JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HIS BRITISH MAJESTY'S PROCURATOR-GENERAL IN EGYPT *v.* DEUTSCHE KOHLEN DEPOT GESELLSCHAFT [1]

Judicial Committee of the Privy Council

(Lord Sumner, Lord Parmoor, and Lord Wrenbury)

Decided December 13, 1918

THIS was an appeal and cross-appeal from a judgment of the Supreme Court for Egypt in Prize, by which certain tugs, motor-boats, lighters, and other craft, the property of the Deutche Kohlen Company, were declared to have belonged at the time of seizure to enemies of the Crown, and to have been properly seized as good and lawful prize, and they were directed to be detained until further orders. The Crown appealed from so much of the judgment as ordered that the craft should be detained only, and claimed that they should be condemned and confiscated. The company cross-appealed, and submitted that the craft were liable neither to condemnation nor detention.

The Solicitor-General and Mr. Gavin Simonds appeared for the Crown; Sir Erle Richards, K. C., and Mr. Balloch for the company.

The Deutsche Kohlen Company, of Hamburg, had a branch at Port Saïd, where it supplied coal to passing steamers. It owned and used a number of tugs, motor-boats, and lighters, none of which was registered in the German Mercantile Marine. After the outbreak of war it carried on its operations under a limited license granted by the Egyptian Government, but ultimately the business was wound up and liquidated, and the company's craft requisitioned and used by the British authorities. The crown claimed the condemnation of the craft as belonging to enemies. Judge Grain rejected the company's contention that the craft were exempt from capture under

[1] *The Times Law Reports*, Vol. XXXV, p. 159.

Article 3 of the Eleventh Hague Convention, as being "vessels employed exclusively in coast fisheries, or small boats engaged in local trade." But he held, contrary to the submission of the Crown, that the craft were "merchant ships" within the meaning of Article 2 of the Sixth Hague Convention, and were liable only to be detained, not to be condemned or confiscated. From these decisions both parties appealed.

The arguments were originally heard in February last, but were broken off to enable the Crown to procure from Egypt certain correspondence bearing on the question whether there had been any seizure of the craft.

The Solicitor-General said that there had been no formal seizure, as any such act would have been a breach of the Suez Canal Convention, but he submitted that the steps taken by the authorities amounted to seizure in law. The possession of the craft by the naval and military forces was tantamount to seizure.

Sir Erle Richards, K. C., contended that the evidence from Egypt showed that there had been no capture, and therefore the court had no jurisdiction, for it was necessary to have capture as a basis of the proceedings. The craft were merchant ships, which were not liable to seizure, and, besides, they had been working under a license from the Egyptian Government, and could not therefore be seized. They were also protected from seizure by the Suez Canal Convention.

Lord Sumner, in delivering their Lordships' considered judgment, said: The Vice-Admiralty Court at Alexandria decided this case on the application of The Hague Conventions, numbers VI (Arts. 1 and 2) and XI (Article 3). The learned judge held that the craft were not immune from seizure, but only made a detention order against them. Accordingly there are cross-appeals. One party claims condemnation, the other immediate release. Each prepared his case on the assumption that there had been a valid seizure and only sought to inquire, which convention, if either, applied, for if neither was applicable, condemnation followed. During the hearing it appeared that the record contained no account of the circumstances of the seizure, nor indeed expressly alleged any seizure at all, and although it might have been enough to have relied upon the recital in the decree under review, that the various craft were "lawfully seized as good and lawful prize," on such a point their Lordships were

