

Privy Council Appeal No. 90 of 1915.

In the Matter of the Steamship "Ophelia."

FROM

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

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1916.**

Present at the Hearing:

LORD PARKER OF WADDINGTON.

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal from a decree of the President of the Admiralty Division, sitting in Prize, condemning as lawful prize the German steamship "Ophelia" and rejecting the claim of the appellant, made on behalf of the German Government, to her release as a hospital-ship protected by the provisions of Convention X of The Hague Conventions of 1907. A very complete abstract of these provisions is set out in the judgment of the learned President, and it is only necessary to refer to the most material of them, which are the following:—

"Article 1. Military hospital-ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers, shall be respected and cannot be captured.

"Article 8. The protection to which hospital-ships are entitled ceases if they are used to commit acts harmful to the enemy. The presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection."

The question whether the "Ophelia" was entitled to protection from capture, as complying with these provisions, or

whether, by reason of her equipment or the acts of her captain and crew, she had lost that right to protection, is almost entirely a question of fact. The only question which is at all in the nature of a point of law arises on the words of the Convention as to the presence of a wireless telegraphy apparatus, and that question can most conveniently be dealt with after the facts have been stated which raise it. It is necessary, therefore, to consider what is open upon an appeal to this Board from the Prize Court on facts.

The Attorney-General has contended that the findings of the Judge below should be held conclusive, and he quotes the "Julia" (14 Moore, Rep. 210) and the "Princess Alice" (L.R., 2 P.C., 245). These cases, however, which were collision cases heard on appeal from the Admiralty Court, and not prize cases, only point out the advantage which the Judge below had in seeing and hearing the witnesses, and also in the knowledge of navigation which he necessarily acquired in the exercise of his office, and the Judicial Committee merely emphasised the rules on which Appeal Courts always profess to act.

Their Lordships are of opinion that this appeal must be treated as a rehearing, in the same way as an appeal to the Court of Appeal from a Judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the Judge, but the Appeal Court gives very great weight to the fact that the Judge below hears the witnesses, which they do not, and practically acts on the opinion of the Judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Here the evidence for the Crown was all on affidavit and the evidence for the claimant was given orally, after his witnesses had had an opportunity of studying the evidence for the Crown. The affidavits for the Crown were sworn before the case for the claimant had been disclosed, except so far as it was very slightly disclosed by an affidavit sworn by the claimant on the 13th February, 1915 (p. 6 of the Record), which did little more than verify the claim. The claimant did not apply to cross-examine any of the Crown witnesses on their affidavits, and his counsel accounts for this by saying that he does not substantially dispute the facts deposed to by the witnesses, but only the inferences drawn by the witnesses from the facts; and it is contended that the claimant's evidence explains rather than contradicts the facts on which the Crown relies. To a great extent that is so, but there seem some contradictions of fact, and some points on which the learned President appears not to have accepted as reliable the oral evidence which he heard. On these points their Lordships would not lightly differ from the learned President, but many matters have been raised on the argument of the appeal which cannot be satisfactorily disposed of by treating them as matters of fact concluded by the view of the President. Their Lordships therefore feel it their duty to review the facts in some detail.

No question is raised as to the necessary formalities to constitute the "Ophelia" a hospital-ship having been complied with. She had a proper certificate, and her name had been duly communicated to the belligerent Powers. She was painted properly as a hospital-ship, and was furnished with the proper flags, although a question is raised as to whether she displayed them properly on the 8th October, one of the days to which the evidence relates.

The first point to be considered seems to be whether the fitting and equipment of the "Ophelia" were such that she can be said, as required by the Convention, to be constructed or adapted "wholly and solely" for affording relief to the wounded, sick, and shipwrecked. The affidavits for the Crown and the admission of witnesses for the claimant show that the vessel, although she had some special fittings appropriate only to a hospital-ship, was not, according to British requirements, at all well adapted and fitted for that purpose; but it is unnecessary to go into the details of this, as their Lordships agree with the view of the learned President (who, it may be observed, himself inspected the ship) that no standard of fitness can be laid down, and although not *well* adapted, this vessel cannot be said *not to be adapted*, and that the real question therefore is whether she was *solely* adapted for hospital purposes. The inadequacy, and the, in some respects, curious character of the sanitary and other hospital equipment is not, however, without significance on the question of the use which it was really intended to make of the vessel.

