1945, and bearing also a Military Government stamp, which ordered the completion of the ship "Flenderwerke 348". A copy of the said communication is now produced to me marked "D.2" and is exhibited to this affidavit.

10 9. The Flenderwerke Company thereupon proceeded with the completion of the said ship. I have read what purports to be a copy of an affidavit of Lieutenant Christopher Howard Highton R.N. sworn in these proceedings and dated the 26th August, 1947. The said affidavit states that the said "Flenderwerke 348" was seized as prize by one of His Majesty's Ships of War shortly before the said 26th August, 1947. The said "Flenderwerke 348" was not launched until the 7th October, 1947, and at all times prior to that date was on land at Lubeck on the stocks of the Flenderwerke Company.

20 10. In or about the month of November, 1947, the Flenderwerke Company received a letter from the British Ministry of Transport dated the 6th November, 1947, requiring the said ship, which had then been named "s.s. Empire Ely" to be converted to oil fuel burning. The Flenderwerke Company thereupon proceeded with the said work of conversion.

11. The Flenderwerke Company have received from the German public authorities on account for the cost of building of the said ship, amounts totalling R.M. 4,926,760. The estimated total cost of building the said ship is R.M. 6.2 millions. I verily believe that the German public authorities will pay to the Flenderwerke Company the balance of the said total cost of building the said ship.

30 12. At the time of the German surrender of the 8th May, 1945, the Flenderwerke Company had received from the North German Lloyd Shipping Company instalments on the Contract price of the said ship amounting to R.M. 2,940,000 of which the sum of R.M. 1,472,048.33 had been spent on the construction of the said ship. On the 20th April, 1948, the Flenderwerke Company repaid to the North German Lloyd Shipping Company the aforesaid sum of R.M. 2,940,000 advanced by that Company.

13. The market value of the said ship is greatly in excess of the sum which will be received by the Flenderwerke Company as the building cost of the said ship.

40 14. Article 947 of the German Civil Code provides:—

(1) If movable things are joined together in such a way as to become parts of one whole thing, the previous owners become owners in common of this thing; the shares are proportionate to the values of the things when they were joined together.

No. 34.

Affidavit of
Hermann
Bunte in
support of
Claim—
Flenderwerke
348.
9th February,
1949,
(continued).

No. 34.

Affidavit of
Hermann
Bunte in
support of
Claim—
Flenderwerke
348.
9th February,
1949,
(continued).

(2) If one of the things is to be considered as the principal thing, its owner acquires sole property.

15. The Flenderwerke Company contend that by virtue of the matters set out in Paragraphs 4 and 5 hereof, they are and at all times have been the true owners of the ship "Flenderwerke 348". The Company further contend that the portion of the said ship completed on the 27th August, 1945, is to be considered as the principal thing and that accordingly the said Company remain the sole owners of the said ship by virtue of the provisions of Article 947 (2) of the German Civil Code.

16. Article 46 of Hague Convention IV concerning the Laws and Customs of War on Land provides that private property on land cannot be confiscated. 10

17. The Flenderwerke Company contend:—

(i) that at the time of the purported seizure of the said ship Flenderwerke 348 as prize on about 26th August, 1947, and at all times prior thereto the said ship was private property on land and that accordingly the said seizure was not lawful by reason of the provisions of Article 46 of the aforesaid Hague Convention IV.

(ii) alternatively, that the said purported seizure is incompetent (a) because hostilities with Germany terminated on or about the 8th May, 1945, and the situation obtained with regard to Germany in the month of August, 1947, precluded the assertion of a right of prize at that date; further or alternatively (b) because the Potsdam Declaration and the Allied Control Council Proclamation No. 2 are inconsistent with a continuing right of prize; 20

(iii) that if contrary to their contention a right of prize might lawfully be asserted in the month of August, 1947, it would be contrary to just and proper legal principles to permit such a right to be asserted in the case of the ship "Flenderwerke 348" because (a) the said ship was private property on land and accordingly not liable to confiscation prior to the giving of the instructions of the Military Government dated 27th August, 1945, and (b) the said ship would have remained private property on land and so protected but for the compulsion of the Military Government exercised by the said instruction. 30

Sworn at His Britannic Majesty's
Consulate-General at Hamburg in
Germany on the 9th day of February,
1949.

H. BUNTE.

Before me,

O. C. ALLEN,
British Vice Consul.

Seal.

British Consulate-General Hamburg.

No. 35.**Writ of Summons—m.v. "Hermes".**

Amended pursuant to the Order of the President dated the 6th day of February, 1951.

No. 35.
Writ of Summons.
13th August, 1947—m.v. "Hermes".
Amended 6th February, 1951.

Writ of Summons—Ship.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

No. 2360.

(In Prize.)

m.v. "Hermes."

10 GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland, and of the British Dominions beyond the Seas King, Defender of the Faith, To the owners and parties interested in the ship "Hermes" of the Port of Registry of which is unknown seized and taken as prize by Our ship of war "~~Royal Rupert~~" Captain Edward Reignier Condor, ~~D.S.O., D.S.C., R.N., Commander naval or military or naval and military forces whilst lying at Emden at the time of the capture of Emden on 6th May, 1945.~~

20 WITNESS, WILLIAM ALLEN VISCOUNT JOWITT, Lord High Chancellor of Great Britain, this 13th day of August in the year of Our Lord One thousand nine hundred and forty-seven.

This WRIT was issued by the said Procurator General of and whose address for service is Storey's Gate, St. James's Park, London, S.W.1.

This WRIT was served by me Trevor Wallace Clayton R.N. of H.M.S. ~~Royal Rupert~~ on the ship "Hermes" by nailing or affixing this original writ for a short time on the forebridge superstructure (there being no mast) of the said vessel, and on taking off this writ by leaving a true copy thereof nailed or fixed in its place at Emden on Wednesday, the 27th day of August, 1947.

Indorsed the 28th day of August, 1947.

30

(Signed) T. W. CLAYTON.

No. 36.**Order giving leave to amend Writ—m.v. "Hermes".**

(not printed).

In similar terms to document No. 2.

No. 36.
Order giving Leave to amend Writ—m.v. "Hermes" 13th August, 1947.
(Not printed).

No. 37.

Affidavit of
T. W. Clayton—
m.v. "Hermes".
21st July,
1947.

No. 37.

Affidavit of T. W. Clayton—m.v. "Hermes".

The "Hermes", Master. Klaus Dehde.

I, TREVOR WALLACE CLAYTON, Lieutenant in His Majesty's Navy, and of His Majesty's Ship of War "Royal Rupert" whereof Captain Edward Reignier Conder, Distinguished Service Order, Distinguished Service Cross, Esq., is commander, make oath and say as follows:—

1. I was present at the capture of the said ship "Hermes", whereof Klaus Dehde was master or commander, and lately taken by His Majesty's Ship of War. 10

2. No ship papers of any sort were delivered up or found on board the said ship or elsewhere at the time of the seizure or afterwards.

(Signed) TREVOR W. CLAYTON.

Sworn by the said Trevor Wallace Clayton on the 21st day of July, 1947.

Before me, Edward Reignier Conder, Distinguished Service Order, Distinguished Service Cross, Captain in His Majesty's Navy, and of His Majesty's Ship of War "Royal Rupert".

(Sgd.) E. R. CONDER. 20

No. 38.

Affidavit of
W. G. R.
Douglas—
m.v. "Hermes".
14th January,
1948.

No. 38.

Affidavit of W. G. R. Douglas—m.v. "Hermes".

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(In Prize.)

No. 2360.

m.v. "Hermes."

I, WILLIAM GEORGE RINTOUL DOUGLAS of Alstereck, Jungfernstieg, Hamburg, representative in Germany of the Ministry of Transport, make oath and say as follows:—

This vessel was found at Emden when the port was occupied by the Allies. It was built on orders of D. G. "Neptun" Bremen by Bremer Vulkan, Bremen-Vegesack, and Messrs. Gebr. Pot, Bolnes, Holland. The vessel was moved to Emden during the war (uncompleted), and is now completing in accordance with orders given by the Ministry of 30

Transport through the Control Commission for Germany by Nordseewerke Emden.

Sworn at 53 Davies Street, Berkeley }
Square, W.1, this 14th day of }
January, 1948

(Sgd.) W. G. R. DOUGLAS.

No. 38.

Affidavit of
W. G. R.
Douglas—
m.v. "Hermes".
14th January,
1948,
(continued).

Before me,

(Sgd.) F. A. CARLTON SMITH,
A Commissioner for Oaths.

No. 39.

10 Licence to Dampfschiffahrts-Gesellschaft "Neptun" to prosecute claim.

Whereas Messrs. Dampfschiffahrts-Gesellschaft "Neptun" are in contemplation of law an alien company:

Now I, The Right Honourable James Chuter Ede, one of His Majesty's Principal Secretaries of State, by virtue of a Warrant under His Majesty's Royal Sign Manual dated the first day of April, One thousand nine hundred and forty-four, authorising me in this behalf, do hereby grant licence and permission to the said Messrs. Dampfschiffahrts-Gesellschaft "Neptun" to enter an appearance in proceedings intituled.

20 m.v. "Hermes" In Prize No. 2360.

and to prosecute in the said proceedings a claim for the release of the said vessel or for any other relief to which the said Company may be entitled in Prize in respect of the said vessel.

Given under my hand at Whitehall this eighteenth day of February, One thousand nine hundred and forty-nine.

J. CHUTER EDE.

No. 39.

Licence to
Dampfs-
schiffahrts-
Gesellschaft
"Neptun" to
prosecute
claim—m.v.
"Hermes"
18th February,
1948.

No. 40.

Appearance—
m.v. "Hermes".
3rd May, 1949.

No. 40.

Appearance—m.v. "Hermes".

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

Writ No. 2360.

Ship: m.v. "Hermes"

Claimants: Dampfschiffahrts-Gesellschaft "Neptun".

Enter an Appearance for the above-named Claimants in respect of their claim to be the true lawful and sole owners of the above-named vessel M.V. "Hermes".

10

Dated the 3rd day of May, 1949.

(Signed) FRESHFIELDS,
and whose address for service is
1, Bank Buildings,
Princes Street, E.C.2,
Solicitors for the Claimants.

No. 41.

Claim of
Dampf-
schiffahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes".
3rd May, 1949.

No. 41.

Claim of Dampfschiffahrts-Gesellschaft "Neptun".

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

No. 2360. 20

Ship: m.v. "Hermes"

Claimants: Dampfschiffahrts-Gesellschaft "Neptun."

The claim of Dampfschiffahrts-Gesellschaft "Neptun" of 98 and 99 Langerstrasse, Bremen, a company incorporated in Germany and appearing in these proceedings by virtue of a license of the Crown granted in that behalf, for and on behalf of themselves, the true, lawful, and sole owners of the said ship, her tackle, apparel and furniture, at the time she was taken and seized as prize by His Majesty's Ship "Royal Rupert," Captain Edward Reignier Conder, D.S.O., D.S.C., R.N., Commander, whilst lying at Emden; for the said ship and for all such loss, costs, charges, damages and expenses as may have arisen and been incurred, or shall or may arise and be incurred by reason of the capture and detention aforesaid.

30

Dated the 3rd day of May, 1949.

FRESHFIELDS,
of 1, Bank Buildings, Princes Street, London, E.C.2,
Solicitors for the above-named Claimants.

The grounds for the said claim are:—

1. That the seizure was unlawful:—

(a) because hostilities with Germany had ceased on or about the 8th May, 1945;

(b) because at the time of the said seizure 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;

10 (c) because the Potsdam declaration dated the 5th June, 1945, and the Allied Control Council for Germany, Proclamation No. 2 dated the 20th September, 1945, are inconsistent with the continuance of a right of seizure in prize at the date of the said seizure.

2. That at all material times the said ship was 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 on Land, 1907.

3. That the said ship was at all material times incomplete and had never formed part of the German merchant marine nor been used for German naval purposes: and that, in the premises, the said ship was not at any material time liable to seizure in prize.

Claim of
Dampf-
schiffahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes".
3rd May, 1949,
(continued).

20

No. 42.

No. 42.

Affidavit of Karl Luhrs in support of claim.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Writ No. 2360.

(In Prize.)

m.v. "Hermes".

I, KARL LUHRS, of Bremen, 1, Wachmannstrasse 95, make oath and say as follows:—

30 1. I am a Managing Director of Dampfschiffahrts-Gesellschaft "Neptun" of Bremen (hereinafter called "the Neptune Steamship Company") and am duly authorised to make this affidavit on their behalf.

2. The Neptune Steamship Company are a company incorporated in Germany in accordance with German law.

3. The Neptune Steamship are the true owners of the ship m.v. "Hermes."

40 4. On the 22nd May, 1938, the Neptune Steamship Company ordered two merchant ships, each of 3,100 tons dead weight, from the Vulkan shipyards, Bremen-Vegesack. One of the said ships was the ship m.v. "Hermes." By reason of the outbreak of war the Vulkan shipyards were unable to complete the construction of the said ships.

Affidavit of
Karl Luhrs in
support of
Claim—m.v.
"Hermes".
28th March,
1949.

No. 42.
 Affidavit of
 Karl Luhrs in
 support of
 Claim—m.v.
 "Hermes".
 28th March,
 1949,
 (continued).

The Neptune Steamship Company accordingly paid to the Vulkan shipyards the sum of RM. 1,160,000 for work done and materials supplied and acquired the property in the materials used for the construction of the said ships. In the month of September, 1942, N.V. Scheepsbouw-
 werf Gebroeders Pot of Bolnes, near Rotterdam, Holland, agreed to complete the ship m.v. "Hermes" for the sum of 754,000 Dutch florins.

5. At the time of the Allied landings in Normandy in June, 1944, about four-fifths of the construction of the said ship m.v. "Hermes" had been completed. It was then decided not to await the completion of the said ship at Bolnes aforesaid, but to tow her to Emden for completion by Nordseewerke G.m.b.H. In order to obtain the transfer of the property in the said ship, the Neptune Steamship Company paid to N.V. Scheepsbouw-
 werf Gebroeders Pot the full building price of 754,000 Dutch florins. 10

6. In the month of October, 1944, the said ship was towed from Bolnes to Emden. In the said month, while lying at Emden, the said ship suffered considerable bomb damage in the course of an air raid. At the time of the German surrender on the 8th May, 1945, no further work had been done on the said ship and she lay damaged, grounded and still incomplete in the harbour at Emden. 20

7. I have read what purports to be a copy of an affidavit of Lieutenant Trevor Wallace Clayton, R.N., sworn in these proceedings. According to the said affidavit the ship m.v. "Hermes" was seized as prize on the 21st July, 1947. No work had then been carried out on the said ship since the date of the German surrender.

8. Subsequent to the 21st July, 1947, certain temporary repairs were effected to the said ship m.v. "Hermes." On the 18th February, 1948, on the orders of the British Ministry of Transport, the said ship was towed from Emden to Hamburg for completion at Hamburg by Deutsche Werft A.G. The said ship has not yet been completed. 30

9. The Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Governments of the United Kingdom, the United States of America the Union of Soviet Socialist Republics and the Provisional Government of the French Republic (hereinafter called "the Potsdam Declaration") dated the 5th June, 1945, provided by Article 5 as follows:—

"(a) All or any of the following articles in the possession of "the German armed forces or under German control or at German disposal will be laid intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe: 40

"II. all merchant shipping, whether afloat, under "repair or construction, built or building."

The Allied Control Council for Germany Proclamation No. 2 dated 20th September, 1945, also required that the German authorities should place at the unrestricted disposal of the Allied Representatives the entire German shipping, shipbuilding and ship repair industries.

10. Article 46 of the Hague Convention IV concerning the Laws and Customs of War on Land provides that private property cannot be confiscated.

11. The Neptune Steamship Company contends:—

10 (i) that, in all the circumstances, the ship m.v. "Hermes" was at all material times private property on land and accordingly not liable to confiscation;

(ii) that the said ship, being at all material times incomplete and never having formed part of the German merchant marine nor been used for German naval purposes, is not liable to condemnation as prize;

20 (iii) that the seizure of the said ship on 21st July, 1947, was unlawful (a) because hostilities with Germany terminated on or about the 8th May, 1945, and (b) because at the time of the said seizure 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, and (c) because the Potsdam Declaration and the Allied Control Council for Germany Proclamation No. 2 are inconsistent with the continuance of a right of seizure in prize at the date of the said seizure.

Sworn at the British Consulate,
Bremen, this 28th day of March,
1949

K. LUHRS.

30 Before me,
F. T. NIBLOCK,
British Vice Consul.

Stamps 4/6
(L.S.)

No. 43.

Further Affidavit of Karl Luhrs in support of claim.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

Writ No. 2360.

m.v. "Hermes".

I, KARL LUHRS of Bremen 1, Wachmannstrasse 95, make oath and say as follows:—

40 1. I am a Managing Director of Dampfschiffahrts-Gesellschaft "Neptun" of Bremen (hereinafter called "the Claimants") and am duly authorised to make this Affidavit on their behalf.

No. 42.

Affidavit of
Karl Luhrs in
support of
Claim—m.v.
"Hermes",
28th March,
1949,
(continued).

No. 43.

Further
Affidavit of
Karl Luhrs in
support of
Claim—m.v.
"Hermes",
6th October,
1950.

No. 43.

Further
Affidavit of
Karl Luhrs in
support of
Claim—m.v.
"Hermes".
6th October,
1950,
(continued).

2. I refer to the former Affidavit sworn by me in this matter on the 28th March, 1949 and in amplification of paragraphs 6 and 7 thereof I say:—

(a) the main damage to the ship m.v. "Hermes" in October, 1944 was above the water line;

(b) the ship did not sink in consequence of that damage but was lightly grounded as a precautionary measure and holes below the water line were provisionally stopped with wooden plugs;

(c) on the day of the capitulation, the 5th day of May, 1945 the ship was capable of floating and could have been moved within the port of Emden. As stated in paragraph 8 of my said former Affidavit, further work was undertaken before the ship was moved to Hamburg. 10

3. There is now produced and shown to me marked "K.L.1" the English Text of the Instrument of Surrender between the Allied Forces and Germany dated 4th May, 1945. There is also produced and shown to me marked "K.L.2" a copy of a letter from the Treasury Solicitor, London, to the Claimants' Solicitors Messrs. Freshfields dated 13th October, 1949.

4. If at the hearing of this matter before the Prize Court the Procurator General relies on the matter contained in the said letter of the 13th October, 1949, the Claimants will contend that no lawful seizure of the m.v. "Hermes" could have been made after the coming into force of the said Instrument of Surrender. 20

Sworn at the British Consulate
Bremen, this 6th day of October,
1950

K. LUHRS.

Before me,
H. LEWTY,
British Vice Consul.

7s. 6d.
Consulate
Stamp.

30

No. 44.

Transcript of
Initial Pro-
ceedings before
Lord
Merriman, P.
29th April,
1948.
(Copy in back
cover.)

No. 44.

Transcript of Initial Proceedings before Lord Merriman, P.—29th
April, 1948.

(Copy in Pocket in back cover of Record.)

No. 45.

No. 45.

Letter—Dampfschiffahrts-Gesellschaft “Neptun” to H.Q. Military Government R.D.R. Division, Minden.

Letter—
Dampf-
schiffahrts-
Gesellschaft
“Neptun” to
H.Q. Military
Government
R.D.R. Divi-
sion, Minden—
m.v. “Hermes”.
16th October,
1946.

To
Headquarters,
Military Government
R.D. and R. Division
(Reportation, Delivery
and Restitution)

10 MINDEN/Westfalia. October 16th, 1946.
Subject: Maintain of rights on the m.s. “Hermes” construction No. 909—shipyard of Gebr. Pot in Bolnes near Rotterdam, at the moment at the yard of the Nordseewerke in Emden.

20 We herewith beg to maintain our rights on the m.s. “Hermes” now under construction at the Nordseewerke in Emden. The original order was put with the shipyard of Bremer Vulcan in Vegesack under the construction No. 769 in May, 1938, and work was started there. By instructions given to us by the Hauptausschuss shipbuilding we had to transfer all materials to the Dutch shipyard of Gebr. Pot in Bolnes near Rotterdam with the intention to have the ship built thereunder the construction No. 909. All material necessary, of which most had already been treated, such as motors and accessories, material and furniture was delivered by the original shipyard in Germany to the Dutch shipyard and had already been paid by us. We furthermore paid instalments amounting to Hfl. 754,000.—=Rm. 1,000,558.—to the Dutch shipyard. In comparison to the completion of the ship, that amounted to about 80%, the task was overpaid to the yard. According to the facts we would be obliged if you would kindly confirm our rights of possession on this vessel.