reluctant to refuse examination into the facts, when a doubt was brought to their notice. Accordingly they directed that further information should be obtained from Egypt. The material now forthcoming is neither as explicit nor as simple as might have been expected. Before the war the business of the Deutsche Kohlen Depôt Gesellschaft in Egypt was to coal steamers passing through the Suez Canal. They owned a large fleet of lighters with the tugs required to tow them. Most of them were of steel, but a few were of wood. Four were water tank boats and the rest chiefly coal barges. There were also for general communication between ship and shore and for harbor business three fast launches. The tugs were about 57 by 14 feet; their tonnage was about 27 tons, and their engines must have been of high power. The lighters, 77 in number, ranged from 82 by 20 feet to 46 by 10 feet. Their average tonnage was nearly 130 tons. Where they were built is not stated, though it is reasonable to suppose that all of them, except perhaps the wooden barges, had come out from Germany, but whether afloat or not is unknown. The tugs were capable of open sea voyages, but in fact they were only employed in Port Saïd harbor. The lighters were incapable of taking the open sea. When war broke out the company's business was for some time allowed to proceed as before. About the end of 1914 some of the lighters were requisitioned, and in October, 1915, a license was granted to the company to continue supplying the rest to the British Coaling Company (Limited). At the end of April, 1916, this license was revoked, and an official was appointed by the General Officer Commanding in Egypt as receiver of the business, "with instructions to liquidate the same." He is styled the liquidator, and, in the name of the Deutsche Kohlen Depôt Gesellschaft, is respondent to this appeal. The proclamation under which he was appointed appeared in the *Journal Officiel Extraordinaire* of January 25, 1915, and provided that "every receiver shall have such powers as shall be prescribed in his instructions for managing the property entrusted to him," but he appears to have been simply placed under the control of the licensing officer, to whose order he was bound to conform. His position was very different from that of a liquidator appointed in legal proceedings. His principal function appears to have been to hold possession of such of the craft as were not from time to time in the use and possession of the naval and military authorities, and with them to supply the requirements of the British

Coaling Company (Limited). Though variously employed and in various places the several craft have throughout been treated as one coaling fleet and as an installation for a single business, physically divisible into units, but managed as a whole.

During the early part of the war the Procurator-General, the present appellant, had been fully occupied in taking proceedings against ships and cargoes in the court of Alexandria, but in the spring of 1916 he decided to seek the condemnation of the fleet of the Deutsche Kohlen Depôt Gesellschaft. He did not wish actually to lay hands on the individual units. They were numerous; they often had no one on board, some were here, some there; most of them were no doubt in the harbors of Port Saïd or Suez, but some were up the Canal and all were being usefully and indispensably employed for military, naval, or commercial purposes. He had also to consider, no doubt, the terms of the Suez Canal Conventions, since the course pursued in the case of *The Pindos* (32 *The Times L. R.*, 489; [1916] 2 A. C., 193) was inapplicable to a fleet of such a size and character. Such of the craft as were not already in the hands of the naval and military authorities were in the possession of the liquidator, though physically scattered up and down. In May, 1916, he instructed the marshal of the Prize Court to report to him on the company's floating craft, and he asked the liquidator to furnish a list of them in June. In July he saw the liquidator and intimated, to quote his affidavit:

> That I proposed to take proceedings against the craft, and owing to the difficulty in serving on the particular craft, I would ask for an order for substituted service on him. It was then agreed between us that, as liquidator, he should, on proceedings being taken, continue to hold such of the tugs and lighters as were in his possession at the disposal of the Crown and the Prize Court. I also arranged with Mr. Bristow, manager of the British Coaling Depôts, and with Mr. Lloyd Jones that the manipulation contract, which was being carried on by the liquidator, should continue to be so carried on as between the Crown and the Coaling Depôts.

He further informed the licensing officer what he desired to do, and with him "came to an understanding that the liquidator should hold the craft and continue to act on behalf of the Crown from the time the proceedings were instituted against the craft."

What, then, is the fair conclusion from all this? It is clear that the Procurator-General meant to bring this fleet before the Prize

Court with a view to its condemnation, and his general intention must have been to do whatever was necessary to give the court jurisdiction. He desired to avoid taking physical possession of the craft *seriatim,* yet he equally desired that all should be validly seized. The liquidator, Mr. Lloyd Jones, had them under his control, and those which were not already in the hands of the naval and military officers of the Crown were being used by Mr. Bristow, above mentioned. The liquidator does not contradict the Procurator's evidence, and in prosecuting his cross-appeal did not question that the Vice-Admiralty Court had jurisdiction.

Their Lordships take the possession respectively of the naval and military authorities and of the liquidator to have been, by agreement, the possession of the marshal of the Prize Court until proceedings were taken, and thereafter to have been "continued" on behalf of the court, the actual requirements of the forces and of the British Coaling Company being satisfied in the meantime and till further order. It is as though the Procurator had pointed to the fleet, assembled in the harbor under the liquidator's eyes, and had said, "Submit to treat this fleet as seized and undertake to do with the vessels as the court and its marshal may direct, or I will at once use force, which I have at hand."

