

Privy Council Appeal No. 75 of 1915.

In the matter of the Steamship "Marquis Bacquehem"

FROM

**HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT
(IN PRIZE).**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 13TH APRIL, 1916.

Present at the Hearing:

LORD PARKER OF WADDINGTON.

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR SAMUEL EVANS.

[*Delivered by* SIR SAMUEL EVANS.]

The subject-matter of this appeal is an Austro-Hungarian steamship of about 4,400 tons gross register.

The Court at Alexandria pronounced that the ship had been seized under such circumstances as to be entitled to detention in lieu of confiscation, and ordered that she should be detained until further order. The Court further declared that the ship should be restored or her value paid to the owners at the conclusion of the war, in accordance with the provisions of The Hague Convention No. VI of 1907.

The appellant contends that this order should be set aside, and asks for the condemnation and confiscation of the ship as prize.

The respondents seek to uphold the order. They have not brought a cross-appeal, and do not ask for restitution.

The facts alleged and relied upon by the respondents in support of the order were that on the 17th August, 1914, when the ship was in the Red Sea about 150 miles north of Port Sudan on her voyage from Karachi to Trieste, she was boarded by officers from H.M.S. the "Duke of Edinburgh," and informed of the hostilities between Great Britain and Austria-Hungary; that until then those on board of her were ignorant of such hostilities; that an officer from H.M.S. "Duke of Edinburgh" informed her master that he was at liberty to proceed on the voyage, and made an entry to that effect in the ship's log-book; that she so proceeded and entered the Port of

Suez; and that she intended to prosecute the voyage through the Suez Canal to its termination at Trieste, but was prevented from so doing by the disabling of her engines on the 20th August.

As was done in reference to Port Said, and the captures of vessels which had been lying there, in the cases of the "Gutenfels" and others, their Lordships in the present case accept that the Port of Suez, in the circumstances of the time is to be regarded as an "enemy port" within the meaning of The Hague Convention.

Assuming this in favour of the respondents, and assuming, for the purposes of this appeal, that The Hague Convention is binding upon Great Britain and Austria-Hungary, their Lordships consider it clear that the case of this ship is not one of those specified in the Convention, where only an order for detention during the war, on condition of restoration or of making compensation after the war, should be made.

Upon the undisputed facts the vessel was not in a belligerent or enemy port at the outbreak of war; nor did she enter such a port while ignorant of the hostilities between the two countries; nor was she captured on the high seas while ignorant of such hostilities.

Accordingly, in their Lordships' opinion, the order made in the Court below in the terms of The Hague Convention cannot stand.

But even if the ship was not entitled to direct protection under the provisions of The Hague Convention, counsel for her owners contended that, inasmuch as the only knowledge of hostilities which her master had was derived from H.M.S. "Duke of Edinburgh," and as she had been allowed to proceed on her voyage by the visiting officer from H.M.S. "Duke of Edinburgh," she ought not to be deprived of the protection she had claimed under The Hague Convention or to be in a worse position than she would have been if the "Duke of Edinburgh" had captured her at sea and exercised the right to detain her.

These contentions were not formulated in accordance with any principle of law, and their Lordships are unable to accept them, even if the facts were as alleged.

In order to appreciate the real situation relating to the voyage, visit, search, and seizure of the vessel, it is deemed useful to make a short statement of the true facts as they present themselves to their Lordships.

The ship was loaded at Karachi, bound with a cargo of cotton for Trieste, and with a cargo of 4,600 sacks of grain for Aden. She set out on her voyage from Karachi on the 4th August, 1914. The following entry appears in the ship's log:—

"August 4, 1914.—Left Karachi. A few minutes before the steamer left the port the agent of the Society repeated a telegram to the commander of the ship received from the directors of the Austrian Lloyd

ordering the captain to go direct to Trieste—not to stop at Aden—and on arrival at Suez the passengers would be shipped on to another steamer and taken to their destination.”

The vessel was not constructed for passenger traffic. No information was given as to what passengers were on board or what were their respective destinations. Nor was anything said about any steamer on which they were to be shipped at Suez. But an entry in the log on the 26th August refers to “arrangements for fifteen Austrian reservists to go to Alexandria *en route* for Europe.”

The summary of the contents of the log between Karachi and Suez (from the 4th to the 20th August) is unusually meagre. It only records the visit from H.M.S. “Duke of Edinburgh” on the 17th. But on a loose sheet of paper discovered in the log-book by his Honour Judge Cator were found these entries:—

“August 12-13, 1914.—We navigate at the same speed. At 8:30 Ras Marshay was sighted. As by approaching Aden we might meet the ‘natanti,’ and in order not to be seen we navigate without lights, this all the more as we had seen some searchlights from the direction of the harbour.

“August 13.—At night we navigate without lights towards the Straits of Perim, keeping our steamer out of the way in order to avoid encounters.”

Thus, darkly and furtively, did the ship sail past Aden—a British possession—the port to which a large part of her cargo was destined. There is a significant omission of any reference to the Aden cargo in the master’s affidavit and in the petition filed for the claimants.

The ship was navigated with similar precautions through the Straits and past Perim Island, also a British possession.

