

*Privy Council Appeal No. 63 of 1915.*

**In the Matter of the Steamship “Gutenfels.”**

*Privy Council Appeal No. 64 of 1915.*

**In the Matter of the Steamship “Barenfels.”**

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**In the Matter of the Steamship “Derfflinger.”**

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 7TH APRIL, 1916.

*Present at the Hearing:*

LORD PARKER OF WADDINGTON.

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR SAMUEL EVANS.

[*Delivered by* LORD WRENBURY.]

THE “GUTENFELS.”

The “Gutenfels” is a German ship. Bound from Antwerp for Bombay and Karachi, she arrived at Port Saïd in the afternoon of the 5th August, 1914, and entered the port while still ignorant (as is now admitted) that hostilities had broken out between Great Britain and Germany. From the 5th August to the 14th August she was not free to leave. On the 14th August she was informed that she was free to proceed if she liked. Matters so remained until the 13th October. She never asked for a pass. She was not offered one. On the 13th October, 1914, the Egyptian Government put a crew on board, and on the 16th October they took her to sea and conducted her to H.M.S. “Warrior,” who seized her as prize and took her to Alexandria. It is admitted that this was done by

arrangement between the Egyptian Government and the British Government.

At the date of these events war had not been declared between Great Britain and Turkey, and Great Britain had not declared Egypt to be a protectorate. The date of the declaration of war with Turkey was the 5th November, 1914. The date of the declaration of the protectorate was the 18th December, 1914.

The Egyptian Prize Court has pronounced the ship to have belonged at the time of seizure to enemies of the Crown, and to have been seized under such circumstances as to be entitled to detention in lieu of confiscation, and has ordered the ship to be detained by the Marshal until further order; and has further declared that, in accordance with the provisions of article 2 of No. VI of The Hague Conventions, the ship must be restored or her value paid to the owners at the conclusion of hostilities. From this order the Crown appeals. There is no cross-appeal. The Crown contends that the ship ought to be confiscated, or, at any rate, that the question whether she ought to be confiscated, or, on the contrary, whether she must be restored or her value paid to the owners at the conclusion of hostilities, should be left to be determined after the war, and that in default of confiscation the order should be for detention till further order, with liberty to apply as in the case of the "Chile" (1914, P. 217). The respondents, having no cross-appeal, cannot contest the order which imposes detention.

The points which have been argued before their Lordships are numerous. Upon some of them it is unnecessary to pronounce any opinion :

*First.* To The Hague Convention No. VI (which is the relevant Hague Convention, and will hereinafter be styled simply The Hague Convention) Egypt was not a party. The question has been raised whether, having regard to the anomalous position in which Egypt stood, The Hague Convention applies to Egypt. Their Lordships find it unnecessary to determine this question. They will assume, in favour of the respondents, that The Hague Convention does apply to the case before them.

*Secondly.* The question has been argued whether Port Saïd was, within the meaning of The Hague Convention, an "enemy port," that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In Hall's "International Law," sixth edition, p. 505, the learned author writes :—

"When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil."

Their Lordships think this to be right.

*Thirdly.* A question has been raised whether, in the events which have happened, The Hague Convention was operative and binding at the date of the events with which the Board are concerned in this case. The respondents say that it was. The Law Officers of the Crown have stated in the plainest terms that the British Government abide by The Hague Convention and look to Germany to do the same. The British Government, by the Order in Council of the 4th August, 1914, presently mentioned, acted under The Hague Convention. It is unnecessary to determine whether The Hague Convention applies or not. Their Lordships will assume in favour of the respondents that it does.

It results that the only question for determination is the construction and meaning of The Hague Convention, and that question reduces itself to the decision of a single point, viz., whether article 2 is, or whether any part of it is, obligatory, or whether, if the course referred to as "desirable" in article 1 be not taken, article 2 has or has not any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or which, having left its last port of call before the commencement of hostilities, enters an enemy port without having heard of the hostilities. The respondents contend that it has, the appellants that it has not. The question is one of law arising on an international document involving a reciprocal obligation performable only at the end of the war. If this Board were now to determine this question of construction, Germany might hereafter take a different view, and the performance of the obligation, as a reciprocal obligation, might become impossible.

The order made by the Egyptian Court determines that the ship must be restored, or her value paid at the conclusion of hostilities. If this order were to stand and at the conclusion of hostilities Germany maintained that the construction upon which that order is based was wrong and refused to restore or pay the value of British ships seized and detained by Germany in like circumstances, the performance of the obligation as a reciprocal obligation would be impossible unless achieved by diplomatic action. Under these circumstances the construction for which the respondents contend, involving as it does a reciprocal obligation performable only at the end of the war, cannot at present be fully determined by their Lordships in the absence of knowledge of the future attitude of the respective belligerents in that regard. Accordingly they think it incompetent to dispose of this question of construction at present.