Their Lordships do not overlook the fact that both the Procurator and the liquidator elsewhere seem to suggest that the question was rather one of service of proceedings *in rem* than of capture, for they give August 8, 1916, as the date of the seizure, which was actually the date when substituted service was effected on the liquidator. The liquidator, however, was chiefly concerned with his disbursements, and it was in this connection that the date of seizure was given to and accepted by the court as August 8th in an interlocutory application. Their Lordships do not think this sufficient to negative the inference to be drawn from the procurator's account of his agreement with the liquidator, and as their Lordships are not asked to suppose that the Procurator completely overlooked the importance of seizure, they conclude that a sufficient seizure having been arranged by consent, the matter subsequently received no further attention.

This view of the facts disposes of two other matters. In spite of a general statement, made on the application for leave to effect substituted service, that the craft to the number of eighty-five were in various places along the canal and constantly changing their

position, no evidence is forthcoming to enable any one lighter to be discriminated from the rest, and the coal barges must for the most part have been kept in the harbors of Port Saïd and Suez. Sir Erle Richards for the liquidator stated to their Lordships that on the present materials he could not ask for a decision, that the craft were seized in inland waters, and were not the subjects of maritime prize at all, and, indeed, such a contention would have precluded the liquidator from obtaining a judicial decision on the effect of the Hague Convention, which is the true issue in the case and in strictness the only issue, which can be presented as of right in the interests of an enemy company. As no point of this kind was made at the hearing, their Lordships will deal with the whole fleet as having been enemy property seized in port, and as such liable to be condemned in a court of prize.

The liquidator further contended that the seizure was bad as being a breach of the Suez Canal Convention, 1888, Article IV. It does not, however, follow that a seizure, otherwise good, must be invalid for all purposes merely because it contravenes some term in an international instrument cognizable in a prize court.

It is legitimate to consider the object with which the convention was entered into, the scope of its provisions, and the mischief which it was intended to prevent. As was pointed out in the Sudmark (34 *The Times L. R.*, 289; [1917] A. C., at p. 623), this convention does not stipulate any penalty for its infraction, and a court of prize is not warranted in creating a penalty where the convention creates none, or in declaring a seizure to be had because in no other form could it effectively create a penalty at all. Again, their Lordships cannot forget that, long before the seizure in the present case, the Canal generally had been made a field of battle by the armies of the Sublime Porte, acting in alliance with those of the German Emperor, and for want of mutuality alone the convention could not be used to protect the property of an enemy whose sovereign had already fundamentally disregarded it. There is, however, on the facts a simpler means of disposing of the point under the terms of Article IV., "*Aucun droit de guerre ne pourra être exercé dans le canal et dans ses ports d'accès.*" In the present case the exercise of any right of war in the Canal was carefully avoided. What was done, though constituting a seizure for the purposes of prize jurisdiction, was done ashore by word of mouth, and involved no belligerent con-

duct in the Canal or its ports of access contrary to the convention. The *de facto* tranquillity, which in the interest of neutrals the convention secures, was fully respected. The interests of neutrals do not demand that acts done in Egyptian territory which do not affect the Canal or its ports of access should be invalidated on the mere ground that they took place in its neighborhood.

To turn to The Hague Conventions, can these tugs and lighters be covered by the words of Convention XI, "*Bateaux exclusivement affectés à des services de petite navigation locale?*" For some reason, which is not apparent, the French text makes the element of size a quality of the service in which the craft are engaged; in the English it is a quality of the craft themselves. In the present case it is difficult to describe either the craft or the navigation in which they engage as small. As applied to the navigation the words evidently predicate of it a petty, local character. These craft are an integral and indispensable adjunct of most important ocean voyages, and without them voyages through the Suez Canal would be impracticable. Their service is the reverse of petty or local. Nor are the craft themselves truly small. The tugs must be of high power, and their mere tonnage and dimensions are therefore not decisive. Few of the barges are even of modest size; none is insignificant, and most of them are of ample burden. Their Lordships are satisfied that, whatever be the precise limits of this article, it was never contemplated that such craft as these should fall within them, and they think the same of the argument that they can be assimilated to fishing boats, so as to entitle them to the tenderness which has often been extended to fisherman under international law.