When, on August 17th, after travelling some 700 miles or more up the Red Sea, she was visited and searched by the officer from H.M.S. “Duke of Edinburgh,” these incidents of the voyage and entries on the loose sheet were not disclosed to him. The Lieutenant Commander acted (no doubt upon the information imparted, to which he appears to have given the unsuspecting credence of an honest sailor) upon the assumption that the master of the enemy vessel was not aware of hostilities. He also acted under a misapprehension that some period of grace had been allowed to the ship. He accordingly refrained from capturing her, and made the following entry in the ship’s log-book:—

“Boarded steamship ‘Marquis Bacquehem’ in latitude 22° 25’ N., longitude 37° 8’ E., and informed captain that a state of war exists between England and Austria. Being within the period of grace, allowed ship to proceed on her voyage. (Signed) J. K. B. Birch, Lieutenant Commander, R.N., H.M.S. ‘Duke of Edinburgh,’ commanded by Captain H. Blackett, R.N.

It was argued, or suggested, that this constituted some kind of licence for the ship to proceed upon her voyage without any risk of capture, or at any rate, of any capture or seizure involving more than detention as a penal consequence. But the entry, in fact, was nothing more than a memorandum of his visit and search which the boarding officer was bound, as part of his duty, to record on the ship's log.

The instructions to officers in such a case are prescribed thus:—

“The visiting officer should enter on the log-book of the vessel a memorandum of the search. The memorandum should specify the date and place of the search, and the name of Her Majesty's ship and of the commander; and the visiting officer should sign the memorandum, adding his rank in the navy.”—(See “Manual of Naval Prize Law,” by Holland, issued by authority of the Admiralty, 1888, article 225.)

What the officer did amounted to no more than if he had said, “From what you have told me, so far as I am concerned you can go.”

Having thus escaped capture by H.M.S. “Duke of Edinburgh,” the ship reached Suez on the 20th August.

There her engines were partly disabled so as to prevent her from entering the Canal; and there she remained until she was taken out to the Roads and captured on the 27th October.

It was admitted by respondents' counsel that, notwithstanding anything contained in any of the Suez Canal Conventions, it was right for the safety of the Canal to disable the ship so as to make it impossible for her to enter it.

In these circumstances, their Lordships are of opinion that the owners of the ship could not after that claim any rights or privileges under any of the Canal Conventions.

In the course of his argument for the respondents, Sir Robert Finlay did not rely upon any protection or privilege under the Canal Conventions. After the reply of the Attorney-General, however, in answer to their Lordships, he put forward tentatively an argument that under the Conventions the vessel while at Suez was immune from any act of hostility. As to this, it is sufficient to state, in addition to what has already been said, that their Lordships find, as a fact, that the ship did not intend to pass through the Canal in the course of her voyage. She intended to, and did, use Suez as a port of refuge. She made direct for it, although laden with a cargo destined for Aden which would have to be reshipped and carried back about 1,300 miles to be delivered at Aden. At Suez her “passengers” were to be shipped on to another steamer and thence “taken to their destination.” She regarded Suez as a neutral port, and intended to stay there indefinitely; and, indeed, on the 26th October, a protest was made against her expulsion from the neutral port.

His Honour Judge Cator, in the Court below, said he greatly doubted if the ship ever intended to proceed beyond Suez. Their Lordships do not share any such doubt. On the contrary, they have come to the conclusions above stated.

As to the order made in the Court below, the judgments express in terms the difficulties the Court felt in ordering detention instead of confiscation.

Judge Cator in one passage said :—

“If the news of hostilities had reached her through any source but that of a British man-of-war, I apprehend that we should have no option but to condemn her to confiscation. That would have been her fate under the old law, and she can only escape by bringing her case within the exceptions specified in The Hague Convention, and when the language of the Convention is clear we must abide by it. For although I have every wish to construe its articles in a liberal spirit, the Court cannot modify or add to them.”

Their Lordships have already declared their opinion that the ship could not be brought within the provisions of the Vith Hague Convention at all.

In another passage His Honour expressed himself as follows :—

“I find it hard to decide whether we should confiscate the ship or only order her detention. I have had more difficulty in making up my mind upon this point than any that I have yet had to determine in prize. For although it is true that, after being warned, the ‘Marquis Bacquehem’ might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the ‘Duke of Edinburgh’ allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention.”

Their Lordships have already shown that this view of the effect of what was done by the Lieutenant Commander of the “Duke of Edinburgh” was erroneous, and that no such result could properly be held to follow his visit and search and his record thereof in the ship’s log.

Indeed, if the officer had been truthfully informed of the facts, he would have been justified himself in capturing the ship on the high seas; and if that had been done, the facts would supply sufficient evidence to enable the Court to order her confiscation.

It is not necessary to comment further upon the judgments. Their Lordships have only dealt as fully as they have with the case because they differ in opinion from the learned Judges of the Court below. Upon the simple ground that the ship, after knowledge of hostilities, entered into an enemy port, where in the circumstances she was not entitled to protection or immunity under any international Convention, their Lordships

are of opinion that she was properly seized as prize, and is subject to confiscation.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed; that the order appealed against should be reversed; and that an order be made condemning the vessel as lawful prize to the Crown. The respondents must pay the costs of the appeal.



In the Privy Council.

THE STEAMSHIP "MARQUIS
BACQUEHEM."

DELIVERED BY
SIR SAMUEL EVANS.

PRINTED AT THE FOREIGN OFFICE BY G. F. HARRISON.
1916.