It remains to apply the above considerations—subject to the above reservations—to the case before the Board.

On the 4th August, 1914, an Order in Council was issued recognising and acting upon article 1 of The Hague Convention, conditionally upon Germany within a limited time doing the same. Germany did not do so, and the Order in Council did not come into operation. If this Order in Council included

Egypt, the result of Germany's refusal to concur was that neither article 1 nor article 2, so far as it is complementary to article 1, took effect as regards Port Saïd. If, as their Lordships incline to think, it did not extend to Egypt, it may, of course, be set out of consideration. In either case nothing turns upon this Order in Council, except that it evidences the desire of Great Britain to take that which The Hague Convention indicated as the reasonable course. Their Lordships do not forget that the respondents placed some reliance upon this Order in Council as assisting in the construction which they place upon The Hague Convention, but their Lordships are unable to accept the view that it is of any service for this purpose. Even if at the date of this Order in Council Great Britain took a particular view of the construction of The Hague Convention, that fact throws no light upon the question as to what is, in fact, the true construction.

On the 5th August, 1914, the Egyptian Government issued a "Décision," or Decree, similar in some respects to the Order in Council of the 4th August. This granted days of grace to sunset on the 14th August to ships of not more than 5,000 tons gross. But as the "Gutenfels" was more than 5,000 tons it did not apply to her.

The facts then are (assuming, as for the purposes of this judgment their Lordships do assume, that The Hague Convention applies) that article 2, so far as it was complementary to article 1, never came into operation by reason of the fact that as between Great Britain and Germany the recommendation agreed by article 1 failed, by reason of the action, or, rather, the inaction, of Germany, to be carried into effect by the contracting parties. Under these circumstances, there being nothing which entitled the "Gutenfels" to remain in the port (for she had long exceeded any such limited right as might arise from a right of passage through the Canal, assuming that she had such a right), there was nothing to prevent the Egyptian Government and British Government acting as they did, and at the least seizing and detaining her during the war, to await at the conclusion of the war the determination of the questions above reserved. The order which, in their Lordships' judgment, will be right will be an order allowing the appeal, and substituting an order in the terms of that in the case of the "Chile" (1914, *P.* 217), leaving the ultimate rights between the parties to be determined after the war.

Their Lordships will humbly advise His Majesty accordingly.

They think that each party should bear his own costs of this appeal.

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#### THE "BARENFELS."

This vessel, bound from Hamburg and Antwerp to Colombo, Madras, and Calcutta, arrived at Port Saïd on the 1st August

1914, and was still there on the 4th and 5th August. Except that she was in Port Saïd before and at the commencement of the war, the relevant facts are identical with those in the case of the "Gutenfels." This case is governed by the decision in the "Gutenfels," and their Lordships will humbly advise His Majesty that the same order should be made.

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#### THE "DERFFLINGER."

This ves-el showed by her build that she was intended for conversion into a war-ship. The Hague Convention therefore does not apply (see article 5). She passed through the Canal, and arrived at Port Saïd on the 2nd August on a voyage from Yokohama to Bremen. Her log contains the following entries:—

"1914. August 2: Arrived Port Saïd. The journey cannot be continued on account of the war.

"August 3rd: Passengers and baggage landed."

Under the International Suez Canal Convention of 1889, she was entitled to use the Canal for the purposes of passage. She had used it, and the above entries show that her voyage of passage was over; that her journey was, in her view, rendered abortive by reason of the war, and that she had accordingly landed her passengers and cargo. Port Saïd was, on the 2nd and 3rd August, a neutral port. The war which caused the discontinuance of the ship's voyage was the war between Germany and France and that between Germany and Russia. When war broke out on the 4th August between Germany and Great Britain, the vessel was lying in Port Saïd, not in exercise of a right of passage, but by way of user of the port as a port of refuge. Under these circumstances, the Canal Convention had ceased to be operative and she was not entitled to any protection. The ship was a German ship lying in an enemy port, and was a ship to which The Hague Convention did not apply.

If any justification were necessary for the subsequent acts of the Egyptian and British Governments, it is found in the fact that the ship, while lying in the port, was using her wireless for communicating information to the German war-ships the "Goeben" and the "Breslau." In their Lordships' opinion, the order for her confiscation was right, and this appeal should be dismissed. The order should be varied, however, so as to run "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown" and in other respects should be in the form of the order under appeal. Their Lordships will advise His Majesty accordingly. The appellants will pay the costs of the appeal.

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In the Privy Council.

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In the Matter of the  
STEAMSHIP "GUTTENFELS,"  
STEAMSHIP "BARENFELS,"  
and  
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