30

Dampfschiffahrts-Gesellschaft
“Neptun”

(Signature) STICKAN

(Signature)

RICHTER

No. 46.

Letter—R.D.R.
Division to
Dampf-
schiffahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes".
7th November,
1946.

No. 46.

Letter—R.D.R. Division to Dampfschiffahrts Gesellschaft "Neptun".

Tel.: Minden 1917

Ref. RDR/M/94323/A.54 (RDR.1)

R.D.R. Division,
Zonal Executive Offices,
C.C.G., MINDEN,
64 H.Q., C.C.G., B.A.O.R.
7th November, 1946.

To: Dampfschiffahrts-Gesellschaft "Neptun"

10

BREMEN.

Subject: Nordse-werke m/s "Hermes".

Ref. your letter N. dated 16.10.46, we regret to inform you that the vessel "Hermes" has already been allocated as Reparations to the U.K.

(Signature)

for Chief,

R.D.R. Division.

No. 47.

Letter—Klaus
Dehde to
Lehnkering &
Co., Emden—
m.v. "Hermes".
23rd July,
1947.

No. 47.

Letter—Klaus Dehde to Lehnkering & Co. Emden, and Enclosures thereto

20

Translation.

Klaus Dehde

Emden, 23rd July, 1947.

to Messrs. Lehnkering & Co.,
Emden.

re prize ship "Hermes"

As I informed you by telephone, s.s. "Hermes" was seized by the Royal Navy as a prize on 21st July, 1947, and I was made master of s.s. "Hermes" for this act by the Port Controller, Mr. Cawthorn.

I enclose one certified copy each of the certificates for your use.

30

Yours faithfully,

(Signed) DEHDE.

No. 47(a)**Enclosure to No. 47.**

Office of the Naval Officer in Charge,
Wilhelmshaven.

No. 47(a).

Enclosure to
No. 47—
m.v. "Hermes".

To the Master of Hermes.

1. You are hereby informed that your ship has this day been seized in prize by the Allied Military Authorities.

2. You are forthwith to hoist the Control Flag (International C burgess).

10 3. You are to deliver up to me now all ship's papers, books, passports, Seabriefs, Charter parties, Bills of Lading, Letters and other documents and writings on board.

4. You are to furnish forthwith particulars of all money and valuables on board.

5. You are also to deliver to me a list of all stores, furniture and cargo on board.

Dated this 21st day of July, 1947.

(Signed) J. W. CLAYTON,

Rank: Lieutenant, Royal Navy.

No. 47(b)**Enclosure to No. 47.**

No. 47(b).

Enclosure to
No. 47—
m.v. "Hermes".

20

The Hermes, Master K. Dehde.

I, TREVOR, W. CLAYTON, holding the rank of Lieutenant in His Britannic Majesty's Navy, and the Prize Officer in charge of the Vessel Hermes, seized as lawful prize of war on the 21st day of July, 1947, by one of His Majesty's Ships, do hereby certify that the following is a correct inventory of the stores, furniture, and cargo of the said Vessel, so far as the same has been ascertained.

No stores, furniture or cargo was found on board.

30 Signed this 21st day of July, 1947.

J. W. CLAYTON.

NOTE.—I do hereby declare that on the 21st day of July, 1947, I delivered a Copy, signed by myself, and that they raised no objection.

Signed this

day of

, 1947.

(Signature)

(Rank)

No. 47(c).

Enclosure to
No. 47—
m.v. "Hermes".**No. 47(c)****Enclosure to No. 47.**

The Hermes, Master K. Dehde.

I, the undersigned TREVOR W. CLAYTON, holding the rank of Lieutenant in His Britannic Majesty's Navy, do hereby certify that the following is a correct account of all monies and valuables found on board the above-named Vessel Hermes, seized, as lawful prize of war, on the 21st day of July, 1947.

No money or valuables were found on board.

Signed this 21st day of July, 1947.

10

(Signature) J. W. CLAYTON.

NOTE.—I do hereby declare that on the _____ day of _____, 1947, I delivered a Copy of the above Certificate to the Master of the Hermes, and that

Signed this _____ day of _____, 1947.
(Signature)
(Rank)

No. 48.

Letter—
A. Ridley to
Deutsche
Werft,
Hamburg—
m.v. "Hermes".
8th December,
1947.**No. 48.****Letter—A. Ridley to Deutsche Werft, Hamburg.**

20

BRITISH MINISTRY OF TRANSPORT REPRESENTATIVE.

Representatives for Germany
W. G. R. Douglas
Telephone Hamburg Civil
34 35 75

Alstereck,
Jungfernstieg,
Hamburg.

Ref. R/H.

Hamburg, 8th December, 1947.

Deutsche Werft,
Hamburg 1
Postfach 889.

30

Subject:—

m.v. "Hermes"—Completion.

Further to your report of Oct. 13th, 1947, and to telephone conversation with Dr. Scholz we would be pleased if you would take in hand the completion of the m.v. "Hermes" for the British Ministry of Transport.

Please arrange for towage from Nordseewerke Emden at the earliest possible opportunity.

A detailed specification of materials and machinery necessary to complete the ship and not obtainable in Germany, should be prepared so that we can order from British sources. In particular we would like at earliest specification for steering gear (electric hydraulic) with space available for fitting, electric motors, windlass, electrical installation switchboard and of plywood for accommodation in say $\frac{7}{8}$ " and $\frac{3}{8}$ " thicknesses

The ship will be classed with Lloyd's Register of Shipping.

(Signed) A. RIDLEY.

10

A. RIDLEY
(Sir J. H. Biles & Co.)
Naval Architects & Engineers for
B.M.O.T.

No. 48.

Letter—
A. Ridley to
Deutsche
Werft,
Hamburg—
m.v. "Hermes".
8th December,
1947,
(continued).

No. 49.

Letter—Legal Branch, H.Q. Land Schleswig Holstein, Kiel to Admiralty Registrar and enclosure thereto.

Telephone:
KIEL 37, Ex. 410.

Legal Branch,
HQ Land Schleswig-Holstein,
KIEL

Reference:—
20 312/Leg/351/371.

312. H.Q., CCG., BAOR.
31 October, 1947.

To:—The Registrar,
Admiralty Registry and Marshal's Office,
Royal Courts of Justice,
London, W.C.2.

Subject:—

The "Flenderwerke 348."

1. The documents enclosed herewith have been passed to this Branch with a request that they be forwarded to you.

30 2. The so-called "decree of the 1st September, 1947", is presumably a writ issued out of your Registry and the "protest" an appearance but as no copies were sent this is merely conjecture.

3. Whilst appreciating that there is no substance in the grounds set forth in the document, it is felt that the best procedure is to forward it at once to you as received, for such action as may be necessary or such advice as you may be pleased to give.

(Sgd.) A. R. SAYLE,
Chief Legal Officer,
Legal Branch,
Headquarters,
Land Schleswig-Holstein.

KIEL
ARWS/MIH
40 Copy to:—
File 351.
Encls.

No. 49.

Letter—
Legal Branch,
H.Q. Land
Schleswig
Holstein, Kiel
to Admiralty
Registrar—
Flenderwerke
348.
31st October,
1947.

No. 49(a).

Enclosure to
No. 49—
Flenderwerke
348.**No. 49(a)****Enclosure to No. 49.**

Translation.

Lübeck, 28. Oct. 1947.

To
Admiralty Registry
Royal Courts of Justice
London.

I herewith protest to the Admiralty Registry, Royal Courts of Justice, London, in the name of Messrs. Lübecker-Flender-Werke, A.G., 10 Lübeck, against the decree of 1 Sept. 47 whereby the ship, building at the yards of the Lübecker Flenderwerke A. G., Lübeck-Siems—Building No. "Flenderwerke 348"—was requisitioned by Lt. C. H. Highton, R.N. and declared as a lawful prize.

I make application to rescind this decree and to de-requisition the ship under construction to the owners and interested parties.

The said decree has been placed before the Lübecker Flenderwerke A. G., Lübeck, on 4 Oct. 1947, between 12.30 and 13.00 hours. According to the legal information contained in the decree protest against same may be raised by the Flenderwerke in Lübeck either 20 personally or through their Lawyer at the Admiralty Registry, Royal Courts of Justice, London.

To justify my protest I beg to state:—

1. The Court is respectfully requested to examine the question whether the principles of International Law still permit requisition of a ship by prisage under existing conditions. It is not denied that, as far as we are aware, England is technically still at war with Germany.

This question should be officially examined by the Court. It is, however, requested to extend the examination to the question whether requisition under prisage is permissible even if the preceding question 30 is answered in the affirmative. Decisions have been repeatedly made by German, and as far as I know, also by British Prize-Court that prisage cannot be exercised after the armistice has been declared. According to local conception this should hold good all the more if as in this case, an unconditional surrender not only of the complete German Armed Forces but also of the entire German people has been effected i.e. complete debellatio as per International Law.

It is generally recognised that the German people is in duty bound to pay reparations. The Occupying Powers have the authority and the

right to decree the legal Directives. However, according to local conception it does not agree with International Law if measures are still being taken which have their lawful basis in War Law only and which would operate only as war measures against the enemy opposing the acting Power fully armed. It is furthermore pointed out that the Controlling Powers and here, in the British Zone, to which Lübeck belongs, England exercises full sovereignty and that according to local conception recourse to war measures within the area of the Sovereignty of His Britannic Majesty cannot be reconciled therewith.

No. 49(a).
Enclosure to
No. 49—
Flenderwerke
348.
(continued).

- 10 2. Furthermore it is pointed out that prisage can de facto be used as a warlike measure only against enemy ships in service and entitled to display colours. Regarding the right to display colours the decision of the Court is requested whether the Interim Flag which has been introduced by the Control Council as identification for German vessels only and with which neither the rights nor the authority are connected which otherwise adhere to the Flag, can be looked upon as a Flag in the sense of Naval War Law. The requisitioned vessel did not yet carry even this flag, as it neither was nor is yet a ship in the sense of Naval War Law but is still in the constructing stage. At the time of the requisition the ship was still on the slipway, i.e. she had not yet been launched.
- 20

The Court is respectfully requested to examine the a/m reasons and to give a decision at earliest to the undersigned Attorney as representative of the Lübecker Flenderwerke A.G., Lübeck.

DR. ADOLF IHDE.

Attorney:

- The undersigned firm, Messrs. Lübecker Flenderwerke A.G., Lübeck-Siems, herewith, confirms the above statements of their Attorney in every respect and joins in the protest lodged by their Attorney against the requisition of the ship "Flenderwerke 348" under construction and request the rescission of the Prize-Decree and the de-requisition of the ship.
- 30

Lübeck, 28th Oct. 1947.

LUBECKER FLENDERWERKE A.G
Lübeck-Siems.

No. 50.

Letter—H.M.
Procurator-
General to
Dampfschif-
fahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes",
1st November,
1948.

No. 50.

**Letter—H.M. Procurator-General to Dampfschiffahrts-Gesellschaft
"Neptun".**

H.M. Procurator General.
Ref. P.3154.

Storey's Gate,
St. James's Park,
London, S.W.1.

1st November, 1948.

Gentlemen,

m.v. "Hermes" (Writ No. 2360).

I am directed by His Majesty's Procurator General to inform you that Prize proceedings have been instituted in London in respect of 10 above-mentioned ship under the Writ also referred to above.

It is now intended to apply to the Court in the near future for the condemnation of the ship and in case you should be advised to seek permission to have an appearance entered on your behalf in the proceedings, your attention is invited to Order III, rule 5 of the Prize Court Rules, 1939, which provides as follows:—

"An alien enemy shall, before entering an appearance, file in the Registry an Affidavit stating the grounds of his claim."

In the event of its being decided to file an Affidavit in the manner now indicated, due instructions should be given to a London firm of 20 Solicitors without delay.

I am, Gentlemen,

Your obedient Servant,

(Signature).

"Neptun" Dampfschiffahrts-Gesellschaft,
Bremen,
Germany.

No. 51.

Letter—H.M.
Procurator-
General to
Dampfschif-
fahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes",
30th November,
1948.

No. 51.

**Letter—H.M. Procurator-General to Dampfschiffahrts-Gesellschaft
"Neptun".**

H.M. Procurator General,

Storey's Gate,
St. James Park,
London, S.W.1,

30th November, 1948.

Gentlemen,

m.v. "Hermes" (Writ No. 2360).

I am directed by His Majesty's Procurator General to refer to the letter from this Department dated 1st November last to which no reply

30

has been received, and to inform you that it is intended to apply to the Court for the condemnation of this vessel at the first sitting of the Court after the 13th December next.

I am, Gentlemen,
Your obedient Servant,
(Signature).

FWB/MF.
"Neptune" Dampfschiffahrts-Gesellschaft,
Bremen,
Germany.

No. 51.
Letter—H.M.
Procurator-
General to
Dampfschif-
fahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes".
30th November,
1948.
(continued).

10

No. 52.

Letter—Dampfschiffahrts-Gesellschaft "Neptun" to H.M. Procurator-General.

Dampfschiffahrts-Gesellschaft "Neptun".
By Air Mail.
H.M. Procurator General,
Storey's Gate,
St. James's Park,
London, S.W.1,
England.

4th December, 1948.
Tie/MuA.

No. 52.
Letter—
Damp'schif-
fahrts-
Gesellschaft
"Neptun" to
H.M.
Procurator-
General—
m.v. "Hermes".
4th December,
1948.

20 Gentlemen,

m/s. "Hermes", Writ No. 2360.

We acknowledge the receipt of your letters dated November 1st and 30th.

We take the liberty to reply that we consider the above mentioned ship the property of this company. Consequently we cannot agree with the seizing in prize of m/s. "Hermes". In order to make valid our claims, we would like to have an appearance entered on our behalf in the proceedings before the London Prize-Court.

30 In accordance with Order III, Rule 5, of the Prize Court Rules, 1939, which provides as follows:—

"An alien enemy shall, before entering an appearance file in the Registry an Affidavit stating the grounds of his claim."

We are at present occupied to prepare the filing of an Affidavit in the Registry and have already contacted a London Firm of Solicitors.

We shall return to the matter as soon as possible and remain meanwhile,

Yours Sincerely,
(Sgd.) DAMPFSCHIFFAHRTS-GESELLSCHAFT
"Neptun".

No. 53.

Letter—
North Sea
Works, Emden
to Dampf-
schiffahrts-
Gesellschaft
"Neptun"—
m.v. "Hermes".
30th December,
1948.

No. 53.

**Letter—North Sea Works, Emden to Dampfschiffahrts-Gesellschaft
"Neptun".**

Translation.

North Sea Works, Emden, G.m.b.H.
The Neptun Steamship Company,
Bremen.

30th December, 1948.

re m/s. Hermes.

Without any commitments for ourselves we give you the following report about the state of the ship before the Surrender. 10

At the time of occupation the ship was in the new harbour in Emden and had previously suffered considerable damage from a bomb explosion and a fire caused thereby, as well as by artillery shell splinters, and she was therefore grounded in shallow water. When we received the instructions to complete the ship, the first thing that had to be done was to stop a number of holes near the water line. Afterwards the ship was towed to our yard, where further caulking was effected and the considerable quantities of water which had entered the ship were pumped out. Apart from that, large jutting out plates and other parts were burnt off to eliminate danger to passing traffic from these jutting out bits. 20

Before the ship was transferred to Hamburg a further 63 patches had to be put on the outer plates. Also a number of holes in the deck had to be closed by welded-on patches or plates, and the deck itself had to be strengthened by putting in supports in order to give it the necessary stability. In order to caulk the double-bottom tanks, manhole covers had to be made and built in. Furthermore, 60 open portholes below deck had to be closed.

In our judgment the ship was by no means capable of being transported in the state in which she was lying in the port at the time of the occupation. 30

North Sea Works, Emden,
G.m.b.H.,
(Signature).

Letter—Sir T. J. Barnes to Messrs. Freshfields.

Storey's Gate,
St. James's Park,
London, S.W.1,
8th July, 1949.

No. 54.
Letter, Sir
T. J. Barnes
to Messrs.
Freshfields—
m.v. "Hermes".
8th July,
1949.

Dear Sirs,

m.v. "Hermes".

10

Prize Proceedings.

With reference to the claim made by you in these proceedings on behalf of Dampfschiffahrts Gesellschaft "NEPTUN" dated 3rd May 1949, and to my discussion with Mr. Pollock on the 24th ultimo., I am writing as then arranged to inform you of the contentions upon which the Crown will rely at the hearing in order that the issues may be more closely defined and the expenditure of unnecessary costs avoided. The Crown will contend that the vessel was seized when the port of Emden was captured and occupied on the 5th May 1945 and will rely in this connection upon the decision of the Prize Court in the case of the
20 BELLAMAN reported in (1948) 2 A.E.R. 679.

The Crown, while not admitting the validity of the contentions in paragraph 1 of your claim, will not rely on any seizure which took place in 1947, as, at that date, by reason of the surrender of Germany and the Allied Declarations and other instruments relating to the German surrender as well as of the decision of the Allied Military Control, this vessel and others had become in any event the property of His Majesty's Government.

The Crown will also contend, contrary to the allegations set out in paragraphs 2 and 3 of your claim, that the vessel was not private property
30 on land, and, that she was at the material time the proper subject of seizure in Prize.

Yours faithfully,

T. J. BARNES.

Messrs. Freshfields, Leese & Munns,
1, Bank Buildings,
Princes Street, E.C.2.

No. 55.

Letter—
Messrs.
Freshfields to
Treasury
Solicitor—
m.v. "Hermes"
23rd August,
1949.

No. 55.

Letter—Messrs. Freshfields to Treasury Solicitor.

Freshfields.

1, Bank Buildings,
Princes Street,
London, E.C.2,
23rd August, 1949.

Dear Sir,

m.v. "Hermes"—Prize Court proceedings.

With further reference to your letter of the 8th July, we shall be obliged if you will let us know whether the allegation in the Writ in 10 these proceedings that the "Hermes" was captured by the "Royal Rupert", is the capture in 1947 on which the Crown does not now rely and whether or not it is intended to amend the Writ by alleging the capture of the ship in 1945 when the port of Emden was captured and occupied.

We shall also be obliged if you will supply us with further information about the capture and occupation of the port and whether the capture was effected by land or sea forces and whether the ships or troops, whichever they may have been, were British or American.

Will you also please let us know whether the capture of the port is 20 alone relied upon as constituting the capture of the ship or whether it is alleged that some other act was done by the capture in relation to the ship.

Yours faithfully,

FRESHFIELDS.

The Treasury Solicitor,
Storey's Gate,
St. James's Park,
London, S.W.1.

No. 56.

Letter—
Treasury
Solicitor to
Messrs.
Freshfields—
m.v. "Hermes".
13th October,
1949.

No. 56.

Letter—Treasury Solicitor to Messrs. Freshfields.

The Treasury Solicitor.

Storey's Gate,
St. James's Park,
London, S.W.1,
13th October, 1949.

P.L.2563/AHK.
DLP/GJW/JMF.

Dear Sirs,

"Hermes."

With reference to your letter of the 23rd August, the Crown does not propose to rely on the seizure of the Hermes by the Royal Rupert in 1947

30

for the reason stated in my letter of the 8th July last. It is not my intention to amend the writ at this stage, but if at the hearing the President thinks that this step should be taken, an application will then be made for the purpose.

The port of Emden was captured and occupied by His Majesty's Canadian Army on the 6th and 7th May, 1945.

The capture of the port is relied upon as constituting the capture of the *Hermes*.

Yours faithfully,

A. H. KENT,
Assistant Treasury Solicitor.

10

Messrs. Freshfields,
1, Bank Buildings,
Princes Street, E.C.2.

No. 56.
Letter—
Treasury
Solicitor to
Messrs.
Freshfields—
m.v. "*Hermes*".
13th October,
1949,
(continued).

No. 57.

Letter—Messrs. Freshfields to Treasury Solicitor.

Freshfields.

1, Bank Buildings,
Princes Street,
London, E.C.2,

DLP/GJW/JMF.

3rd August, 1950.

20

Dear Sir,

m.v. "*Hermes*"—In Prize.

(Writ No. 2360).

We shall be obliged if you will inform us whether any steps were taken on or after the 6th and 7th May 1945 in connection with the M.V. "*Hermes*" as prescribed by the Naval Prize Act 1864 and if so what steps were taken.

We are, dear Sir,

Yours faithfully,

FRESHFIELDS.

30

The Treasury Solicitor,
Storey Gate,
St. James's Park,
London, S.W.1.

No. 57.
Letter—
Messrs.
Freshfields to
Treasury
Solicitor—
m.v. "*Hermes*".
3rd August,
1950.

No. 58.

Letter—
Treasury
Solicitor to
Messrs.
Freshfields—
m.v. "Hermes".
10th August,
1950.