The application of the Eleventh Convention does not depend merely on the question whether these craft can or cannot be styled "navires de commerce" with tolerable propriety. The construction of the article which would bring under that term all floating structures not "navires d'état" was rejected by their Lordships in *The Germania* (33 *The Times L. R.*, 273; [1917] A. C., at p. 378, and in delivering the opinion of the Board, Lord Parmoor observed at p. 378), "There is nothing in the context of Article 2 which would suggest that the expression, 'un navire de commerce' includes every class of private vessel." It would be a mistake to seek in the Hague Conventions, or in the terms there employed, exhaustive categories of every kind of *bâtiment* afloat, or to suppose that, taken collectively,

the *bateaux, bâtiments* and *navires* there mentioned cover the whole field of possible means of carriage by water so as to make provision somewhere or other for each and all of them. Conventions concluded between nations so diversely interested rest principally on compromise, and cannot be expected to exhibit the comprehensiveness of a code.

The language of the general preamble to the article is of importance, but the actual text must come first. The articles contemplate ships—*navires de commerce*—which in the course of a voyage from a port of departure or to a port of destination enter a port and there find themselves entangled in hostilities of which they were unaware, or ships also commercially engaged upon a voyage, finding themselves in a port, whether of loading, of call, or of discharge, which by the outbreak of war becomes an enemy port, and they provide days of grace, in order that such ships may have their chance to go in peace, and deal specifically with the case in which *force majeure* prevents them from availing themselves of this opportunity. The picture so drawn is plain, and, if there are vessels entitled to the designation of *navires de commerce* which lie outside this picture, then the scope of the article affords them no assistance, be their designation on their classification what it will. Neither collectively nor individually was the fleet of the Deutsche Kohlen Depôt engaged in or between ports of departure and discharge. It did not find itself in Port Saïd in the course of a voyage. Port Saïd was its home, nor had it any other. No *force majeure* affected it. In point of fact, after the outbreak of war it went on with its regular employment in its permanent home as before, and no opportunity for departure was desired, for there was neither the intention nor the means for taking it elsewhere. This fleet was the very opposite of the *navires de commerce* referred to, and was as fixed in its habitat and in its orbit as trains of coal trucks from which steamers take their coal under a tip. If so, it is unnecessary to express an opinion whether the craft could be called *navires,* and, if so, whether they were also *navires de commerce.* To them Convention XI had no application at all.

In the alternative, but only in the alternative, the question arises whether any benefit could be claimed under the convention for craft which did not avail themselves of the days of grace and were not prevented by *force majeure* from doing so. The "Décision" of the

Egyptian Government, dated August 5, 1914, gave permission to German ships, which found themselves in Egyptian ports at the outbreak of hostilities, to quit the port up to sunset of August 14. Let it be that some of these craft could not go, because they were not built for sea, though no doubt with some alterations they could have been made fairly seaworthy; let it be that none of the members of the fleet had any business or occupation elsewhere. This does not secure to them the benefit of the convention without complying with its terms: it is only ground for saying that they are not within the scope of the convention at all. They remained in the port and continued their usual employment and took the risk involved in the fact that by Article XIII of the same Décision "*les forces navales et militaires de Sa Majesté Britannique* pourront exercer tout droit de guerre" in Egyptian waters, apart of course from the terms of the Suez Canal Convention. Remaining where they were conferred on them no irrevocable permission to stay and trade, no permanent immunity from the belligerent rights of the Crown. Later on a license was applied for and obtained, but before seizure that license had been duly revoked. Thereafter at any rate the liquidator could not invoke for their protection the principle that "When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay," Princess Thurn and Taxis *v.* Moffit (31 *The Times L. R.*, 24; [1915] 1 Ch., at p. 61), even if such a principle is applicable to personal property only, when no enemy person is actually present or in charge of it.

In the result the appeal succeeds and should be allowed, and the cross-appeal fails and should be dismissed, in each case with costs. The decree of condemnation must be amended by omitting the words "and that the said tugs, lighters, motor-boats, and floating craft be detained until further order of the court," as well as the subsequent words "and detention," and the subjects seized must be forthwith condemned and confiscated.

Their Lordships will humbly advise his Majesty accordingly.