No. 58.

Letter—Treasury Solicitor to Messrs. Freshfields.

Registered.
The Treasury Solicitor.

Storey's Gate,
St. James's Park,
London, S.W.1.
10th August, 1950.

DLP/GJW/JMF.

Dear Sirs,

m.v. "Hermes"—Writ 2360.

I am obliged for your letters of the 28th July and 3rd August.

I send you herewith the documents which you sent me on the 22nd 10
June, 1949.

I do not know the purpose of the enquiry in your letter of the 3rd August or what exactly you mean. I believe, however, you are aware of the steps taken in the proceedings which include the Writ issued against the "Hermes" on the 13th August, 1947 and the Order made by the Prize Court that the "Hermes" and her un-consumable stores being required for the services of His Majesty forthwith, be forthwith released and delivered to the Crown without appraisalment.

Yours faithfully,

A. H. KENT,
Assistant Treasury Solicitor. 20

AHK/HP
Messrs. Freshfields,
1, Bank Buildings,
Princes Street,
London, E.C.2.

No. 59.

Letter—Sir
T. J. Barnes
to Messrs.
Freshfields—
Hull 507, Etc.
20th January,
1951.

No. 59.

Letter—Sir T. J. Barnes to Messrs. Freshfields.

Treasury Solicitor.

Storey's Gate,
St. James's Park,
London, S.W.1.

DLP/GJW/JMF.

20th January, 1951. 30

Dear Sirs,

Hull 507.
Hull 508.
Flenderwerke 347.
Flenderwerke 348.

As you know, these cases, together with that of the "Hermes", are in the list for hearing on the 5th February next, and I have to inform you that the Procurator General while not admitting the validity of the

contentions in paragraph 1 of your claims will not rely on any seizures which took place in 1947.

The Procurator General will contend contrary to the allegation set out in paragraph 2 of your Clients' claims that the vessels were not private property on land and that they were at the material time the proper subject of seizure in prize.

10 Without prejudice to the Procurator General's claim that these vessels were seized in Prize when the ports of Lubeck and Flensburg were occupied on 2nd and 10th May, 1945, respectively, the Procurator General will contend that by reason of the surrender of Germany and the Allied Declarations and other instruments relating to the German surrender, as well as of 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 can only be released to His Majesty's Government.

The Procurator General thinks it right to emphasise these matters in order that there may be no misconception as to his contention that the vessels belong to His Majesty's Government in any event.

Yours faithfully,

(Sgd.) T. J. BARNES.

20

Messrs. Freshfields,
1, Bank Buildings,
Princes Street,
London, E.C.2.

No. 59.

Letter—Sir
T. J. Barnes
to Messrs.
Freshfields—
Hull 507, Etc.
20th January,
1951,
(continued).

No. 60.

Instrument of Surrender.

Instrument of Surrender of all German armed forces in Holland in northwest Germany including all islands and in Denmark.

30 1. The German Command agrees to the surrender of all German armed forces in Holland, in northwest Germany including the Frisian Islands and Heligoland and all other islands, in Schleswig-Holstein, and in Denmark, to the C.-in-C. 21 Army Group. This to include all naval ships in these areas. These forces to lay down their arms and to surrender unconditionally.

2. All hostilities on land, on sea, or in the air by German forces in the above areas to cease at 0800 hours British Double Summer Time on Saturday 5 May 1945.

40 3. The German command to carry out at once, and without argument or comment, all further orders that will be issued by the Allied Powers on any subject.

No. 60.

Instrument of
Surrender.
4th May, 1945.

No. 60.
Instrument of
Surrender.
4th May, 1945,
(continued).

4. Disobedience of orders, or failure to comply with them, will be regarded as a breach of these surrender terms and will be dealt with by the Allied Powers in accordance with the accepted laws and usages of war.

5. This instrument of surrender is independent of, without prejudice to, and will be superseded by any general instrument of surrender imposed by or on behalf of the Allied Powers and applicable to Germany and the German armed forces as a whole.

6. This instrument of surrender is written in English and in German. The English version is the authentic text. 10

7. The decision of the Allied Powers will be final if any doubt or dispute arises as to the meaning or interpretation of the surrender terms.

B. L. MONTGOMERY,
Field-Marshal.

4 May 1945.
1830 hrs.

FRIEDEBURG.
KINSEL.
G. WAGNER.
POLEK.
FRIEDEL.

No. 61.
Act of Military
Surrender.
7th May, 1945,

No. 61.

Act of Military Surrender.

20

Only this text in English is authoritative.

Act of Military Surrender.

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Soviet High Command all forces on land, sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8 May and to remain in the positions occupied at that time. No ship, vessel, or aircraft is to be scuttled, or any damage to their hull, machinery or equipment. 30

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force and by the Soviet High Command.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

No. 61.
Act of Military
Surrender,
7th May, 1945.
(continued).

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force and the Soviet High Command will take such punitive or other action as they deem appropriate.

10 Signed at Rheims France at 0241 on the 7th day of May, 1945.

On behalf of the German High Command,

JODL.

In the presence of

On behalf of the Supreme Commander,
Allied Expeditionary Force.

W. B. SMITH.

F. SEVEZ,
Major General, French Army
(Witness).

On behalf of the
Soviet High Command.

SOUSLOPAROF.

20

No. 62.

Act of Military Surrender.

No. 62.
Act of Military
Surrender,
8th May, 1945.

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery, or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders

No. 62.
Act of Military
Surrender,
8th May, 1945.
(continued).

issued by the Supreme Commander, Allied Expeditionary Force and by the Supreme High Command of the Red Army.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force and the Supreme High Command of the Red Army will take such punitive or 10 other action as they deem appropriate.

6. This act is drawn up in the English, Russian and German languages. The English and Russian are the only authentic texts.

Signed at Berlin, on the 8th day of May 1945.

v. FRIEDEBURG KEITEL STUMPF

On behalf of the German High Command.

In the presence of:

A. W. TEDDER,
On behalf of the Supreme
Commander Allied
Expeditionary Force.

G. ZHUKOV,
On behalf of the Supreme
High Command of the 20
Red Army.

At the signing also were present as witnesses:

J. DE LATTRE-TASSIGNY,
General Commanding in
Chief French Army.

CARL SPAATZ,
General, Commanding United
States Strategic Air Forces.

No. 63.
Declaration
regarding the
de east of
Germany
(Cmd. 6648).
5th June,
1945.
(Print in back
cover).

No. 63.

**Unconditional Surrender of Germany, Declaration and other documents
dated 5th June 1945 (Cmd. 6648).**

(Print in pocket in back cover of Record.)

No. 64.
Protocol of
the proceedings
of the Berlin
Conference
(Comd. 2nd
August, 1945).
(Print in back
cover).

No. 64.

Protocol of the proceedings of the Berlin Conference (Cmd. 7087).

(Print in pocket in back cover of Record.)

Report of the Tripartite Merchant Marine Commission.

Section "A".

Report of the Tripartite Merchant Marine Commission.

Report of the
Tripartite
Merchant
Marine
Commission.
7th December,
1945.

1. The Governments of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America, agreed at the Conference held at Berlin between the 17th July and 2nd August, 1945, that "The German Merchant Marine, surrendered to the three Powers and wherever located shall be divided equally among the U.S.S.R., the U.K., and the U.S.A.". For this purpose the three Governments agreed to "Constitute a Tripartite Merchant Marine Commission comprising two representatives for each Government, accompanied by the requisite staff, to submit agreed recommendations to the three Governments for the allocation of specific German merchant marine ships and to handle other detailed matters arising out of the agreement between the three Governments regarding the German merchant ships".

2. As authorised by the above agreements, a Tripartite Merchant Marine Commission comprising two representatives of each Government was established. The representatives were:—

20	Admiral G. I. Levchenko	U.S.S.R.
	Mr. A. A. Affanasiev, N.K.M.F.	U.S.S.R.
	Vice Admiral Sir Geoffrey J. A. Miles, K.C.B.	U.K.
	Sir Andrew Common, M.W.T.	U.K.
	Vice Admiral R. D. Ghormley, U.S.N.	U.S.A.
	Mr. Thomas F. Dunn, W.S.A.	U.S.A.

3. The Commission met in the City of Berlin, at the Headquarters of the Allied Control Authority from 1st September to 7th December, 1945.

4. A special committee was established for deciding all practical matters connected with the division of the German Merchant Marine and for preparing recommendations for the distribution of the vessels between the three Powers. In addition, a Technical sub-committee was formed to inventory the vessels comprising the German Merchant Marine and to compile the lists of these vessels, as well as a Sub-Committee for their valuation according to the method adopted.

5. The representative of each of the three Governments assumed the responsibility for submitting lists of all German ships known to them and these lists were corrected by the Technical Sub-Committee as further information came to light. On the basis of these lists the Commission compiled the first basic lists of the German merchant ships available,

divided in four categories viz.: A—Passenger Liners, B—Cargo Liners, C—Tankers and Special ships, D—Dry Cargo vessels.

Each category of vessels was sub divided in two groups:—

1. Large vessels—Passenger ships over 1600 GRT and Cargo ships over 2300 DWT.
2. Small vessels—Passenger and cargo ships under above mentioned tonnage.

Vessels under 1600 GRT. or 2300 DWT. were listed separately as it was considered that the requirements of the Allied Control Council could be met out of this tonnage. 10

6. The basis adopted for division was a valuation of the tonnage at 1938 building prices.

The Committee worked out the values, taking into account type, size, speed, and age of the vessels also the type of machinery.

The method adopted was, of necessity, somewhat arbitrary, but it provided a practical means of assessing the relative values of the vessels to be distributed. Passenger vessels were valued separately. The values were assessed before it was known to which Power the vessel would be allocated.

7. On completion of the first Basic Lists on September 18, 1945, 20 inspection parties comprising representatives of the U.S.S.R., U.K., and the U.S.A., were sent to the ports in all zones of Germany, and to the United Kingdom, Denmark, Norway, Poland and Holland. Instructions were given to the representatives of the three Powers to inspect the German merchant vessels in the United States ports.

The inspection parties inspected the German merchant vessels which lay in the ports at the time of inspection. Some of the vessels mentioned in the first Basic List were not inspected as they were at sea. The inspection parties found a number of vessels not mentioned in the first Basic Lists. 30

Many vessels of small tonnage (Coastal ships) were not inspected as time did not allow of this.

According to the condition of the vessels, their machinery and cargo gear as recorded in the inspection reports, the values were adjusted and the final agreed lists were compiled.

8. The Commission discussed the question of the vessels, which according to the order of Allied Supreme Commander, were sunk with Chemical warfare ammunition. It was agreed that nine vessels, which were already sunk at the time of the discussion were to be excluded from the lists of the German merchant marine to be divided and to be 40

included in the List of Sunken ships with a notation to this effect. It was agreed to leave the other six vessels the loading of which with Chemical warfare ammunition had begun, in the list of the German merchant marine to be divided and to include them in the share of the United Kingdom.

9. The Commission at its first meeting addressed a letter to the Allied Control Council for Germany asking for information about the tonnage necessary to the needs of the German Peace economy.

10 On November 21st, 1945, the reply of the Allied Control Council was received, requesting the reservation for the needs of the German peace economy of 175,000 tons carrying capacity of the German merchant marine (see Appendix 3).

In order to meet this request, the Commission reserved 200,000 tons DWT, i.e. 175,000 tons carrying capacity (see Appendix 4); the Commission then worked out its recommendations for the division of the German merchant marine between the three Powers (see Appendix 1).

10. The Commission discussed the following questions, arising out of the decision of the Berlin conference regarding the German merchant marine:—

- 20 (a) Sunken vessels.
 (b) Merchant vessels that were owned by the Allies and Neutrals and seized by the Germans.
 (c) Repair and re-conversion of the vessels to be divided.
 (d) Supply of the ships to be divided, with spare parts, stores, fuel and food.
 (e) Provision of the vessels to be divided with the necessary shipping and technical documents.
 (f) Delivery of vessels divided between the three Powers.
 (g) German merchant ships under construction in Sweden.
 30 (h) German merchant ships which may be found in the future.
 (i) German Sea Fishing Fleet.
 (j) German port facilities and dredging fleet.
 (k) Inland Water Transport.
 (l) Compensation for use of vessels prior to delivery.

Section "B".

Recommendation of the Tripartite Merchant Marine Commission for the Division of the German Merchant Marine.

The Tripartite Merchant Marine Commission agrees and recommends to the three Governments that:—

- 40 1. The German merchant marine surrendered to the three Powers be divided equally among the U.S.S.R., the U.K., and the U.S.A. according to the attached list (see Appendix 1).

No. 65.
 Report of the
 Tripartite
 Merchant
 Marine
 Commission.
 7th December,
 1945,
 (continued).

2. In conformity with the decision of the Allied Control Council (see Appendix 3) 175,000 tons carrying capacity, i.e., 200,000 DWT, of the German merchant marine be reserved for German peace economy in accordance with the attached list (see Appendix 4).

3. All the German merchant vessels sunk within five miles of the coast of Germany (see Appendix 5) be destroyed before the end of 1946.

Each of the three Powers, represented on the Commission, shall report to the others when this has been done.

In the case of the few vessels mentioned in Appendix 5, sunk in the coastal zones of countries other than Germany, a formal request for their destruction shall be sent to the Sovereign Powers concerned. 10

4. Vessels not of German nationality (see Appendix 6) be placed in the custody of the Allied Control Council for Germany, pending return to their owners on proof of title.

5. The Commission discussed the question of the German merchant vessels that were in construction in the Swedish shipyards at the time of capitulation of Germany.

As the information about this question is insufficient, the matter be taken up through the normal diplomatic channels.

6. As regards German merchant ships which are subject to the Berlin Agreement and which may subsequently be found when the agreement about the division of the German merchant marine is in force, independently of the flag under which these ships may be, the three Governments take in such cases all appropriate measures through the normal diplomatic channels to secure an immediate delivery of these ships to the Allied Control Council for Germany, and the principles of the agreement for the division of the German merchant marine be applied to these ships. 20

7. The repair of damage caused by War or Marine Risks during use, running repairs effected for the benefit of the user, and running repairs effected while in use before delivery, be for the account of the user and not be charged to the recipient power. 30

Special fittings, as in the case of troopers, be for the account of the user. Passenger accommodations fitted for troop carrying have to be re-converted to their previous state at the expense of the country which made the fitting.

Capital restoration repairs and repairs to damage caused by war or marine casualties suffered by vessels prior to the Surrender of Germany, also improvements to crew accommodation be paid for by the Government to which the vessel is allocated to the Government in whose 40

country or zone the repair has been or will be effected. Where repairs have been or will be effected in Germany the cost be borne by Germany and charged against the Reparations' account of the recipient power.

The custodian power shall facilitate the repair of a vessel in Germany allocated to the other powers to the extent of making her seaworthy to sail or be towed before German repair facilities are radically reduced in accordance with the Allied Policy agreed at Berlin.

In the U.K. repair facilities will also be granted but no special priority can be given.

10 8. All spare parts, stores, furniture and equipment on board be handed over at the time of transfer to the recipient power and anything removed from the vessel by the custodian power or its agents be returned.

9. All available documents on board or in the possession of the custodian power or its agents be handed over at the time of delivery. Plans known to be available in the builders yards be handed over also.

10. On transfer the custodian power shall certify to the recipient power the authority under which delivery is made.

20 11. The physical delivery of the vessels be started immediately on ratification of the report and recommendations of the Commission, and it is hoped that delivery can be begun by 20th December, 1945. Between the signing of the report and ratification information on locations of ships to be transferred be supplied to the recipient powers and vessels be concentrated in nominated agreed ports. Representatives of each of the three Powers in the ports of delivery be instructed to give every possible assistance to the recipient power.

Every effort be made to complete the delivery of the ships by the 20th January, 1946.

30 All other matters relative to the delivery of German merchant vessels lying in ports of Powers represented on the Commission or of zones occupied by them be dealt with bi-laterally between the Sovereign Nations concerned, in other ports they be arranged direct between the recipient power and the country concerned.

12. If any German vessels, allocated under the division lists to one of the three Powers be lost or damaged before the physical delivery to the said Power, while in service by another Power, this last Power is under the obligation to give to the Power to which the vessel was to be delivered a vessel of similar type from its own list or to repair the damaged vessel at its expense.

40 13. As the Commission failed to reach agreement on the disposal of the German fishing fleet, dredger fleet, port facilities, inland water

No. 65.

Report of the
Tripartite
Merchant
Marine
Commission.
7th December,
1945,
(continued).

No. 65.
Report of the
Tripartite
Merchant
Marine
Commission.
7th December,
1945,
(continued).

transport and compensation for use of vessels prior to delivery, it was agreed to recommend to the three Governments to decide these questions separately without connecting them with the division of the German merchant marine.

14. The Tripartite Merchant Marine Commission be dissolved on the date of the ratification of this report and recommendations.

After the dissolution of the Tripartite Merchant Marine Commission, the Senior Naval Officers in Germany, representing each of the three Powers, assisted by the Representatives of Narkommorflot, the British Ministry of War Transport, and the U.S. War Shipping Administration, where necessary, be authorised to handle any questions which may subsequently arise out of the agreement between the three Governments regarding the German merchant marine. 10

15. The foregoing document is drawn up in the Russian and English languages. The text in each language is an original text and is of equal authenticity.

Senior Representative Union of Soviet Socialist Republics.	Senior Representative United Kingdom.	Senior Representative United States of America.	
Admiral G. I. Levchenko	Vice Admiral Sir Geoffrey J. A. Miles, K.C.B.	Vice Admiral R. L. Ghormley, U.S.N.	20
Representative, Union of Soviet Socialist Republics.	Representative, United Kingdom.	Representative, United States of America.	
Mr. A. A. Affanasiev, N.K.M.F.	Sir Andrew Common, M.W.T.	Mr. Thomas F. Dunn, W.S.A.	

Headquarters,

Allied Control Authority Building,

Berlin.

30

7th December, 1945.

No. 65(a)

No. 65(a).

Appendix 1 to
No. 65.**Appendix to No. 65.**

Appendix 1.

Agreed Recommendations for the Division of German
Merchant Vessels.

U.K. Allocation.

Serial Number	Name	Value in £
	* * * * *	
Uncompleted Vessels.		
10 1402	Ostmark	148,000
1404	Flenderwerke No. 347	78,500
1405	Flenderwerke No. 348	63,000
1406	Hull No. 506 at Flensburg	31,000
1407	Hull No. 507 at Flensburg	27,000
1408	Hull No. 508 at Flensburg	15,500
1410	Atlas	42,500
1411	Deutscherwerft No. 451	28,000
1412	Deutscherwerft No. 467	11,500
1414	Hull "Hermes" at Emden	25,500
1415	Victoria	41,500
	* * * * *	
20	(Note.—Further Appendices contained in the detailed recommendations of the Commission for the allocation of German ships to the U.S.S.R. and the United Kingdom.)	

No. 66.

No. 66.

Telegram from British Embassy, Moscow, to Foreign Office, London.

(Copy)

(CYPHER)

DIPLOMATIC (SECRET)

FROM MOSCOW TO FOREIGN OFFICE.

Mr. Roberts
No. 5530.

30 31st December, 1945.

D. 6.30 p.m. 31 December, 1945.
R. 6.53 p.m. 31 December, 1945.Telegram from
British
Embassy,
Moscow to
Foreign Office,
London.
31st December,
1945.

Following is translation of letter from Molotov to you.

(Begins)

Dear Mr. Bevin,

In acknowledging receipt of your letter of December 26th on question of dividing German fleet, I agree with you that at present there are no reasons for delay delivery of ships of German navy and merchant fleet on the division of which agreement has already been reached on

No. 66.

Telegram from
British
Embassy,
Moscow to
Foreign Office,
London,
31st December,
1945,
(continued).

Tripartite Commission. At the same time I have to inform you that Soviet Government has approved the Tripartite Commission's report and recommendations of December 7th about division of German merchant fleet except Clause 14 of recommendations dealing with dissolution of Tripartite Commission whose activity in the opinion of Soviet Government has not yet been completed.

(Ends)

No. 67.

Letter—
Secretary of
State for
Foreign Affairs
to Russian
Ambassador,
18th January,
1946.

No. 67.**Letter—Secretary of State for Foreign Affairs to Russian Ambassador.**

No. W.551/41/58.

Foreign Office, S.W.1,
18th January, 1946.

10

Your Excellency,

I have the honour to inform your Excellency that His Majesty's Government have considered the Report and Recommendations of the Tripartite Merchant Marine Commission signed in Berlin on the 7th December, 1945, and have decided to accept them subject to the following reservations:—

(1) The lists of ships for division between the three Powers and to be retained for the German peace economy contain a small number of vessels which have been claimed by other Governments. They also contain other minor errors. His Majesty's Government consider that appropriate adjustments should be made in the allocations to satisfy legitimate claims and rectify errors. Details are contained in the enclosed Memorandum.

20

(2) With regard to the recommendation covering the treatment of non-German ships listed in Appendix 6 to the Report, His Majesty's Government desire to record that most of these ships have already been returned to their owners. His Majesty's Government are under formal obligations to certain other Governments in regard to the return of their ships captured or found in the course of operations and the acceptance by His Majesty's Government of the Commission's recommendations must be subject to these obligations, which are known to the Governments of the United States and Union of Soviet Republics.

30

(3) His Majesty's Government reserve the right to consider in individual cases whether German ships sunk within five miles of the coast of the British zone of Germany should be salvaged or destroyed. They will, however, report to the Governments of the United States and the Union of Soviet Socialist Republics the action taken and the reason for it.

(4) Many of the ships divided between the three Powers or to be retained for the German peace economy, having been seized in prize, are the subject of proceedings in the Prize Court of the United

40

Kingdom. In accepting the Report of the Commission, His Majesty's Government desire to point out that these vessels are subject to the directions of the Prize Court, and this may limit their ability to give complete effect to some of the detailed recommendations as to the procedure for delivery.

(5) The Report recommends dates for the commencement and completion of delivery of vessels allocated between the three Powers which His Majesty's Government consider impossible to achieve.

10 (6) While His Majesty's Government accept in principle the recommendations of the Commission regarding the division of liability as between the custodian and recipient Power for costs incurred in connection with German ships prior to delivery, they reserve the right, in view of certain accounting and currency difficulties involved, to discuss further the method of calculation and payment, particularly in regard to the cost of repairs effected in Germany.

20 (7) The acceptance by His Majesty's Government of the Report and recommendations is without prejudice to the arrangements already agreed upon as to the re-allocation of ships falling to the shares of the United Kingdom and United States Governments to meet the claims of other Western Allies. His Majesty's Government must also reserve the question of responsibility for the six ships to be sunk with chemical warfare ammunition on board in accordance with the decision of the Supreme Allied Commander.

(8) As soon as the Report and Recommendations have been ratified by all three powers, His Majesty's Government will commence deliveries forthwith and will proceed to carry out the recommendations as quickly as practicable.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,
(For the Secretary of State)

(Sgd.) R. A. GALLOP.

His Excellency,
Monsieur Feodor Tarasovitch Gousev,
etc. etc. etc.

Harrington House,
13 Kensington Palace Gardens, W.8.

No. 68.

40 **Letter dated the 18th January, 1946—Under Secretary of State for Foreign Affairs to American Ambassador.**

(not printed).

In similar terms to Document No. 67.

No. 67.

Letter—
Secretary of
State for
Foreign Affairs
to Russian
Ambassador.
18th January,
1946.
(continued).

No. 68.

Letter—
Under
Secretary of
State for
Foreign Affairs
to American
Ambassador.
18th January,
1946,
(Not printed).

No. 69.

No. 69.

Letter—
American
Ambassador to
Secretary of
State for
Foreign
Affairs.
2nd February,
1946.

Letter—American Ambassador to Secretary of State for Foreign Affairs.

(W.1455/41/58)

United States Embassy,
1, Grosvenor Square, W.1.
2nd February, 1946.

Dear Mr. Bevin,

I am instructed to advise you that my Government has approved the Tripartite Merchant Marine Commission report on the disposition of German merchant ships and that it concurs in the stipulation by the Government of the Union of Soviet Socialist Republics that the Tripartite Merchant Marine Commission should continue in existence for the time being. 10

My Government finds it necessary to make a reservation concerning the transfer of title to certain ships which the report allocated to the United Kingdom and the U.S.S.R. but which are in United States possession and on which prize court proceedings have been instituted. Transfer of title to these ships must await the completion of technical proceedings and be subject to some guarantee to safeguard the United States Government, which has given the undertaking to the prize court, against possible claims against these ships. This reservation is necessary because the institution of prize court proceedings is interpreted to imply requisition of title by the United States Government and therefore necessitates legal authority, possibly by special legislation, for the transfer of title to other Governments. In the meanwhile my Government is ready to proceed with the disposition of the ships and to transfer custody subject to this reservation. Details may be worked out by the War Shipping Administration with the appropriate shipping authorities of your Government and of the Soviet Government. It is understood that this reservation affects only a few ships, including the s.s. Milwaukee scheduled to be transferred to the United Kingdom, and the s.s. Caribia and Kaiser, scheduled to be transferred to the U.S.S.R., and a few other ships at most. 20 30

Sincerely,

(Signed) W. J. GALLMAN,
for the Ambassador.

The Right Honourable
Ernest Bevin, M.P.
Secretary of State for Foreign Affairs,
The Foreign Office.

No. 70.

No. 70.

Note—Russian Ambassador to Foreign Office.

Note—
Russian
Ambassador
to Foreign
Office.
11th February,
1946.

Translation from Russian.

Soviet Embassy.

No. 35-A.

11th February, 1946.

The Embassy of the Union of Soviet Socialist Republics present their compliments to the British Foreign Office, and with reference to the latter's note of 18th January 1946, No. W551/41/58 and memorandum attached thereto, have the honour to communicate the following.

10 The Soviet Government have noted the British Government's statement that they have considered and accepted the report and recommendations of the Tripartite Commission for allocating the German merchant fleet. With regard to the reservations made by the British Government in this connection, the Soviet Government consider it necessary to make the following declaration.

20 The Soviet Government take note of the British Government's declaration that they are bound by formal undertakings regarding the non-German vessels listed in Annex 6 to the report. It goes without saying that these undertakings of the British Government should not cover Latvian and Estonian vessels, which are to be returned to the Latvian and Estonian Soviet Socialist Republics respectively.

30 The Soviet Government do not object to the nine vessels referred to in paragraph 1 of the British memorandum being deleted from the list of the German merchant fleet, with consequent redistribution between the three Allied Powers of the vessels to be allocated. They cannot however, agree with the British Government's reservation in paragraph 1 of the letter so far as this reservation makes the transfer of German vessels which it was decided were to be allocated in accordance with the decisions of the Berlin Conference, dependent on future decisions of the British Prize Courts. The Soviet Government have also no objections to the proposal contained in paragraph 3 of the letter. In this connection it is assumed that the Soviet Union of course will retain a similar right in respect of German vessels sunk in the waters of the Soviet Zone of occupation in Germany.

40 The Soviet Government consider that the work of the Tripartite Commission should be continued for the purpose of allocating the remaining classes of vessels and for the settlement of other questions connected with the transfer to the Three Powers of all German merchant vessels allocated. The Commission should examine and decide on the spot any questions which may arise in connection with the transfer of vessels and in particular the questions referred to in paragraphs 5, 6 and

No. 70.

Note—
Russian
Ambassador
to Foreign
Office.
11th February,
1946.
(continued).

7 of the British memorandum. The Commission might discuss the questions of the method of calculation and payments for repairs carried out on German vessels which are being transferred to the Soviet Union and the question of the three tankers claimed by the Norwegian Government. If the Commission considers the Norwegian Government's claims justified, the Soviet Government will transfer the tankers in question to the Norwegian Government on condition that in the final rectification of the lists of vessels to be transferred the Soviet Union will receive compensation by the transfer of vessels of a similar type.

No. 71.

10

No. 71.

Note—Foreign
Office to
Russian
Ambassador.
21st March,
1946.

Note—Foreign Office to Russian Ambassador.

No. W1869/41/58.

With the Compliments of the Under Secretary of State for Foreign Affairs.

The Foreign Office present their compliments to the Soviet Embassy and with reference to the latter's note of 11th February, 1946, have the honour to state as follows:—

(i) His Majesty's Government desire to make it clear that nothing in the second paragraph of Foreign Office Note No. 20 W551/41/58 of 18th January, 1946, was intended to refer to Latvian or Estonian Vessel.

(ii) His Majesty's Government take note that the Soviet Government do not object to the nine vessels referred to in paragraph 1 of the Memorandum enclosed with the Foreign Office note of 18th January being deleted from the list of the German merchant fleet, with consequent redistribution between the three Powers of the vessels to be allocated.

(iii) As regards the reservation made in paragraph 4 of the Foreign Office note of 18th January concerning ships which are the 30 subject of proceedings in the Prize Court of the United Kingdom, His Majesty's Government desire to point out that they were obliged to make this reservation as they are not empowered to dispose by any executive act of vessels which are the subject of Prize proceedings or to issue directions to the Prize Court, but are bound, like every other litigant, to submit their requests to the independent judgment of the Court and to abide by the Court's decisions. Nevertheless it should be mentioned that the Court has already

decreed the condemnation of the vessels in question and arrangements have been made to transfer the title therein to the Soviet Government.

No. 71.
 Note—Foreign
 Office to
 Russian
 Ambassador.
 21st March,
 1946,
 (continued).

10 (iv) His Majesty's Government take note that the Soviet Government have no objection to the reservation contained in paragraph 3 of the Foreign Office note of 18th January, whereby His Majesty's Government have reserved the right to consider in individual cases whether German ships sunk within five miles of the coast of the British zone of Germany should be salvaged or destroyed. His Majesty's Government will of course raise no objection if a similar right is exercised by the Soviet Government in respect of the Soviet zone.

(v) With respect to the question of responsibility for the six ships to be sunk with chemical warfare ammunition on board, His Majesty's Government desire to make it clear that paragraph 7 of the Foreign Office note of 18th January was not intended to suggest, that this question should be re-opened as between His Majesty's Government and the Soviet Government.

20 (vi) As regards the continuation of the work of the Tripartite Merchant Marine Commission, His Majesty's Government have already intimated to the Soviet Government that they agreed that the Commission should remain in existence for the time being and in fact the Commission has already resumed its sittings. His Majesty's Government agree that the Commission might discuss the questions referred to in paragraphs 5, 6 and 7 of the Memorandum enclosed with the Foreign Office note of 18th January, and also the question whether the three tankers mentioned in paragraph 4 of the Memorandum should be transferred to the Norwegian Government, subject to the allocation to the Soviet Government of vessels of a similar type. As regards the question of the method of calculation and payment for costs incurred in connection with German ships prior to delivery, however, and particularly the cost of repairs effected in Germany, His Majesty's Government consider that this matter should be discussed by the Finance Divisions of the Soviet, United Kingdom and United States Elements of the Control Commission.

30

2. It is assumed that a copy of the Soviet Embassy's note of 11th February will be communicated to the United States Government. A copy of this reply is therefore being transmitted to the United States Embassy in London for the information of the United States Government.

40

Foreign Office, S.W.1.

21st March, 1946.

No. 72.

Affidavit of
D. Haigh.
10th October,
1950.

No. 72.

Affidavit of D. Haigh.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

	Hull 507.	No. 2355.
Claimants:	Schiffahrt Treuhand G.m.b.H.	
	Hull 508.	No. 2370.
Claimants:	Schiffahrt Treuhand G.m.b.H.	10
	“Flenderwerke 347.”	No. 2356.
Claimants:	Lubecker Flender-Werke A. G.	No. 2371.
	“Flenderwerke 348.”	
Claimants:	Lubecker Flender-Werke A. G.	

I, DURBAN HAIGH of the Ministry of Transport, Berkeley Square House, Berkeley Square in the County of London make oath and say as follows:— 20

1. I am the head of the Ship Management Branch of Ship Management and Contracts Division of the Ministry of Transport and the files relating to Hulls 507 and 508 and Flenderwerke 347 and Flenderwerke 348 have been in my possession and I have dealt with matters relating to these ships since August, 1948.

2. After the surrender of Germany the German Merchant Marine (except as regards a limited amount of tonnage left for German use) was divided between the United Kingdom, the United States of America and Russia by the Tripartite Merchant Marine Commission. The vessels allocated by the Tripartite Merchant Marine Commission to the United Kingdom and the United States were then re-allocated among the Western Allies (including the United Kingdom and the United States) through the Inter-Allied Reparation Agency (I.A.R.A.). In the case of all ex-German ships allocated to the United Kingdom by I.A.R.A. arrangements were made for certain repair work and work to complete partly built ships to be carried out in German shipyards through the medium of the Allied Control Commission. 30

3. In some cases the actual orders to put work in hand were given by the occupying power prior to and in anticipation of the allocation of 40

individual vessels to particular Allies. It was arranged between the Powers that responsibility for payment for the work ordered rested ultimately upon the Power to which the vessel was allocated.

No. 72.
Affidavit of
D. Haigh,
10th October,
1950,
(continued).

4. The Ministry of Transport became responsible for paying for the cost of all work performed on ships after the capitulation which were eventually allocated to the United Kingdom.

5. The Hulls 507 and 508 and Flenderwerke 347 and Flenderwerke 348 were completed in German shipyards. Hulls 507 and 508 were completed by Flensberger Schiffbau A. G. of Flensburg and Flenderwerke 347 and Flenderwerke 348 were completed by Lubecker Flender-Werke A. G. The Hulls 507 and 508 after completion were named "Empire Towy" and "Empire Frome" and Flenderwerke 347 and Flenderwerke 348 were named "Empire Nene" and "Empire Ely" respectively.

6. The work performed on these ships in the German shipyards after the surrender of Germany has been paid for entirely by the Ministry of Transport. Payment of the accounts for the work performed in the German shipyards prior to the 1st January, 1947, was made to the Foreign Office (German Section) and in respect of work performed after the 1st January, 1947, payment was made to the Joint Export/Import Agency which was a section of the Allied High Commission in the Anglo-American Zone.

7. Payment was made to the Foreign Office in respect of work performed before the 1st January, 1947, because the Foreign Office were at that time entirely responsible for the British Zone. On the 1st January, 1947, the British and United States Zones were fused and payments in respect of work done thereafter became due to the Joint Export/Import Agency.

8. Before the accounts were paid the procedure was that they were submitted by the German shipyards, either directly or through some other body to the Foreign Office or the Joint Export/Import Agency, as the case might be, the accounts having first been examined and checked by the German price-fixing authorities.

9. The German price-fixing authorities endorsed the accounts to indicate their satisfaction in regard to the charges made and the Foreign Office or the Joint Export/Import Agency thereupon sought reimbursement and obtained payment from the Ministry of Transport.

10. The accounts rendered to the Ministry of Transport were only in respect of work done on the ships after the surrender of Germany and the Ministry of Transport have not at any stage been concerned with the cost of work performed on the ships before the surrender.

11. The Ministry of Transport have not at any time been concerned with the manner in which the monies they paid to the Foreign Office,

No. 72.
 Affidavit of
 D. Haigh,
 10th October,
 1950,
 (continued).

German Section, or the Joint Export/Import Agency was disposed of or how the German shipyards were paid.

12. Pending the rendering of detailed accounts for all ships repaired or completed in Germany for Ministry of Transport account after the surrender, advances were made by the Ministry of Transport from time to time to the Foreign Office, German Section, and the Joint Export/Import Agency but these advances were not related to particular ships or particular yards. On agreement being reached in regard to all accounts the Ministry of Transport effected a final settlement with the Foreign Office, German Section, and the Joint Export/Import Agency in 10 respect of the balance of its liability. I understand that there has been a subsequent adjustment agreed upon between the Foreign Office, German Section and the Joint Export/Import Agency to allow for certain payments previously treated as being due to the Joint Export/Import Agency having ultimately been shown to be due to the Foreign Office.

13. The total payments made to the Foreign Office, German Section, and the Joint Export/Import Agency in respect of the completed ships are as follows:—

“Empire Towy” (Hull 507)	£171,491	0	0	20
“Empire Frome” (Hull 508)	£202,203	0	0	
“Empire Nene” (Flenderwerke 347)	£229,337	4	9	
	(RM. 3,079,999.98)			
“Empire Ely” (Flenderwerke 348)	£352,047	12	0	
	(RM. 4,728,000)			

The rate of exchange for conversion of sterling to Marks was taken as 13.43.

14. Certain values were placed on ships in the Report of the Tripartite Merchant Marine Commission. The values placed on these ships were based on 1938 figures and were purely arbitrary values in 30 order to enable the ships to be allocated between the United Kingdom, the United States of America and the U.S.S.R. in the proportion of one-third to each based on the total value.

Sworn by the above-named Durban }
 Haigh at 43/4, Albermarle Street, W.1, } D. HAIGH.
 this 10th day of October, 1950. }

Before me,

J. A. H. HORTIN,
 A Commissioner for Oaths.

Affidavit of A. H. Kent.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

No. 2355.

Hull 507

Claimants: Schiffahrt Treuhand G.m.b.H.

No. 2370.

Hull 508

Claimants: Schiffahrt Treuhand G.m.b.H.

No. 2356.

Flenderwerke 347

Claimants: Lubecker Flender-Werke A.G.

No. 2371.

Flenderwerke 348

Claimants: Lubecker Flender-Werke A.G.

I, ALAN HUGH KENT of Treasury Solicitor's Department, Storey's Gate, St. James's Park, London, make oath and say as follows:—

20 1. I am an Assistant Solicitor in the Treasury Solicitor's Department and in my capacity as such have the conduct of these proceedings on behalf of the Procurator General.

2. I am informed by His Majesty's Secretary of State for War and verily believe that the port of Lubeck was occupied by His Majesty's Army on the 2nd May, 1945, and that the port of Flensburg was occupied by His Majesty's Army on the 10th May, 1945.

30 3. I have also caused enquiries to be made by the Land Commissioner Schleswig-Holstein as to the dates on which the ports of Lubeck and Flensburg were occupied and I am informed from the Office of the Land Commissioner Schleswig-Holstein that Lubeck was occupied by armoured detachments of His Majesty's Army on the 2nd May, 1945, and that Flensburg was occupied by a Military Government detachment of His Majesty's Army on the 10th May, 1945.

Sworn by the above-named Alan
Hugh Kent at 21 Old Queen Street }
in the City of Westminster this 27th } (Sgd.) ALAN H. KENT
day of October, 1950 }

Before me,

(Sgd.) PETER WINCKWORTH,

A Commissioner for Oaths.

No. 74.

Affidavit of
H. D. Samuel—
m.v. "Hermes".
18th January,
1951.

No. 74.

Affidavit of H. D. Samuel and Exhibit thereto.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

Writ No. 2360.

s.s. "Hermes".

Claimants: Dampfschiffahrts Gesellschaft "Neptun".

I, HERBERT DAWKIN SAMUEL of the Admiralty, Queen Anne's Mansions, London, make oath and say as follows:—

1. I am an Assistant Secretary in the Admiralty and the Head of the Naval Law Branch of the Secretary's Department. 10

2. I have had search made in the Admiralty for the signals originating from the Admiralty and the Combined Chiefs of Staff in 1944 and 1945 on the subject of captured German ships.

3. I am not permitted to disclose the text of the top secret signals which were secret owing to the contents thereof and also because they were sent in secret cypher.

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: 20

(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 30 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 effected in Bremen and Bremerhaven 40 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".

No. 74.
Affidavit of
H. D. Samuel—
m.v. "Hermes".
18th January,
1951.
(continued).

Sworn by the above-named Herbert
Dawkin Samuel at 17, Old Queen
Street in the City of Westminster } (Sgd.) H. D. SAMUEL.
10 this 18th day of January, 1951 }

Before me,
(Sgd.) G. F. COOMBS,
A Commissioner for Oaths.

No. 74(a)

No. 74(a).

Exhibit to No. 74.

Exhibit to
No. 74.

"A"

This is the Exhibit marked "A" referred to in the Affidavit of Herbert Dawkin Samuel sworn this 18th day of January, 1951, before me,

20 (Sgd.) G. F. COOMBS,
A Commissioner for Oaths.

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

Date 8.6.45.

Info. A.N.C.X.F.
C. in C. Rosyth.
F.O.I.C. Humber.
30 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
40 at point of departure for U.K. by reason uncertainty regarding arrangements for refitting.

No. 75.

Affidavit of
D. Haigh—
m.v. "Hermes".
19th January,
1951.

No. 75.

Affidavit of D. Haigh.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.
(In Prize.)

Writ No. 2360.

s.s. "Hermes"

Claimants: Dampfschiffahrts Gesellschaft "Neptun"

I, DURBAN HAIGH of the Ministry of Transport, Berkeley Square House, Berkeley Square in the County of London make oath and say as follows:—

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1. I am the Head of the Ship Management branch of the Ship Management and Contracts Division of the Ministry of Transport and the files relating to the "Hermes" have been in my possession and I have dealt with matters relating to this ship since August, 1948.

2. After the surrender of Germany the German Merchant Marine (except as regards a limited amount of tonnage left for German use) was divided between the United Kingdom, the United States of America and Russia by the Tripartite Merchant Marine Commission. The vessels allocated by the Tripartite Merchant Marine Commission to the United Kingdom and the United States were then re-allocated among the Western Allies (including the United Kingdom and the United States) through the Inter-Allied Reparation Agency (I.A.R.A.). In the case of all ex-German ships allocated to the United Kingdom by I.A.R.A. arrangements were made for certain repair work and work to complete partly built ships to be carried out in German shipyards through the medium of the Allied Control Commission.

20

3. In some cases the actual orders to put work in hand were given by the occupying power prior to and in anticipation of the allocation of individual vessels to particular Allies. It was arranged between the Powers that responsibility for payment for the work ordered rested ultimately upon the Power to which the vessel was allocated.

30

4. The Ministry of Transport became responsible for paying for the cost of all work performed on ships after the capitulation which were eventually allocated to the United Kingdom.

5. On the surrender of Germany the "Hermes" lay aground in a damaged condition and still incomplete at Emden. After the surrender the "Hermes" was partially repaired by Nordsee Werke, Emden, and thereafter she was towed from Emden to Hamburg for the completion of the repairs by Deutsche Werft A.G. in Hamburg.

6. The work performed on the "Hermes" in the shipyards of the two German firms mentioned in paragraph 5 hereof has been paid for

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entirely by the Ministry of Transport. Payment of the accounts for the work performed in the Nordsee Werke shipyards at Emden which amounted in all to Fifteen Thousand One Hundred and Eighty-Two Pounds Six Shillings and Five Pence (£15,182 6s. 5d.) was made to the Foreign Office (German Section) in so far as the accounts related to work performed prior to the 1st January, 1947 and to the Joint Export/Import Agency, which was a section of the Allied High Commission in the Anglo-American Zone, in so far as the accounts related to work performed after that date.

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D. Haigh—
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19th January,
1951,
(continued).

10 7. Payment was made to the Foreign Office in respect of work performed before the 1st January, 1947, because the Foreign Office were at that time entirely responsible for the British Zone. On the 1st January, 1947, the British and United States Zones were fused and payments in respect of work done thereafter became due to the Joint Export/Import Agency.

20 8. Before the accounts were paid the procedure was that they were submitted by the German shipyards, either directly or through some other body to the Foreign Office or the Joint Export/Import Agency, as the case might be, the accounts having first been examined and checked by the German price-fixing authorities.

9. The German price-fixing authorities endorsed the accounts to indicate their satisfaction in regard to the charges made and the Foreign Office or the Joint Export/Import Agency thereupon sought reimbursement and obtained payment from the Ministry of Transport.

10. The accounts rendered to the Ministry of Transport were only in respect of work done on the ships after the surrender of Germany and the Ministry of Transport have not at any stage been concerned with the cost of work performed on the ships before the surrender.

30 11. The Ministry of Transport have not at any time been concerned with the manner in which the monies they paid to the Foreign Office, German Section, or the Joint Export/Import Agency was disposed of or how the German shipyards were paid.

40 12. Pending the rendering of detailed accounts for all ships repaired or completed in Germany for Ministry of Transport account after the surrender, advances were made by the Ministry of Transport from time to time to the Foreign Office, German Section, and the Joint Export/Import Agency but these advances were not related to particular ships or particular yards. On agreement being reached in regard to all accounts the Ministry of Transport effected a final settlement with the Foreign Office, German Section, and the Joint Export/Import Agency in respect of the balance of its liability. I understand that there has been a subsequent adjustment agreed upon between the Foreign Office, German Section and the Joint Export/Import Agency to allow for certain payments previously treated as being due to the Joint

No. 75.

Affidavit of
D. Haigh—
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19th January,
1951.
(continued).

Export/Import Agency having ultimately been shown to be due to the Foreign Office.

13. Following the temporary repair of the "Hermes" at Emden she was towed to Hamburg for completion in the shipyard of Deutsche Werft A.G. with whom a contract for the necessary work was concluded by the Ministry of Transport. This contract provided that the shipyard would be paid for the cost of labour and material employed, and in addition, a fixed fee for the work based on previously accepted estimates as to the total cost; the fixed fee being to cover overheads and profit.

14. In accordance with the terms of this contract, the Ministry of Transport paid to Deutsche Werft A.G. through the medium of the Joint Export/Import Agency the sum of Two Hundred and Fourteen Thousand Eight Hundred and Seven Pounds Fifteen Shillings (£214,807 15s.) which amount included the sum of Three Thousand and Twenty-eight Pounds One Shilling and Nine Pence (£3,028 1s. 9d.) being the cost of the towage of the "Hermes" from Emden to Hamburg. 10

15. In addition to the sums paid to the German shipyards at Emden and Hamburg the Ministry of Transport incurred a further expenditure of some Thirty Seven Thousand Pounds (£37,000) in connection with the completion of the vessel in respect of materials and equipment supplied from the United Kingdom and also a sum of about One Thousand Pounds (£1,000) in respect of professional fees for survey and like services. 20

Sworn by the above-named Durban
Haigh at 43/44 Albemarle Street,
W.1, this 19th day of January, {
1951

(Sgd.) D. HAIGH.

Before me,

(Sgd.) J. A. H. HORTIN,
A Commissioner for Oaths.

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No. 76.

Affidavit of
H. T. Baillie-
Grohman.
22nd January,
1951.

No. 76.

Affidavit of H. T. Baillie Grohman.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(In Prize.)

I, VICE ADMIRAL HAROLD TOM BAILLIE-GROHMAN, C.B., D.S.O., O.B.E., of Fletcher's Sidlesham Common Chichester make oath and say as follows:—

1. Early in 1945 some months before the surrender of Germany I was appointed the Flag Officer Kiel area. 40

2. In my capacity of Flag Officer Kiel area the ports of Lubeck and Flensburg among others came under my command.

3. According to my records the port of Lubeck was captured by the Army on 2nd May, 1945. The Navy arrived in the port on 3rd May and I hoisted my flag at Travemunde (the mouth of the river on which Lubeck lies) on this date. Captain M. J. Yeatman, R.N. took over as Naval Officer in charge on 5th May and I moved my headquarters to Kiel on 7th May.

10 4. According to my records the port of Flensburg was occupied by Naval forces on 10th May, 1945. Captain B. D. Bell-Salter took over as Naval Officer in charge Flensburg on that day.

5. The Naval Officers in charge at Lubeck and Flensburg were appointed to control the ports and the shipping in them and were responsible to me. I came under the Commander in Chief (Naval) Germany who immediately after the occupation had his headquarters in Paris and later came to Minden in Germany.

20 6. The British Naval and Military authorities controlled all the labour and fuel in these ports after the occupation of them so that nothing could be done by the Germans with their ships whether they were completed ships or uncompleted ships building in shipyards. The original idea had been to have armed guards in every ship who were to be soldiers, but the Army found they could not undertake this duty and only specially selected ships had British Army guards. All small craft were ordered into Tirpitz Hafen, Kiel, and placed in a pool. Certain tugs and small craft were detailed to work for us under a permit system and a patrol system of harbour craft was organised to prevent sabotage and inter communication between the larger ships.

30 7. Control in general was often exercised through the appropriate German Official whom we made responsible, but when a large quantity of shipping was later found in the Kiel Canal and up the Schlei Fiord we sent small Naval parties there to take charge of it.

8. At the entrance to Kiel Harbour and at Travemunde we had tanks and some Army artillery to control the entrances.

Sworn by the above-named Harold }
Tom Baillie-Grohman at Chichester }
in the County of Sussex this 22nd }
day of January, 1951 }

H. T. BAILLIE-GROHMAN,
Vice-Admiral,
(Retired).

Before me,

J. S. WIDDOWS,

A Commissioner for Oaths.

40

No. 76.

Affidavit of
H. T. Baillie-
Grohman.
22nd January,
1951,
(continued).

No. 77.

Affidavit of
A. H. Kent—
m.v. "Hermes".
25th January,
1951.

No. 77.

Affidavit of A. H. Kent and Exhibit thereto.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

No. 2360.

(In Prize.)

M.V. "Hermes."

I, ALAN HUGH KENT of Storey's Gate, St. James's Park, London, S.W.1, make oath and say as follows:—

1. I am an Assistant Solicitor in the Treasury Solicitor's Department and in my capacity as such have the conduct of these proceedings on behalf of His Majesty's Procurator-General. 10

2. I am informed by His Majesty's Secretary of State for War and verily believe that the Port of Emden was occupied by His Majesty's Canadian Army on the 6th and 7th May, 1945.

3. There is now produced and shown to me marked "A.H.K.1" a certificate received by His Majesty's Procurator-General from the Harbour Master at Emden certifying that the motor vessel "Hermes" was in the Port of Emden between the 1st November, 1944 and the 17th February, 1948, and that she was in the Port of Emden at the time of capitulation. 20

Sworn by the above-named Alan
Hugh Kent at 17, Old Queen Street,
in the City of Westminster, the 25th
day of January, 1951.

ALAN H. KENT.

Before me,

G. F. COOMBS,
A Commissioner for Oaths.

No. 77(a).

Exhibit to
No. 77.

No. 77(a)

Exhibit to No. 77.

"A.H.K.1." 30

Wasserstrassenamt.
Hafenkapitan.

Emden, den 5. September, 1949.

Bescheinigung.

Es wird hiermit bescheinigt, dass der Neubau "Hermes" in der Zeit vom 1. November 1944 bis zum 17. Februar 1948 in Emden gelegen hat. Zur Zeit der Kapitulation halte "Hermes" in Aussenhafen festgemacht.

Stamp:
Wasserstra Benamt.
Emden.
Hafenkapitän.

I.A.
Hagemann. 40

Translation:

Certificate.

It is to certify that the hulk "Hermes" has been in the Port of Emden from the 1st November, 1944, till 17th February, 1948. During the capitulation the ship was berthed in the Aussenhafen.

(Signed) HAGEMANN.

This is the Exhibit marked "A.H.K.1" referred to in the Affidavit of Alan Hugh Kent sworn this 25th day of January, 1951,

Before me,

10 G. F. COOMBS,
A Commissioner for Oaths.

No. 77(a).

Exhibit to
No. 77,
(continued).

No. 78.

Affidavit of E. J. Passant.

No. 78.

Affidavit of
E. J. Passant,
25th January,
1951.

In the High Court of Justice.
Probate, Divorce & Admiralty Division.
In Prize.

Hull 507. Writ No. 2355.
Claimants: Schiffahrt Treuhand G.m.b.H.

20 Hull 508. Writ No. 2370.
Claimants: Schiffahrt Treuhand G.m.b.H.

Flenderwerke 347. Writ No. 2356.
Claimants: Lubecker Flender-Werke A.G.

Flenderwerke 348. Writ No. 2371.
Claimants: Lubecker Flender-Werke A.G.

"Hermes." Writ No. 2360.
Claimants: Dampfschiffahrts Gesellschaft "Neptun".

I, ERNEST JAMES PASSANT, Director of Research Librarian and Keeper of the Papers in His Majesty's Foreign Office, make oath and say as follows:—

30 I have had search made in the archives of the Foreign Office and can say:—

(1) The Protocol of the Proceedings of the Berlin Conference between the Heads of Government of the Union of Soviet Socialist

No. 78.
 Affidavit of
 E. J. Passant,
 25th January,
 1951,
 (continued).

Republics, United States of America and United Kingdom, of 2nd August, 1945 (Command Paper No. 7087) (hereinafter referred to as "the Potsdam Agreement") contains in Part IV B. the principles for the distribution of the German merchant marine. The material provisions are as follows:—

(a) The German Merchant Marine surrendered to the Three Powers and wherever located, was (with the exception of inland and coastal ships determined to be necessary to the maintenance of the basic German peace economy) to be divided equally among the Union of Soviet Socialist Republics, the United Kingdom and the United States of America. The United Kingdom and the United States of America were to provide out of their shares of the surrendered German merchant ships appropriate amounts for other Allied States, whose merchant marines had suffered heavy losses in the common cause against Germany, except that the Union of Soviet Socialist Republic was to provide out of its share for Poland; 10

(b) A Tripartite Merchant Marine Commission was set up to submit agreed recommendations to the three Governments for the allocation of specific German merchant ships.

(2) The Tripartite Merchant Marine Commission on 7th December, 1945, presented a report to the three Governments, recommending *inter alia* that a number of uncompleted vessels, including those the subject of the present proceedings, should be allocated to the United Kingdom. 20

(3) Subject to reservations which are not material in the present proceedings the three Governments accepted the aforementioned report of the Tripartite Merchant Marine Commission.

(4) On 14th January, 1946, the United Kingdom and United States of America concluded with France and fifteen other States the Agreement on Reparation from Germany (Treaty Series No. 56 (1947)) (hereinafter referred to as the "Paris Agreement") under which the Inter-Allied Reparation Agency was set up. It is the function of the Agency to make an equitable distribution among the signatories of the Paris Agreement of the capital equipment (including ships) available as reparations from Germany in accordance with the Potsdam Agreement. 30

(5) The United Kingdom and United States of America notified the Inter-Allied Reparation Agency that the vessels allocated to them in the report of the Tripartite Merchant Marine Commission were available for re-allocation among the signatories of the Paris Agreement (including themselves).

(6) On the 24th May, 1946, the Inter-Allied Reparation Agency approved a re-allocation which provided *inter alia* that the uncompleted 40

vessels, the subject of the present proceedings, should be allotted to the United Kingdom as part of its share of reparations from Germany.

Sworn by the above named Ernest James Passant at 17 Old Queen Street in the City of Westminster this 25th day of January 1951,

Before me,

G. F. COOMBS,

A Commissioner for Oaths.

No. 78.

Affidavit of
E. J. Passant.
25th January,
1951,
(continued).

E. J. PASSANT.

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No. 79.

No. 79.

Affidavit of C. H. Petrie.

Affidavit of
C. H. Petrie—
m.v. "Hermes".
5th February,
1951,

In the High Court of Justice.

Probate, Divorce & Admiralty Division.

No. 2360.

In Prize.

m.v. "Hermes".

I, CHRISTOPHER HENRY PETRIE, D.S.O., Royal Navy of 94, Piccadilly, London, W.1, make oath and say as follows:—

1. In February, 1945, I was appointed in command of Naval Party 1500 and as N.O.I.C. elect at Emden.

20 2. The port of Emden was surrendered to the Allied Forces on May 6th, 1945. I arrived in the port of Emden with Brigadier Rockingham of the Canadian Army on the morning of May 6th and the port was surrendered by Captain von Blissing of the Kriegsmarine about 10 a.m. From that moment I assumed control of the port. I commissioned H.M.S. Royal Prince as my Headquarter ship and my Naval Party arrived the same evening.

3. 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.

30 No German could enter the port precincts without a pass. Later a number of these were issued to German officials responsible for lock gates etc. and maintenance generally. It was impossible for the Germans to do anything to their ships or go aboard them.

4. No German was permitted to board a German ship or enter the shipyards without authority.

Sworn by the above named Christopher Henry Petrie at in the City of Westminster the 5th day of February, 1951.

C. H. PETRIE.

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Before me,

G. F. COOMBS,

A Commissioner for Oaths.

Judgment of Lord Merriman, P.

In the High Court of Justice.

Probate, Divorce & Admiralty Division.

(Admiralty.) (In Prize.)

Royal Courts of Justice, Thursday, 10th May, 1951.

Before:

THE RIGHT HONOURABLE THE PRESIDENT.
(Lord MERRIMAN.)

“Hull 507” Writ No. 2355. 10

Claim of Schiffahrt Treuhand G.m.b.H.

“Hull 508” Writ No. 2370.

Claim of Schiffahrt Treuhand G.m.b.H.

“Flenderwerke 347” Writ No. 2396.

Claim of Lubecker Flender-Werke A.G.

“Flenderwerke 348” Writ No. 2371.

Claim of Lubecker Flender-Werke A.G.

m.v. “Hermes” Writ No. 2360.

Claim of Dampfschiffahrts Gesellschaft “Neptun”.

(Transcript of the shorthand notes of James Towell & Sons, 12, New 20
Court, Carey Street, London, W.C.2.—Official Shorthand-writers,
Admiralty and Prize Courts.)

The Attorney-General (Sir Hartley W. Shawcross, K.C.), Mr. C. T. Le
Quesne, K.C. and Mr. Maurice E. C. Rena (instructed by The
Treasury Solicitor) appeared on behalf of His Majesty’s Procurator-
General.

Mr. Kenneth Diplock, K.C. and Mr. R. I. Threlfall (instructed by
Messrs. Freshfields) appeared on behalf of the Claimants.

J U D G M E N T .

The PRESIDENT: In these cases the Crown seeks condemnation of 30
five partly built ships which, it is alleged, were captured in Prize with
the captures of the ports in North-West Germany where they lay at the
time of the total surrender of Germany to the Allies in 1945. The
material facts as to the situation and state of construction of these objects
are as follows:—

The “Hermes” was lying afloat at Emden. At the outbreak of 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, it was decided to tow her to Emden for completion. There

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 below the water line were provisionally stopped with wooden blocks. She lay in the harbour in Emden damaged, grounded and still incomplete, at the time of the surrender. As it is expressly admitted by the Claimants that she had acquired the character of a ship, it is unnecessary to go into further detail. I will refer to her throughout simply by her name.

10 *347 and 348* were still on the stocks at Lubeck. *347* was almost ready for launching, save that she had not been painted. About 70% of the building of *348* was completed but the outer sides and decks were only partly rivetted. In view of the definition of a "ship" submitted by the Claimants it might be said that *347* had already acquired that character. That argument, however, was not pressed on behalf of the Crown and I do not think it is necessary to draw any distinction between these two structures. I will refer to them throughout as the Lubeck structures.

20 *507 and 508* were on the stocks at Flensburg. Their state of construction was considerably less advanced. 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. Again I do not propose to distinguish between these two structures and will refer to them throughout as the Flensburg structures.

30 From time to time during the sittings of the Prize Court in the recent war the Court has drawn attention to the necessity, in connection with both goods and ships, of strict compliance with the provisions of the Naval Prize Act, 1864. In the "*Bellaman and Agostino Bertani*" (1 Ll. P.C. 265 at page 271) I tried, not for the first time to express the view of the Court about the irregularities in this respect. If, in connection with these cases, it was intended by the Admiralty and those advising the Crown in these matters to give effect to those warnings, their history, as will be seen later, shows that the attempt was not wholly successful. Thus the cases have well merited the care and attention devoted to them on both sides, for which I express my obligation and thanks.

40 Since the surrender of Germany this Court has condemned as good and lawful Prize a large number of ships found in German ports. I have from time to time expressed surprise that the affidavits showed, almost invariably, that the seizure in Prize had occurred at a port in this country, often at Methil, at various dates and sometimes after the actual fighting had long ceased; but I was always assured, and was content with the assurance, that this was merely a matter of form and that the real capture had occurred when the German ports in question were overrun by British naval and military forces, and that the formal seizure, for example at Methil, was merely to enable the authorities to make

No. 80.

Judgment of
Lord
Merriman, P.
10th May, 1951.
(continued).

No. 80.

Judgment of
Lord
Merriman, P.
10th May, 1951,
(continued).

appropriate arrangements for refitting in some suitable British port for the purpose of requisition in Prize. On the 28th April, 1948, these five objects came before the Court for condemnation in a long list of ships and cargoes. They were dealt with as a group of eight so-called ships, which were all partly built at the time of the surrender. Condemnation was sought on the ground that they were all German property. The absence of papers was explained by their unfinished condition. I was invited to infer German ownership, not only from their situation but from the fact that no appearance had been entered although a period of six months had elapsed since the service of the writ. As appears from the transcript of the Official Shorthandwriter, when the first of this group (not one of these cases), was called on, Counsel explained that the vessel was seized when Bremerhaven was overrun, though the affidavit showed that she was seized elsewhere on 16th June, 1947. I had condemned seven of the objects, including all that I am now dealing with except "348". When that case was called on, Counsel called my attention to a letter from Dr. Adolf Ihde, a German lawyer and notary practising at Lubeck, protesting on behalf of the Lubecker Flenderwerke A.G. against what he called a decree of 1st February, 1947, whereby this structure, then a completed vessel, was requisitioned and declared a lawful Prize. This, as I appear to have pointed out at once, was a misapprehension. All that had been done was to make an order for her requisition pending the determination of the Prize suit on the lines laid down by the Privy Council in *The "Zamora"* (1916, 2 A.C. 77). I need not quote the terms of the letter. Suffice it to say that it formed the basis of the Claimants' claim in these cases and summarised in fair and courteous language the substance of the argument which has been addressed to me on their behalf. In particular it raised the question whether international law permitted seizure in Prize as late as 1947, for in this case, as in the others, that was the date of seizure alleged in the affidavit. A discussion ensued in the course of which I referred to the usual practice, to which I have already alluded, about the seizure of ships captured in German ports overrun at the time of the surrender, but formally seized in this country, but said that I could not understand seizure as late as 1947. Accordingly I cancelled, there and then, all the condemnations that I had made in that group and made it clear that I would require a full argument of the right to claim condemnation of anything seized during what was then referred to as the "Armistice".

On 20th December, 1948, one of that group of cases, the "*Ostmark*", was brought before me specially. She was in Kiel when that port was occupied on the 5th May, 1945. The "*Ostmark*" had been launched in 1940 but was still not fully built when Kiel was occupied. Mr. Le Quesne very properly reminded me of Dr. Ihde's letter, the substance of which he read, and of what had occurred, as I have just said, at the sitting of the Court on 28th April. He also reminded me of the fact

that the seizure of the "*Ostmark*", as in the other cases, was sworn to have been effected in 1947, whereas he submitted that she was in fact seized when Kiel was occupied. He also directed my attention to the date of the partial and total surrenders by Germany, to which I shall be obliged to make more detailed reference, and to the submissions which the Claimants were likely to make thereon. But he invited me to deal with the "*Ostmark*" there and then on the ground that both the builders and the building-owners, with whom the Procurator-General had been in communication, had disclaimed any wish to appear or to make a claim. After a full discussion in the course of which allusion was made to the history of these and earlier cases which I have already mentioned, I decided to condemn the vessel on the basis that this was unopposed but upon the terms that the sum of £170,000 which had been paid into Court should remain in Court pending further application, it being understood also that the condemnation was without prejudice to the possibility of revocation if the argument in the whole group of cases later showed that it could not be justified.

To return to the actual cases now before me. In every case there is an affidavit by a Naval Officer who professed to have effected, or to have been present at, the capture of the ship (which meanwhile had been completed), by one of H.M. Ships of War, on some date in June, July or August, 1947. The writ referred to these captures. At the same time it is right to mention that there was an affidavit in each case saying that in their unfinished state they were found in the ports I have already mentioned when these ports were respectively occupied by the Allies, and referring in brief to their subsequent history. In these circumstances it is unnecessary to recount the details. It will be sufficient to take the example of the "*Hermes*" which, *mutatis mutandis*, covers all the rest. The writ was issued on 13th August, 1947, and describes her as a ship whose port of registration is unknown, and as having been seized and taken as Prize by H.M.S. "*Royal Rupert*", Captain Edward Regnier Condor, D.S.O., D.S.C., R.N., her Commander. Lieut. Clayton, an officer in H.M.S. "*Royal Rupert*", swore on 21st July, 1947, that he had been present at the capture of the "*Hermes*" lately taken by H.M. Ship of War. He swore that Klaus Dehde was her Master or Commander. A letter from Herr Dehde, dated Emden, 23rd July, 1947, is exhibited to one of the later affidavits. In this he says that she was seized by the Royal Navy as Prize on 21st July, 1947, and that he was made Master of her for this act by the Port Controller, Mr. Cawthorne. As to this performance, save that I would substitute the word "*farce*" for the word "*act*", comment is needless in light of what is now admitted to have been the true position for more than two years before that date. Yet it was not until 8th July, 1949, that the Procurator-General wrote to the Claimants' solicitors to say that the Crown would contend that the vessel was seized when the port of Emden was captured and occupied on what was said.

No. 80.
 Judgment of
 Lord
 Merriman, P.
 10th May, 1951,
 (continued).

incorrectly, to be 5th May, 1945, and would rely in this connection upon the decision in the "*Bellaman*" (supra) but would not rely upon the seizure which took place in 1947 as at that date, by reason of the surrender of Germany and the Allies' declarations and other documents relating to the German surrender as well as of the decision of the Allied Military Control this vessel and others had become in any event the property of His Majesty's Government. It added that the Crown would also contend, contrary to the allegations in paragraphs 2 and 3 of the claim, that the vessel was not private property on land and that she was at the material time the proper subject of seizure in Prize. As I have already mentioned the allegation that the "*Hermes*" was private property on land has been expressly abandoned. It was not until 20th January, 1951, when these cases were already in the list for hearing on 5th February, that a letter in terms similar to those of 8th July, 1949, was written with regard to the Lubeck and Flensburg structures. With regard to these, the allegation that they were all private property on land was maintained in the argument for the Claimants. 10

To return to the "*Hermes*"; on 13th October, 1949, a letter was written on behalf of the Procurator General correcting the date of the occupation of Emden. It was then stated that the port was captured and occupied by H.M. Canadian Army on 6th and 7th May, 1945, and that the capture of the port was relied upon as constituting the capture of the "*Hermes*". It was not until 5th February, 1951, the day on which these cases actually came on for hearing, that an affidavit was sworn by Captain C. A. Petrie, D.S.O., R.N., who in February, 1945, was appointed Naval Officer in Command elect for Emden, in which he proves that the port of Emden was surrendered to the Allied forces on 6th May, 1945, on the morning of which day he arrived in the port of Emden with Brigadier Rockingham of the Canadian Army and took the surrender from Captain von Blissing of the German Navy about 10 a.m. on that day. He said that from that moment he assumed control of the port, commissioned H.M.S. "Royal Prince" as his Headquarters Ship, and that his naval party arrived the same evening. His affidavit also shows that the port was thereafter controlled by the Navy with the assistance of military guards. The port area was cleared of Germans other than those in guarded camps and was later enclosed in a barbed wire fence. No German could enter the port precincts without a pass, a number of which were issued to German officials responsible for lock gates and maintenance generally, but it was impossible for the Germans to do anything to their ships or to go aboard them. No German was permitted to board a German ship or enter the shipyards without authority. Thus at long last the facts from which I am now invited to infer the capture of the "*Hermes*" on 6th May, 1945, were ascertained, and I accept this evidence. 20 30 40

No similar affidavit was filed describing the exact procedure adopted by the Royal Navy in occupying the other two ports, but it was not disputed that it must have been substantially the same and I am prepared

to find that this was so. In passing it may be convenient at this point to dispose of a misapprehension which arose, both in the "*Ostmark*" (supra) and in the argument of these cases, about the capture of the "*Unitas*" whose condemnation has already been upheld by the Privy Council (1950 A.C. 536). She was supposed to have been seized on some date in June, 1945, but was in fact in Wilhelmshaven when that port was occupied on the 6th May, 1945. She was, therefore, on exactly the same footing, in this respect, as the "*Hermes*".

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10 Lubeck was occupied by military forces on 2nd May and by naval forces on 3rd May. Flensburg was occupied by combined naval and military forces on 10th May. It is admittedly immaterial whether the 2nd or 3rd May is taken as the date of the occupation of Lubeck.

When the cases came on for hearing the writs were still unamended but, without objection, they were amended at the hearing to allege that the several objects were taken as Prize by naval or military or naval and military forces while lying at the respective ports at the time of their capture on the dates I have just mentioned. At the same time leave was given to the Claimants to make any consequential amendments in their claim, but it was not thought necessary to make any. To complete
20 this curious story it only remains to mention that in the course of the argument the ex-Attorney General admitted for the first time on behalf of the Crown that by virtue of the Declaration relating to the unconditional surrender of Germany dated 5th June, 1945, and issued as Cmd. 6648, it was impossible to assert that the right to seize German property in Prize subsisted after that date, for the simple and sufficient reason, outlined in the Procurator General's letter of the 8th July, 1949, that the assumption of the Government of Germany by all the Allied powers upon the unconditional surrender of Germany, with all the elaborate provisions for the control, amongst other things, of German
30 merchant and other shipping wherever such vessels might be at the time of the Declaration, was quite inconsistent with any right thereafter of one belligerent Ally to seize any of such shipping in Prize. This is what Dr. Ihde had submitted in his letter of 28th October, 1947, which was read at the hearing of 28th April, 1948, in relation to the seizures in these cases which were then alleged and sworn to have taken place in 1947.

By this surprisingly long and circuitous route we have now arrived at the real issues in these cases. It has been necessary to recount this history because it is strongly relied upon in support of one of the
40 arguments on behalf of the Claimants.

The questions for decision, it is agreed, may be stated as follows: (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

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Lubeck 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 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 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 8th July, 1949, already quoted, 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? This question is said to involve an examination of the validity of the Potsdam Agreement of August, 1945, set out in Cmd. 7087, and various consequential agreements between the Allies, as well as a consideration of the circumstances in which these various ships were completed and the arrangements for payment therefor. It is said also to involve the consideration of German municipal law relating to accretion and the weight to be attached in a Court of Prize to a certificate by the Minister of State that what was done was an act of state in a foreign country. It might be necessary to consider these matters, in spite of the fact that the decision of a Prize Court would have no binding effect if the same issues were litigated in a municipal court. Since these difficult questions must necessarily be academic if all these objects are condemned, both sides adopted my suggestion that it would be better to leave them to be more fully argued, if necessary, after the Prize issue proper had been determined. Accordingly I will say no more about them for the present, but will return to the three main questions on the issue "Prize or no Prize".

(I) The first question chiefly depends on the dates on which the ports were occupied respectively. It is conceded that this question must be answered in the affirmative as regards Lubeck. It is disputed, as regards both the other two ports, by reason of the surrender to Field Marshal Montgomery at Luneberg on 4th May of the North-West area of Germany and, in any event, as regards Flensburg by reason of the documents of the total surrender of the German armed forces, signed respectively at Rheims on 7th May and Berlin on 8th May, 1945. As Emden was occupied before either of these two later dates and Flensburg was occupied after both of them, it is immaterial whether 7th May or 8th May is taken as the date of the total surrender. Both these documents imposed on the Germans a cessation of active hostilities at 23.01 hours Central European time on 8th May. That was the date celebrated in this country as "VE Day". On this day both Houses of Parliament attended services of Divine Worship in celebration of our victories and deliverance, and His Majesty The King and his Prime Minister broadcast to the British peoples. Mr. Le Quesne was content to take this as the relevant date. Earlier in the argument the ex-Attorney General had suggested that by reason of a statement in all the documents of

- surrender that these were independent of and without prejudice to, and would be superseded by, any general instrument of surrender imposed by or on behalf of the Allied powers and applicable to Germany and the armed forces as a whole, or words to the same effect, the relevant date is 5th June, when the Declaration embodied in Cmd. 6648 was made. As I have already said, I agree with his view that, for the reasons already given, belligerent rights of Prize could not subsist after that date, but it does not follow from this that if a total surrender itself operates to bring these rights to an end they subsisted until that date. My opinion is that
- 10 Mr. Le Quesne was right in accepting 8th May as the latest relevant date for the total surrender. In my opinion the true effect of the Declaration of 5th June, 1945, was to recite the total surrender of the German armed forces which had already taken place and to impose on the German people the government of the Allies in consequence of that surrender. This issue, therefore, is narrowed down to the question whether His Majesty's Forces could exercise belligerent rights of Prize in Flensburg, whether 4th May or 8th May is taken as the date of total surrender in that area, and as regards Emden whether those rights survived the Luneberg surrender on 4th May. As to this point, it is true that the
- 20 surrender to Field Marshal Montgomery was a complete surrender of the German forces in XXI Army Group Area, in which all three ports were situated. But, on any view of the matter, I do not think that this surrender can be described as a general cessation of hostilities. The very fact that the rest of the German armed forces did not surrender until three or four days later implies that they might attempt to carry on hostilities in that area, if only by air. In my opinion, therefore, 8th May is the only date that matters. If so, the issue is further narrowed to the occupation of Flensburg. But, whether I am right or wrong in this respect, the question of principle remains to be determined.
- 30 As to this the Claimant's argument may be summarised 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. The argument is attractive at first sight, but it requires an examination of the question whether a total surrender is merely an armistice in a permanent form or whether, as the Crown suggests, the two things are of an essentially different nature.
- 40 In considering the essential characteristics of a surrender, it may not be inapt to begin with a simple example. Under the threat of the guns of the captors' ship, a vessel strikes her colours. Does that necessarily mean that the capture is complete at the moment when she does so, and that, for example, putting a Prize crew on board is not a hostile action because in fact no further opposition is offered? In the

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“Rebeckah” (1 C.Rob. 227) the question was whether the capture was a droit of Admiralty or was Prize to the naval captors. This depended upon whether the ship was captured when lying at anchor in a port or haven, or whether the capture was made by naval officers in their naval character. At page 233 Lord Stowell said: “The first question that will occur applies to the time of capture, whether that is to be dated from the actual taking possession, or the previous striking of the colours; and I think that the striking of the colours is to be deemed the real *deditio*. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered. But as that attempt failed, I am of opinion that the act of formal submission, having never been effectively discontinued, must be deemed the consummation of the capture.” Lord Stowell, having also determined that the surrender was made not in the roadstead but when the vessel was only about to enter it, and having dealt with other points which have no bearing on the question at issue, condemned the vessel to the captors in Prize. 10

In “*The Edward and Mary*” (3 C.Rob. 305), a claim for Prize salvage of a British merchantman taken by a French privateer, Lord Stowell at page 306 says: “The master, I must observe, has given an improper deposition, and very ill according with the entries in his log-book: by that it appears that the French vessel brought him to, and declared herself a French privateer, and ordered him to lie to; but owing to the boisterous state of the weather, she did not send a man on board. I can by no means agree to what has been advanced in argument, that it was on this account *no capture*. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to and obey the direction of the French lugger, and await her further orders, she was completely under the domination of the enemy; there was no ability to resist and no prospect of escape. The Frenchman, who has been examined, appears to have given the true account; he says that he understood it to be a capture.’ There have been many instances of *capture* where no man has been put no board, as in ships driven on shore, or into port.” 30

But in my opinion it does not follow from these cases that hostilities between the captor and the captured ship ceased at the moment when the Prize strikes her colours, and that the overt act of taking possession is a peaceably act distinct from the capture. This very question arose in the “*Pellworm*” (3 B. & C. P.C., 1053), which decided that when an enemy merchant ship had hauled down her flag on the approach of a British cruiser outside neutral territorial waters, but had succeeded in manœuvring herself within territorial waters before she was boarded and taken possession of by a Prize crew, the capture was within the territorial waters and the Prize could not be retained. In giving the judgment of the Privy Council Lord Sumner at page 1059 said: 40

10 "In principle it would seem that capture consists in compelling the
 "vessel captured to conform to the captor's will. When that is done,
 "deditio is complete, even although there may be on the part of the prize
 "an intention to seize an opportunity of escaping, should it present
 "itself. Submission must be judged by action, or by abstention from
 "action: it cannot depend on mere intention, although proof of actual
 "intention to evade capture may be evidence that acts in themselves
 "presenting an appearance of submission were ambiguous, and did not
 "result in the completed capture. The conduct necessary to establish
 20 "the fact of capture may take many forms. No particular formality is
 "necessary—'La Esperanza' (1 Hag. Adm. at page 91). A ship may be
 "truly captured, although she is neither fired on nor boarded—'The
 "'Edward and Mary'—if, for example, she is constrained to lead the
 "way for the capturing vessel under orders, or to follow her lead, or
 "directs her course to a port or other destination, as commanded. If
 "she has to be boarded, she is at any rate taken as prize when resistance
 "has completely ceased. It was contended before their Lordships by
 "counsel for the Crown that hauling down the flag was conclusive in the
 "present case, or at least was conclusive when taken in conjunction with
 30 "stopping the engines as ordered. It was said to be an unequivocal act
 "of submission, as eloquent as the words 'I surrender' could have been.
 "an act which could not be qualified by any intention which did not
 "find expression in action. This is to press the 'Rebeckah' beyond what
 "it will bear, for there the facts showed, that, after the act of formal
 "submission by striking colours, there was no discontinuance of that
 "submission either effectively or at all, whereas Sir William Scott
 "intimates that, if any attempt had been made to defeat the surrender,
 "he would not have treated the deditio as complete until possession was
 "actually taken. It is true that by tradition, when ships are engaged in
 40 "combat, striking the colours is an accepted sign of surrender, but to do
 "so without also ceasing resistance is to invite and to justify further
 "severe measures by the victorious combatant. In the case of a
 "merchantman, where the traditions of commissioned men-of-war are
 "not of equal application, the hauling down of the flag, like any other
 "sign or act of submission, is to be tested by inquiring whether the prize
 "has submitted to the captor's will. What a combatant seeks to
 "intimate by acts signifying surrender is first and foremost that he ceases
 "to fight and submits to be taken prisoner; what a merchantman
 "intimates is, that she means to do as she is told, and that the chattel
 "property may be captured in prize, although the seamen in charge of it
 "are not made prisoners, or placed under personal restraint."

Likewise, when a solitary seaboard fortress with its adjacent port is
 besieged by naval or naval and military forces, what difference can it
 make whether entry is effected by a landing party, *vi et armis*, through
 a breach in the walls made by the guns of the invading fleet, or unopposed
 through the city gates after a white flag had been hoisted over the citadel?

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No such distinction, as far as I am aware, has been drawn in Prize law, and *Lindo v. Rodney* (2 Douglas 613, Note) and the case of the "*Ships taken at Genoa*" (4 C. Rob. 388) which were both cases of capture of ports upon surrender, are authorities to the contrary. But it is argued that in such cases the surrender was an isolated act while hostilities still continued over the theatre of war generally. Be it so. This seems to be merely saying that although the unopposed occupation of an isolated port which has surrendered unconditionally may properly be regarded as the capture of that port, the simultaneous hoisting of white flags, metaphorically speaking, in every such port within the whole theatre of operations involves the conclusion that no one of them can be said to be captured. In the absence of any authority for this proposition I am unable to accept it. 10

But 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. If this is the true effect of a general surrender, why is it not equally true of the local or individual surrender whether of a ship or of a seaboard fortress? It is true that the ship may be rescued, or that the tables may be turned, as in the case of the "*Ships taken at Genoa*" (supra), by a victory of the enemy elsewhere; but until either of these events happens how can it be said that the imposition of the will of the victor upon the fortress or ship is either more or less hostile in character than the imposition of the will of the victor upon the totality of similar fortresses or ships throughout the enemy's territory? 20

This may be tested by considering what happened to these ports after the surrender. So far from there being any obligation upon the Allies to lay down their arms, it is, I think, indisputable that, as in the case of the boarding party on the one hand or the landing party on the other, the naval and military forces which occupied these ports advanced, figuratively speaking, in full panoply with all appropriate precautions to guard against surprise and if necessary to impose their will on the surrendered enemy. Even if no force was openly displayed, it was there in reserve. If I may be permitted to paraphrase the concluding passage quoted from Lord Sumner's judgment in the "*Pellworm*" (supra) in terms of this case, I would do so 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." The affidavit of Captain Petrie proves that measures were taken in these ports which were almost exactly analagous to putting a Prize crew on board a captured ship. The barbed wire fences, it is true, 30 40

were not put up to imprison the Germans found in the ports, but they were put up to stop them from interfering with any maritime property therein. This, it seems to me, is the very antithesis of an implied contract that both sides shall refrain from any hostile act, and bears no resemblance to an armistice arranged upon the terms that neither side shall do any belligerent act so long as it lasts.

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It is, of course, well settled that belligerent rights in Prize end with whatever may be the true cessation of hostilities (*The "Harmony"* 2 Dods. 78). The headnote in this case reads: "The Prize Court of
 10 "Admiralty has jurisdiction over cases of seizure as prize, although the
 "same may have been effected after the time prescribed for the cessation
 "of hostilities by a treaty of peace". To understand the point of the case
 it is essential to consider the relevant facts. As appears from a note on
 page 57 of the same volume, the Treaty of Peace between Great Britain
 and the United States of America was signed on 24th December, 1814,
 and was finally ratified on 17th February, 1815. By one of its clauses it
 was agreed that, immediately after the ratification of the Treaty by both
 20 parties, orders were to be sent to the armed forces and citizens of the
 two powers to cease from all hostilities and, to prevent causes of com-
 plaint which might arise on account of the Prizes which might be taken
 at sea after the ratification, it was agreed that all vessels
 taken in the relevant part of the Atlantic Ocean after 30 days
 from the ratification should be restored on each side. The
 "*Harmony*", a British ship with a British cargo, was captured
 by an American privateer on 2nd March, 1815, who took away
 the master and the rest of the crew except the mate, and sent
 an American Prize master and another American and five Frenchmen
 on board with directions to take the vessel to a port in the United States.
 On 24th March, 1815, the mate, having previously ascertained that the
 30 Frenchmen would not oppose him, cut down the Prize master with a
 hatchet and threw him overboard. He then brought the ship and cargo
 to England, where he caused both to be arrested in a suit for Prize
 salvage by reason of recapture from the enemy. On 6th May the Court
 decreed restitution to the owners of the vessel and the owners of the
 cargo respectively on payment of £1,390 to the Prize salvor. Later,
 however, a claim was entered on behalf of the American captor and
 monitions were issued to show cause why the "*Harmony*" should not be
 40 decreed to be released from the re-capture as having been effected after
 the time specified in the treaty of peace for the termination of hostilities,
 and why the same should not be delivered up to the claimant on behalf
 of the American captor. After various proceedings which are irrelevant
 and in spite of the submission by the owners of the vessel and the cargo
 that the Prize Court had no jurisdiction and that only an appellate court
 could set aside the original release to them, Lord Stowell held that he
 had jurisdiction to recall his original decision and that the original
 decree of restitution upon salvage ought to have no effect, and ordered
 that ship and cargo be released from the re-capture and delivered to the

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master of the American privateer. The significance of the judgment is that although Lord Stowell held that belligerent rights of Prize had ceased at the date of recapture, he had jurisdiction to release the ship and cargo to the original captor although their capture was effected after the ratification of the Peace Treaty, but within the 30 days of grace. Rightly understood, this decision does not help the Claimants.

But then it is said, where is the line to be drawn: is it to be suggested that the victors can continue seizing ships and goods in Prize until the peace treaty is signed; it may be years later? I do not consider that any such conclusion necessarily follows. I do not doubt that short of the signing of a peace treaty victors may abrogate, expressly or impliedly, any rights that they have *jure belli*, including rights of Prize. However that may be, in these cases it is conceded that such rights were abrogated by the Declaration signed at Berlin on 5th June, 1945, but I see no reason for holding that the Crown had lost these rights because of anything which occurred before that date. 10

(II). On the question whether the capture of these ports was of such a nature as *ipso facto* to effect the capture of these objects respectively, the Claimants put their case on three grounds: First, they submit that capture must be an act of conscious volition, and that, even in the case of the "*Hermes*", which is admittedly a proper subject of Prize capture, the history which I have related regarding her, taken with other matters to which I will refer, proves that it was not the intention of H.M. Forces to seize her in Prize when they occupied Emden, but on the contrary, her capture and seizure was expressly deferred to a time when no Prize rights existed. Further, that everything that can be said in this respect with regard to the "*Hermes*" applies with even greater force to the Lubeck and Flensburg structures. As regards the Lubeck and Flensburg structures: Secondly, that their very nature leads to the opposite conclusion; and thirdly, that a shipbuilding yard and the stocks whereon ships are being built cannot be said to be part of a port. 20 30

I will deal first with the argument that neither the Lubeck nor the Flensburg structures were in a port at all. It is suggested that, in contrast with a ship-repairing yard, a shipbuilding yard is not part of a port, and *Hunter v. The Northern Marine* (13 A.C. 717) is relied on in support of this proposition. An examination of the case in the Court of Session (14 S.C., 4th Series, 144), and in the House of Lords, shows that the decision turned on the wording of a policy of insurance, the provisions of a local Act defining the limits of the Port of Greenock, and on the geography of the River Clyde. In my opinion that case affords no guidance in the present. On the contrary, I think that the case of the "*Three Motor Gunboats*" (VII Ll. P.C. 106) tells the other way. These gunboats were sought to be condemned as enemy property. They were being constructed at Southampton to the order of the Turkish Government and were seized as Prize in the builders' works at Woolston in the port of Southampton in November, 1914. It was proved that at the time 40

of the seizure the vessels were complete and had been tried and accepted by or on behalf of the Turkish Government and that almost the whole of the purchase money had been paid. Sir Samuel Evans enquired whether the seizure had occurred after his decision in the "*Roumanian*" (1 B. & C. P.C. 75). His question was clearly directed to the point that *The "Roumanian"* was the earliest case in the first World War in which goods not actually on board or on the quayside had been condemned. So when he was told that the gunboats had been seized before that judgment he said that he assumed that they were already afloat, but was
10 informed that they were still on the slips at the material date. Nevertheless he condemned them.

Moreover, the affidavits of Mr. W. G. R. Douglas, the representative in Germany of the Ministry of Transport, afford *prima facie* evidence that these structures were found in the ports of Lubeck and Flensburg respectively when they were occupied by the Allies. If this statement is challenged it is for the Claimants to displace it; but the affidavits in support of the claim contain no evidence that the stocks on which these structures were being built were not part of the respective ports. Accordingly I find there is nothing in this point.

20 It will be more convenient to consider the nature of the Lubeck and Flensburg structures in connection with the question whether they are proper subjects of maritime Prize. But I bear in mind that there is a close relation between this question and the third question, for, just as it is argued that the very nature of these structures is relevant to the question whether there was any intention to seize them at the material time, so the alleged absence of any such intention is relevant to the question whether they are or are not proper subjects of Prize.

This brings me to the cardinal issue on the present question, that is to say, whether the capture of a given object must be an act of conscious
30 volition.

In the forefront of the Claimants' argument is put the fact that, until the formal amendments of the writs were made in the course of the hearing, the alleged seizure in Prize of these objects was sworn to have taken place in 1947, and that there is no evidence whatever of any intention to effect their capture or seizure before that date. Indeed it is suggested that it cannot be assumed that those advising the Crown realised even in 1947 that it was then much too late to make Prize seizures in Germany, but that this consideration first emerged, if not in the course of this hearing, at any rate in the course of the earlier
40 proceedings to which allusion has already been made.

Accordingly it is argued, as a matter of law, that there must either be or not be a seizure in Prize at a given moment and that it is a fallacy to suppose that there can be a formal seizure at a later date of things which are said to have been seized informally at an earlier date. But if there is any distinction between the actual capture and a formal seizure

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in Prize, each, it is said, requires an act of conscious volition. The very fact that even in 1948 those acting for the Crown thought (as is shown by the history of these cases), that the exercise of Prize rights still subsisted after 5th June, 1945, affords, if not conclusive, at least most cogent evidence that they were first consciously exercised in 1947.

While it is recognised that in this Court I ought to follow my own decision in "*The Bellaman*" and "*The Agostino Bertani*" (supra), that case is distinguished on the ground that the belated action taken in connection with the ships in question was nevertheless in time, having regard to the express terms of the Italian Peace Treaty, whereas in the present cases it is suggested that all the available documents go to show that express instructions were given that there was to be no seizure until the actual completion of these objects as ships. It is submitted that there is no such doctrine as that the hostile capture by naval forces of a port necessarily involves the seizure in Prize of everything in that port, or even of everything in that port which is a proper subject of Prize. While it is admitted that a hostile capture of a port raises a *prima facie* presumption that ships found there are captured with the port itself (*The "Progress"*, Edwards, 210), it is argued that the presumption is rebuttable, and that the less a particular structure has acquired the character of a fully-built ship by so much the more readily should the presumption be held to be rebutted. 10 20

In arguing that capture in Prize involves an act of conscious volition and that no such act took place until 1947, over two years too late, the Claimants rely not only upon the history of these cases exemplified by that of the "*Hermes*", which I have already set out in full, but on contemporary instructions given in 1945. In particular they rely upon the affidavit of Mr. H. D. Samuel, an Assistant Secretary in the Admiralty and Head of the Naval Law Branch of the Secretary's Department, dated 18th January, 1951. He says that he is not allowed to disclose the contents of signals because they were sent in secret cypher. The affidavit continues: "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 operation 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 30 07

“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 instruc-
 10 “tions were to follow regarding the treatment of shipping falling in 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 paraphrase is as follows:
 “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
 20 “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.”

While it is admitted that too much reliance cannot be placed on the
 wording of signals which are not textually quoted, it is argued that a clear
 distinction is drawn between enemy ships captured before the surrender
 of Germany, or ships captured by forces in German ports before the
 surrender or declaration of the defeat of Germany on the one hand, and
 the further instructions that were to follow regarding the treatment of
 30 ships falling into the hands of the Allied Expeditionary Force upon the
 surrender or declaration of defeat. It is said that these objects all fall
 into the latter group as distinct from ships or shipping captured on the
 High Seas or in German ports before the surrender, and that with regard
 to the class containing these objects, the first instructions were contained
 in the signal of 8th June, 1945, paraphrased in Exhibit A. to
 Mr. Samuel’s affidavit, and that the instructions given in that signal are
 now admitted to have been given three days too late. Moreover, it is
 argued, not merely was seizure under these instructions too late with
 40 regard to actual ships falling into the hands of the Allies upon surrender
 or declaration of defeat, but the signal contained express instructions
 that objects such as these were not to be seized until at point of
 departure for the United Kingdom, by reason of uncertainty regarding
 arrangements for refitting. Admittedly none of these things, as their
 history shows, were completed until 1947, hence the farce of seizure at
 that time, all of which, it is said, is utterly inconsistent with any inten-
 tion to seize these objects at any rate at the time when these ports

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respectively were occupied by virtue of the surrender. This is a very formidable argument. On the other hand, it was pointed out that the instructions regarding ships captured before the surrender of Germany were clearly designed to facilitate the use of these ships, no doubt through the machinery of the Allies' respective Prize Courts, for operations against Japan. As regards shipping falling into Allied hands upon surrender or declaration of defeat, it is pointed out that there is a well-recognised distinction between the original capture and the procedural seizure by, for example, nailing the writ to the mast, and it is argued that having regard to the fact that the signal of 8th June, 1945, 10 is admittedly a paraphrase it is not inconsistent with the recognition of this distinction. That is to say, in the first sentence the word "seized" may well refer to ships already captured, while the words "to be seized" in the second and the last sentences respectively may be taken to refer to a procedural seizure later. Even so, this contemporary evidence plainly suggests, at the least, that there was no act of conscious volition to seize the objects in Prize at any time before 5th June, 1945, after which, if capture had not already been effected, it was too late.

But behind all this lies the vital question whether every capture in Prize necessarily involves an act of conscious volition at all. Manifestly 20 this will usually be so as a matter of fact. For example, the capture of an individual ship on the High Seas almost necessarily involves, as has already been seen, some overt act such as putting a Prize crew on board, which imports that the capture was an act of conscious volition. But in my opinion the suggestion that an act of conscious volition is necessary either to Prize capture or to Prize salvage is in direct conflict with Lord Stowell's judgment in "*The Progress*" (Edwards, 210). That case concerned a claim for salvage on ships recaptured from the French at Oporto by the allied British and Portuguese army under Lord Wellington. It is unnecessary for the purpose of these cases to 30 consider the difficulties which Lord Stowell felt concerning the absence of any conjoint operation by the Navy and Army in the capture of Oporto, or as regards the limits which must be set to the right of the military to claim Prize salvage because their operations in a distant sphere led indirectly to the relief of all ports within the area of operations. Expressing his opinion generally, he said: "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 40 "which contained the vessels is in effect the same as taking bodily "possession of the ships themselves. It is *likewise*"—(the italics are mine)—"clear in point of principle, that it is not necessary that it "should be primarily the intention of the captor to recover the property. "It might not be in his immediate contemplation, perhaps not even

“within his knowledge; and yet, if the service is performed, if the
 “recovery of the property is the immediate and necessary result of
 “what he has done, he will be entitled to salvage.” The word
 “likewise” in the first line of page 211 is, as I said in the “*Bellaman*”
 (supra), highly significant. Again, when the judgment was resumed at
 a later date, Lord Stowell said at page 213: “But I thought that, under
 “all the circumstances, there was sufficient to satisfy the Court that,
 “although in some instances no actual possession had been taken, yet
 “that the ships had been sufficiently reduced under the bodily posses-
 10 “sion of the French army to entitle them to be considered as captors.”
 And after saying that the case still remained in some degree of
 obscurity, for there was no evidence as to the part which the Navy took
 in the recapture, and that all the cases he could recollect were cases of
 joint service, while there was here no proof of co-operation, which was
 to be regretted, he said at page 214: “I do not see why the claim of the
 “army may not be established on principle, if it can be shewn that
 “*maritime property in a maritime*”—(the italics are mine)—“town has
 “been recovered by its efforts directed to that purpose.”

When once the question of the capture of the ports upon surrender
 20 is determined, we are concerned with the alleged capture of maritime
 property in a maritime town, in spite of the fact that no formal posses-
 sion was taken of any individual object, and without it being primarily
 the intention to capture any individual piece of property, the capture of
 which, I will assume, was not in immediate contemplation or even
 within the knowledge of those who captured the ports respectively. I
 have no doubt which way Lord Stowell would have decided this
 question of conscious volition. For what it is worth, founding myself
 upon his judgment, I came to the same conclusion in the “*Bellaman*”
 (supra); but if this argument had convinced me that I was wrong I
 30 should not hesitate to say so.

In the “*Bellaman*” (supra) when Tripoli was captured on 23rd
 January, 1943, it was reasonably clear that no particular attention was
 paid either to the “*Bellaman*” or the “*Agostino Bertani*” or to any
 other vessel lying sunk in the harbour. From this it was argued that
 seizure in Prize was never contemplated, at any rate until long after-
 wards, and that, in effect, the ships were only regarded as obstructions
 to the harbour to be cleared away as soon as possible; (ibid. 269). On
 3rd September, 1943, an armistice was signed with Italy which
 admittedly precluded any seizure in Prize so long as it continued. It
 40 was not until some time in 1944 that the Admiralty signal was sent
 directing that any such vessels as might be salvaged should be seized in
 Prize and placed in the custody of the Admiralty Marshal’s substitute.
 Although these instructions could not lead to a valid seizure, the time
 for which had passed by virtue of the terms of the armistice, I thought
 that they were not inconsistent with capture having already been

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effected. Then, in 1947, there was the same sort of performance of a purported seizure as in the present cases, which was manifestly dictated by the impending signature of a Peace Treaty with Italy (ibid. page 270).

Likewise, as regards the Lubeck and Flensburg structures, I have little doubt that at the moment when these two ports were occupied no particular attention was paid to the question whether these structures were being captured in Prize. The language of the Admiralty signal on 8th June, 1945, is, as I have already said, ambiguous. Subject to this point there is a fairly close analogy between it and the signal quoted in the "*Bellaman*" (supra). Like that it was out of date, but it shows an appreciation that ships in the occupied harbours were subjects of Prize. Like that, it directs that seizure shall take place on some future event—in the one case when salvage operations are complete, in the other when the vessels are ready to depart for the United Kingdom. In the present cases, as in the "*Bellaman*", nothing more was done until these events happened, in each case in 1947, when the purported seizure in Prize took place. In my opinion there is no essential distinction between the two cases. In each case there was no special intention to capture the particular objects, and no overt act of capture save in so far as that was involved in the capture of the port. 10 20

In the "*Ision*" decided on 2nd March, 1915, Sir Samuel Evans, with regard to mistaken notions about the date of capture and the habit of deponents, which appears meanwhile to have become inveterate, of swearing to the wrong date of capture, said something which touches this point. The case so far as I am aware is only reported in the Official Transcript. Here again it is important to bear in mind that his judgment in the "*Roumanian*" (supra) was under appeal to the Privy Council. It might still be open to doubt, therefore, whether, and in what circumstances, a cargo unladen and stored on land in this country was liable to capture. As to this, Sir Samuel Evans said: "Then a question 'has been raised . . . as to whether the property was seized on land or 'on board ship or in port. Now what was done in this case apparently 'was what has been done by the officers of Customs acting for the Crown 'in nearly all these cases of seizure of cargoes coming in after the out-'break of war. This vessel, the '*Ision*' arrived on the 2nd October, and 'the hand of the captors is put upon these goods on the 3rd October. 'It has become a habit of some of the deponents to say that the formal 'seizure was not made till afterwards. This is not in my view the 'proper construction to be put on what was done. What is done is this. 30 40
 "'We seized these goods on the 3rd October'—applying the facts of this 'case to what is done—but we will take no serious steps by way of
 "'removal of the goods or otherwise for some time until we see what
 "'the actual facts are'. Then a little later on, I think in this case on
 "'the 17th October, further investigations having been made, the seizure

“which in fact took place *for all purposes of the law*”—(the italics are mine)—“on the 3rd October was completed on the 17th October by their saying that ‘we shall adhere to the seizure which we made on the 3rd October, having made investigation into the facts of the case’. It does not seem to me that there are any circumstances in this case at all which would tend to show that the seizure was on land, as was contended with reference to part of the goods in the case of the ‘*Roumanian*’ which came before me some months ago.”

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In the “*Sommelsdijk*” (23 Ll. Reports, 119), the Court of Appeal
10 considered the question whether a claim for damages for detention of
a neutral vessel for 41 days in exercise of the belligerent right of visit
and search was a matter for the War Compensation Court or was in the
exclusive jurisdiction of the Prize Court. The ship was detained in the
Downs where she was searched, so far as was possible at sea, and was
then ordered to London with an armed guard on board, and escorted by
a destroyer. She was eventually taken to the Royal Albert Dock and
was there thoroughly searched, her cargo being discharged for that
purpose. The search being completed, the cargo was re-loaded and she
was allowed to proceed, without ship or cargo being brought into the
20 Prize Court for adjudication. The court was unanimous in holding
that the jurisdiction to award or refuse damages was in the Prize Court.
At page 121, after quoting the Commission issued at the beginning of
the First World War, and, I may add, also issued in the recent war,
Lord Justice Bankes said: “The question for decision in the present case
“is whether the modern practice of carrying out the right of visit and
“search constitutes a seizure within the meaning of the commission. In
“the absence of any authority to the contrary it would seem that the
“means adopted under the present practice of carrying out a visit and
“search would amply justify a finding of a seizure.” After quoting a
30 passage from Oppenheim dealing with the question of the search of
vessels, and referring to the fact that in the “*Roumanian*” (1B. & C. P.C.
at 540) Lord Parker, delivering the opinion of the Privy Council, held
that the actual seizure took place when a letter from the Customs House
stating that the cargo of petroleum was placed under detention was
delivered on board the ship, at a time when only a comparatively small
part of the cargo remained in the ship, the rest having been pumped
into tanks some 100 to 150 yards from the wharf at which she lay, and
not some weeks later when the writ was formally affixed to the tanks,
the Lord Justice continued: “These authorities appear to me to afford
40 “strong confirmation of the view that the action of the naval authority
“in the present case amounted to a seizure which clothed the Prize
“Court with authority to entertain the claim of the respondents to this
“appeal.” Lord Justice Atkin said at page 124: “It may well be that
“a claim for injury to goods or to person made against a person exercising
“a belligerent right of search on the high seas, though neither vessel

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“nor goods were ever brought in, might be held to be exclusively
 “cognisable in the Prize Court. Good reasons could be adduced why it
 “should. But assuming that there must be a capture as a condition
 “precedent to jurisdiction in prize, it appears to me that the forcible
 “bringing in of a vessel under an armed guard for purposes of search
 “amounts to such a capture. If there were an immediate intention at
 “the commencement of the operation to bring the vessel in for adjudica-
 “tion, there would be an obvious capture; and in my opinion it makes
 “no difference that the present intention is to bring her in for search,
 “with the further intention if the search results in a particular way to 10
 “have the vessel or goods adjudicated. It cannot be doubted that the
 “practice of the Prize Court in this country has been to act on this
 “view.”

It is right, however, to say that a German Prize Court has held
 upon the construction of the German Prize Code that it is necessary
 to determine in each case what was the intention of the commander
 of the warship in bringing the vessel into port, and if the vessel was only
 brought into port for the purpose of visit and search she could not be
 considered captured even if the commander of the warship had placed 20
 a crew on board. (See “*Bertha Elizabeth*” 1915 Jurisprudence
 Allemande en matiere de Prises Maritimes, page 45, and the “*Niobe*”,
 ibid. page 50).

In the present cases, however, as in the “*Bellaman*” (supra) it was
 not merely a question of visit and search and release, but, however
 belatedly, these objects have actually been brought in for adjudication.
 In my opinion I ought to follow my own decision in the “*Bellaman*” and
 hold that the hand of the captor was upon them from the moment when
 the ports respectively were occupied.

(III). As to the third question, whether the Lubeck and Flensburg 30
 structures are proper subjects of Prize, the rival arguments may be
 summarised as follows: The Claimants submit that there are two
 distinct subject matters of Prize, ships on the one hand, and on the
 other merchandise which has a maritime character, either because it
 is part of a cargo at sea, or at least is in port about to be laden, or having
 been unladen is still in port, or, if removed elsewhere, is in such a situa-
 tion as not to have lost its character as cargo. As regards ships, I am
 bound by my own decisions to hold that a ship is none the less a ship
 because it has for the time being become unnavigable, and I am glad
 to know that this accords with a decision of the Japanese Prize Court
 in the Russo-Japanese War (*The “Thalia,”* 2, Russian and Japanese 40
 Prize Cases, 116) and of the Italian Prize Court in the first World
 War (*The “Beleno,”* unreported). But, while this is recognised, it is
 argued that a structure does not become a ship at all until it is either
 actually launched or at least has reached a stage of construction capable
 of being launched and floating. The Claimants dispute that an embryo

ship can be regarded as "goods" within the definition in Section 2 of the Naval Prize Act, 1864, whereby that term "includes all such things as are by the course of Admiralty and the law of nations the subject of adjudication as Prize (other than ships)". They assert that an object in course of construction as a ship either is or is not a ship, which term by the same Section includes "Vessel and Boat, with the Tackle, Furniture, and Apparel of the Ship, Vessel or Boat." If it is merely in process of acquiring that character it has not become a ship, yet cannot be regarded as "goods." The Crown, on the other hand, point out first

10 of all that neither of these definitions is expressed as being exhaustive and that the Naval Prize Act is an Act for regulating procedure in Prize, but not for declaring the law of Prize; that both definitions merely say that certain things are "included" in the terms Ships and Goods respectively and that neither definition excludes these structures (see *Mellows v. Low*, 1923, 1 K.B. at page 526). But even if they cannot be described as Ships, it is urged that they are such things as are by the course of Admiralty and the law of nations the subject of adjudication in Prize. I propose to begin with the assumption that these structures cannot be described as "Ships" and that it is necessary to determine whether

20 they are "such things (other than Ships) as are by the course of "Admiralty and the law of nations the subject of adjudication in Prize."

In Story page 28 the principles are thus stated: "As preliminary to the subject it may be observed, that the ordinary Prize jurisdiction of the Admiralty extends to all captures made on the sea, *jure belli*; to captures in foreign ports and harbours; to captures made on land by naval forces, and upon surrenders to naval forces"—(the italics are mine)—"either solely or by joint operations with land forces; and this, whether the property so captured be goods, ships or mere choses in action; to captures made in rivers, ports and harbours, of the

30 "captors' own country; to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces." Sir Samuel Evans quoted this statement with approval in the "*Frederick VIII*" (1917 P. at page 45) in connection with the above definition of "goods."

The passage in Story is based in the main upon the decision of Lord Mansfield in *Lindo v. Rodney*, reported in a foot note to *Le Caux v. Eden* (2 Douglas at page 613). It is worth noting in passing that, as appears from the end of the note, another action against Admiral Rodney in which the same question arose was tried by Lord Mansfield, in which

40 he gave the same judgment without further argument, which judgment was affirmed upon appeal to the House of Lords. In effect, therefore, the judgment in *Lindo v. Rodney* itself has the authority of the House of Lords. The case arose upon a Rule to show cause why a prohibition should not be issued to the Judge of the Admiralty from proceeding to the condemnation of goods taken and seized by His Majesty's land and

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sea forces under the command of Admiral Rodney and General Vaughan at the Island of St. Eustatius and its dependencies upon the surrender thereof, as good and lawful Prize.

The circumstances of the surrender of the Island of St. Eustatius on 3rd February, 1781, are set out in the Annual Register for 1781, page 102. As the report of the case shows, various goods, wares, merchandise, arms, stores and ammunition were taken and seized upon such surrender and all persons concerned were cited to show cause why they should not be pronounced to have belonged at the time of the capture and seizure to the King's enemies as goods of enemies, or otherwise liable to confiscation. The Rule for the prohibition was discharged. The ground upon which the prohibition was prayed was that the goods were taken upon land, and Lord Mansfield said that the only question was whether the goods, being taken on land, though in consequence of surrender to ships at sea, excluded the only Prize jurisdiction known in the Kingdom. After an examination of the essential difference between the Prize Court and a Common Law Court, or even between the Admiralty Court when sitting in Prize and when sitting in Instance, and having expressly refrained from entering into any discussion as to plunder or booty in a mere continental land war without the presence or intervention of any ships or their crews, Lord Mansfield, at page 614, poses the question thus: "The question then is, whether such a capture ashore, by a fleet of ships and the land and sea forces aboard, in consequence of a previous surrender of the place, is within the jurisdiction of the Court of Prize." After noting (page 615) that the Prize Court has uniformly without objection tried all captures in ports, havens, etc., within the Realm, he says: "What is still more extensive, foreign ports or harbours are not the high seas, any more than the shore, but numberless captures made there have been condemned as Prize."

I will not dwell upon the terms of the commission, which as I have already mentioned, was issued during the late war as in former times; but at page 616 Lord Mansfield considers the reason of the thing; he says: "Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for the trial of Prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each. The Claimant is not obliged to sue the captors for damages and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant, and subjects his property to the rules and authority of a municipal law by which he is not bound. In short, every reason which created a Prize Court as to things taken upon the high seas, holds equally when they are thus taken at land. The original cause of taking is here at sea. The force

“which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.” At page 619 he referred to the judgment of Lord Chief Justice Lee in the case of *Key and Hubbard v. Vincent Pearse*, in which he himself had been Counsel, quoted in *Le Caux v. Eden* (supra) at pages 606 to 608. This case also arose out of an attempt to prohibit the Admiralty from taking jurisdiction to condemn a ship belonging to certain Irish merchants which had been taken, not upon the high seas, but, as was alleged, in the City of New York by a King’s ship. On the ground, as Lord Mansfield summarised the judgment, that “the question, Prize or no Prize, is the boundary line and not the locality of land or sea or port within the body of a county within the realm,” Lord Chief Justice Lee decided in favour of the commander of the King’s ship. In the course of his judgment, which is quoted on page 608, the Lord Chief Justice said: “Though, therefore, I do agree that the jurisdiction of a Court of Admiralty, generally, is limited to matters arising *super altum mare*, and is, in that respect, local, yet I do not take it to be so in case of prize; for the jurisdiction does not depend on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations.” Finally, Lord Mansfield concludes at page 619: “If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the State, if goods taken upon land by ships, should not be within the prize jurisdiction.” In passing I would observe that there is nothing in the passages quoted to assist the Claimants on the two earlier questions.

But it is said—“This is all very well in the 18th century but we are engaged in considering Prize law in the 20th century.” There is no doubt, of course, that there has been a steady process of mitigation of the extreme rigour of Prize law in modern times; but I was reminded by the Claimants in connection with the question whether total surrender ends the right to seize in Prize, that the object of Prize is still the coercion of the enemy by harassing and interfering with his navigation. No doubt; but let us see where that leads us. In the “*Roumanian*” (supra) at page 83 Sir Samuel Evans cited with approval Dana’s note to Wheaton, 8th Edition, 1866, page 451, note 171, under the heading “Distinction between Enemy’s Property at Sea and on Land”: “War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. 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

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“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; for it is a subject of taxation, contribution and confiscation. 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.”

The question whether the capture of any particular property is a justifiable means of coercion must in my opinion be tested as a matter of principle. For example it must be irrelevant either that the object is so insignificant that by itself it makes no appreciable difference to the enemy's conduct of the war; or that the enemy is so nearly defeated that the seizure of one object more or less is in fact unnecessary inasmuch as it adds little or nothing to the coercion which is already being brought to bear upon him; or that a proper subject of Prize is in such a condition that it cannot be made serviceable in time to affect the enemy's powers to resist before the inevitable end occurs. 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 or belonging to persons who were living under his control, whether it were on land or on sea, because he could make them the subject of a contribution or confiscation so as to be available for his war effort?

The Claimants' argument seems to lead to somewhat absurd results. For example: a ship damaged by collision on her maiden voyage is being repaired by fitting a number of fresh plates. Her sister ship, building in the same yard has the same number of plates yet to be fitted. One is “maritime property” seizable in Prize; the other is said not to be so. Consider also the plates themselves. In transit by sea from the steelworks to the port they would presumably be liable to seizure as contraband; so, I think, would they be when unladen on to the quay for delivery to the builder's yard. Yet when they are rivetted into position they lose the character of “maritime property” in the one case and keep it in the other. Indeed, I think that some guidance is to be obtained from the analogy of contraband cargo which is condemnable in spite of the Declaration of Paris, on the question whether, as Wheaton says, the convertibility of property to war-like uses is a test of the enemy's interest in the property so as to make it *prima facie* a subject of capture. It is the essence of contraband that the goods in question have an enemy destination and are capable of a war-like use, remembering that the words “war-like use” have a wide significance in their application to a totalitarian state. (See *The “Alwaki”* (1940 P. 215) and the “*Monte*

Contes” (1944 A.C. 6)). For example, parcels of floor polish and boot polish destined for Germany have been condemned as contraband on evidence that their chief component, beeswax, is extensively used as an ingredient of high explosive compositions and of waterproof compositions for sealing shells and bombs. The beeswax can be extracted by a simple chemical process; that is to say, the polish can readily be converted to war-like uses. But it is said that there is no analogy between such a case and the present, because cargo is in a separate category from ships. So it is in the sense that regarded merely as neutral

10 cargo in an enemy bottom, or enemy property in a neutral bottom, the parcel of floor polish would be protected by the Declaration of Paris. It is the convertibility to war-like use that matters. The ships in Tripoli harbour were convertible to war-like use by salvage operations and a process of reconditioning. These structures are convertible to war-like use by the even simpler process of continuing the building upon lines already laid down. Save that in the case of the cargo it is also necessary to prove the enemy destination, either directly by the ship’s documents or by the doctrine of a continuous voyage, while in the other two cases the enemy is in actual control at the moment of capture. I cannot see

20 any intelligible distinction between these three classes of case.

At the end of it all the question “Prize or no Prize” seems to me to turn on the point from which one starts. If one starts by saying that good and lawful Prize must be either a “Ship”, in the full sense of the word, or else “Goods” by which is meant cargo in a ship, or about to be laden in a ship, or just unladen from a ship, that is one thing. But if one goes to the front of Prize law to see whether the reason of the thing demands that there must be such a hard and fast rule, that is another. Beyond doubt these things would have been held to be Prize in Lord Mansfield’s time. The Claimants have not satisfied me that there is

30 any ground in reason, or upon authority, for holding that any one of them is not Prize now. On the contrary, I hold that there was a hostile capture of the ports in which they lay; that, being “maritime property in a maritime town”, they were captured bodily when the ports in which they lay were captured. I regard the procedural laxity and confusion as deplorable but not fatal. I am satisfied that every one of them is good and lawful Prize and I decree that they be condemned to the Crown accordingly. That being so, the other questions do not arise.

Mr. DIPLOCK: My Lord, this matter, if I may say so, has not been one of simplicity, and I understand that it is necessary for me to apply

40 to your Lordship to admit of an appeal. I am, as your Lordship appreciates, in this difficulty, that my clients are enemies, who had a licence to prosecute the matter before you, but they have no licence to prosecute an appeal to the Privy Council, although I apprehend that there will not be any difficulty in getting such a licence. But before I can do anything in that regard I have to take a positive step, and I think putting up security would be such a positive step. I think it is

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necessary that my instructing Solicitors should regularize their position and to apply for a licence to prosecute an appeal.

The PRESIDENT. I will do anything I can to facilitate an appeal, Mr. Diplock, and I think I can give you a licence here and now to prosecute an appeal to the Privy Council.

Mr. DIPLOCK: I think I have a right to prosecute an appeal to the Privy Council, my Lord.

The PRESIDENT: I think I, or the Privy Council, have to admit an appeal, and I admit an appeal straight away, so far as I can do so, and I certainly express the opinion, for what it is worth, that this is a proper case for you to have every facility for appealing to the Privy Council, subject, of course, to anything the Crown may have to say on the question of security. What have you to say about that, Mr. Le Quesne? 10

Mr. LE QUESNE: In the course of your Judgment your Lordship mentioned the case of *The "Unitas"*, and in that case security was ordered in the sum of £500.

The PRESIDENT: Yes—and in the case of *The "Bellaman"* it was £400.

Mr. LE QUESNE: That is so, my Lord. If there is to be an appeal in this case the amount of printing which will be involved will be considerably more than was involved in *The "Unitas"*, because there are far more documents in this case than there were in that case. In that case your Lordship will remember that there were a very few documents, and the actual Record was quite a small one. In this case there will be a great deal more printing required to be done than there was in the case of *The "Unitas"*, and, in addition to that, the cost of printing has very much increased. I therefore ask your Lordship to say that in this case security shall be given in the sum of £750. 20

The PRESIDENT. This is a case, I presume, in which my Judgment, or the Judgment of the Privy Council if the case goes to appeal, will be decisive of a large number of cases. 30

Mr. LE QUESNE: Yes, I think that that is so, my Lord.

The PRESIDENT: There was a whole group of cases of which this was one, and there is something to be said for not putting it all on these people so far as the question of security is concerned—and then there is the question of costs, about which you may want to say something, Mr. Le Quesne.

Mr. LE QUESNE: Your Lordship will have noticed that I have not so far said anything about costs. 40

The PRESIDENT: I thought that probably you would not ask for costs in this case, which is really a test case.

Mr. LE QUESNE: I am not asking for costs in this case, my Lord.

The PRESIDENT: Well, in view of the fact that you are not asking for costs, I do not think that I ought to make the Order for security too heavy.

Mr. LE QUESNE: I do not want to ask for anything which appears to your Lordship to be unreasonable, but I submit, making allowance for what your Lordship has said, that in this case we ought to have security for not less than the amount which was ordered in *The "Unitas"*.

The PRESIDENT: What have you to say about that, Mr. Diplock?

10 Mr. DIPLOCK: The matter is one which is entirely in your Lordship's hands. With regard to the question of the printing of the documents, your Lordship will appreciate that in this case there were a number of documents before the Court which related to the question—the fourth question—which you have not had to decide.

The PRESIDENT: I have already thought of that, but that question may have to be argued in the Privy Council.

Mr. DIPLOCK: I have been considering that question—not an easy one perhaps—and it seemed to me that as it was a matter on which evidence of German law was desired by the Attorney General. . . .

The PRESIDENT: Only if the point arose.

20 Mr. DIPLOCK: I apprehend that if I were successful on appeal to the Privy Council and that question arose the Privy Council would remit the matter back to your Lordship for further consideration.

The PRESIDENT: Well, if that would avoid the printing of a lot of the documents, so much the better. If that point is not going to be argued before the Privy Council there would be a great saving so far as the printing of the documents is concerned.

30 Mr. DIPLOCK: I think my friend agrees that it is not an easy point and that if I were successful on appeal the matter would have to be remitted to your Lordship, because it is not one which the Privy Council could decide.

The PRESIDENT: Mr. Le Quesne, I think it is very desirable that that course should be adopted—and, of course, if you are successful in the Privy Council in upholding my Judgment the whole thing falls to the ground.

Mr. LE QUESNE: It will be extremely difficult to decide what can be left out, my Lord.

40 The PRESIDENT: I do not think so. A large number of the documents it would not be necessary to have printed on any view. I am quite certain that Mr. Threlfall and Mr. Rena could easily agree on what documents should not be printed for the Privy Council, particularly if the fourth question is not to be argued there—or the Treasury Solicitor and Messrs. Freshfields could agree on what documents should or should not be printed for the Privy Council. I am certainly not going to do that. I may tell you that when I began to prepare my Judgment I carried to and fro a whole lot of bundles of documents, but as I

No. 80.
 Judgment of
 Lord
 Merriman, P.
 10th May, 1951,
 (continued).

proceeded with the preparation of my Judgment the number of documents I required got less and less. I think you can agree on the documents to be printed for the Privy Council without any very great difficulty.

Mr. LE QUESNE: If the fourth question is not going to be raised and argued before the Privy Council there are no doubt many documents which will not have to be printed, and it may not be a matter of serious difficulty to decide what those documents are, but, even so, a considerable number of them will have to be printed.

The PRESIDENT: Of course a considerable number of them will 10 have to be printed. The bundle of documents in which the signals are contained is, for instance, a very small one—and the documents with regard to the cost of building these vessels need not all be printed for the Privy Council.

Mr. LE QUESNE: Even accepting that, my Lord, the amount of printing to be done for the Privy Council in these cases will greatly exceed the amount of printing which was required to be done in *The "Bellaman"* or *The "Unitas"*.

The PRESIDENT: Mr. Le Quesne, this is a matter which from your point of view is far more extensive than it is from Mr. Diplock's 20 point of view, and why should Mr. Diplock's clients bear the whole of these costs?

Mr. LE QUESNE: I realise the force of that observation, my Lord, but I submit that regard must be had to the fact that in this Court we have succeeded and we have not asked for costs.

The PRESIDENT: I can tell you, Mr. Le Quesne, that you would not have got them, in a test case like this, even if you had asked for them.

Mr. LE QUESNE: I appreciate that, if I may say so, my Lord.

The PRESIDENT: I do not think there is any need in this case to 30 fix any sum higher than £500 as security.

Mr. LE QUESNE: If your Lordship pleases.

Mr. DIPLOCK: Then there is a certain period of time which your Lordship has to fix, and I ask that that period of time shall be an extensive one. Amongst other things, we have to get the money over here.

Mr. LE QUESNE: May I ask what period of time my friend has in mind?

Mr. DIPLOCK: Would your Lordship say three months?

The PRESIDENT: Yes, I think that is reasonable.

Mr. LE QUESNE: If your Lordship pleases.

The PRESIDENT: That was the period of time I allowed in *The* 40 "*Bellaman*", I think.

Mr. DIPLOCK: Yes.

The PRESIDENT: Very well.

Mr. DIPLOCK: I am obliged to your Lordship.

The PRESIDENT: I repeat my thanks to you all for the help you have given me.

No. 81.**Decree—Hull 507.**

No. 81.

Decree—
Hull 507.
10th May, 1951.

In the High Court of Justice.

10 Probate, Divorce and Admiralty Division
(Admiralty) (In Prize.)

Writ No. 2355.

Before: The Right Honourable the President

Cause: "Hull 507."

20 The President having heard Counsel for the Crown and Counsel for the Claimants, Schiffahrt Treuhand G.m.b.H. of Ferdinandstr.56, III, Hamburg 1, 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, after mature deliberation dismissed the claim of the Claimants and pronounced the "Hull 507" to be enemy property and as such liable to confiscation by the Crown, and condemned the same as good and lawful prize, but made no Order as to costs.

The President further ordered that the German "Hull 507" be delivered over to the Crown in lieu of sale, subject to the payment by the Crown of all costs, expenses and other sums (with exception of Fee 49 in Appendix "B" of the Prize Court Rules 1939) that would have been properly chargeable against the proceeds of sale if the vessel had been sold. The President further admitted an Appeal subject to security being given by the Claimants in a sum of £500 within three months.

Dated the 10th day of May, 1951.

No. 82.**Decree—Hull 508.***(not printed).*

No. 82.

Decree—
Hull 508.
10th May, 1951.
(Not printed.)

30

(In similar terms to Document No. 81).

No. 83.**Decree—Flenderwerke 347.***(not printed).*

No. 83.

Decree—
Flenderwerke
347.
10th May, 1951.
(Not printed.)

(In similar terms to Document No. 81).

No. 84.

Decree—
Flenderwerke
348,
10th May, 1951.
(Not printed.)

No. 84.**Decree—Flenderwerke 348.***(not printed).*

(In similar terms to Document No. 81).

No. 85.

Decree—
m.v. "Hermes".
10th May, 1951.
(Not printed.)

No. 85.**Decree—m.v. "Hermes".***(not printed).*

(In similar terms to Document No. 81).

No. 86.

Receipt for
payment into
Court of £500.
9th August,
1951.
(Not printed.)

No. 86.**Receipt for payment into Court of £500 dated 9th August, 1951. 10***(not printed).*

No. 87.

Registrar's
Certificate.

No. 87.**Registrar's Certificate.**

I, LIONEL FRANK CHRISTOPHER DARBY, Registrar of the Admiralty Division of the High Court of Justice, In Prize, Hereby Certify that the foregoing pages contain a true and exact copy of all the evidence, proceedings and orders made or had in the suits in so far as the same have relation to the matter of the Appeals of Schiffahrt-Treuhand G.m.b.H., Lubecker Flender-Werke A.G., and Dampfschiffahrts-Gesellschaft "Neptun", together with a true copy of the Judgment of the Right Honourable Lord Merriman The President. 20

In Faith and testimony whereof I have to this sheet affixed the Seal of the said Admiralty Division of the High Court of Justice In Prize.

Dated this 10th day of January 1952.

(Seal)

L. F. C. DARBY,
Registrar.

In the Privy Council.

ON APPEAL

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

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

BETWEEN

SCHIFFFAHRT - TREUHAND, G.m.b.H.,
LUBECKER FLENDER-WERKE A.G. and
DAMPSCHIFFFAHRTS - GESELLSCHAFT
"NEPTUN" - - - *Appellants*

— AND —

HIS MAJESTY'S PROCURATOR
GENERAL - - - *Respondent.*

RECORD OF PROCEEDINGS.

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