In the opinion of Commander Newman, who had special experience in the fitting of hospital-ships, the "Ophelia" was not only unsuitable for use as a hospital-ship, but was undoubtedly fitted and intended for signalling purposes. He came to that conclusion without knowing that the ship was suspected of acting as a signalling ship, and when he had merely been instructed to report on her suitability as a hospital-ship. It is obvious that there could hardly be a greater or more dangerous abuse of the privileges of a hospital-ship than the communicating to the naval authorities of her nation information which she would be constantly in a position to obtain by virtue of her immunity. Her signalling apparatus ought to be confined strictly to what would be necessary for receiving instruction as to her duties and for calling for assistance in the performance of them and suchlike legitimate purposes. That the risk of such abuse was present to the minds of the framers of The Hague Convention is shown by the mention of wireless telegraphy. Instead of the signalling apparatus and equipment of the "Ophelia" being confined within the narrow limits necessary for a *bonâ fide* hospital-ship, it was obviously very largely in excess of them. She had a very unusual number of signal balliards working on brackets from the funnel, which brackets were fitted to her in Kiel after her first fit-out and very shortly before her capture; but it is said by the German witnesses that this was merely in

substitution for another arrangement of signal halliards working on a stay between the masts, and that the stay interfered with the wireless apparatus which had been supplied. It appeared, however, that the flags of the International Commercial Code which she had on board were kept stowed away in the chart-house; whilst on each side of the funnel, which was thus equipped with an abnormal number of signal halliards, there were stowed on hooks, obviously kept there for immediate use, special German flags which must have been provided for her when adapted for a hospital-ship, and must have been meant for secret signalling. Her masts were, on this last visit to Kiel, lengthened, which would have the effect of extending the receiving capacity of her wireless installation. This, it was said, was done not for the purpose of so increasing the range, but because the signal halliards on the brackets were interfered with by the wireless. This explanation in itself shows the great attention which was being paid to the signalling equipment of the ship. It is, however, the enormous number of Verey's signal lights which were on board which seemed to the President, and seems also to the Board, practically conclusive that the vessel was specially equipped for signalling. These lights are fired from a special kind of pistol, of which there were two on board. Of these Verey's lights she had on board no less than 600 green, 480 red, and 140 white lights, obviously a most abnormal number. It is said by Commander Newman that a British vessel of the same class would have about 12 of each. At the trial it was discovered for the first time that a record of the number of these lights, which had been used, had been kept, but that it was destroyed by the paymaster by the order of Captain Pfeiffer after the capture, and on the evening of the day when they had been informed that the vessel was to be put in the Prize Court. The subject of spoliation of documents will be dealt with hereafter, but the destruction of this particular book indicates in a most significant manner that the signal lights were provided for an illegitimate purpose, and none the less so because at that time the British officers had not made any complaint on this point. If any doubt could have remained as to the intended use of these lights, it seems cleared away by the incredible explanation which Captain Pfeiffer was driven to give of the large number of them. He actually swore that the green and red lights were intended to illuminate the surface of the sea and assist in searching at night for shipwrecked mariners or their corpses. Even white lights fired two at a time from the two pistols would be of little use for such a purpose, and green and red lights obviously of no use at all. They were, he suggested, to be so used because curiously enough the vessel had no searchlight, which as an auxiliary hospital-ship she certainly ought to have had. This was the only way in which the number of lights could be accounted for; but a much better explanation, which would account for a moderate number, was that they were used

to acknowledge Morse signals received from a distance greater than the Morse lamp which they had on board would carry, and a suggestion was also made that they would be used to identify the ship on coming into German harbours at night, for which obviously such a number as were on board would not have been wanted. No evidence was given of what the identification signal of the "Ophelia" was, and as to how many, if any, green, red, and white lights would be required to make it.

On these facts the learned President found that the "Ophelia" was not adapted or equipped *solely* as a hospital-ship and with that finding their Lordships agree. This finding would in itself justify the condemnation, but the matter ought not to be left to rest there, and the use actually made of the vessel must now be considered.

The "Ophelia" was before the war a German merchant-vessel—a few days before the war she was in the Thames, and on the 3rd August, 1914, she received orders from the German consulate by an order of the German Government that she was to return to Germany for military service, and she sailed on the 4th August with a party of German reservists on board. She was met by a German gunboat off Nordeney and was directed to go to Heligoland, which she did, and shortly afterwards went on to Hamburg, where her fitting as a hospital-ship was commenced by the Hamburg-American Steamship Company for the German Government. On the 12th August she went to Kiel, where her fitting was continued. On the 5th September she received orders to go to Cuxhaven, and arrived there on the 6th, but shortly afterwards came back to the Kaiser Wilhelm Canal, and got her certificate as a hospital-ship on the 11th September. On the 19th she went to Heligoland. There she stayed until the 3rd October, when she went to Wilhelmshaven. During all this time she did no hospital work, but according to the witnesses at the trial, the time was occupied in drilling the crew in boat work and stretcher work and the like. The witnesses denied the suggestion that during that period she did any scouting, and there is no evidence that she did. On the 6th October she proceeded from Wilhelmshaven to Schellinghorn roads, at the mouth of the Weser River, and at 11 A.M. of that day, whilst she was on her passage down the river, a German torpedo-boat, "S. 116," was sunk by a British submarine in the mouth of the Ems. The "Ophelia" arrived at Schellinghorn roads, about noon, and at 8.30 P.M. received orders to steam at once to the mouth of the Ems. There is considerable mystery as to the orders received on this evening and the next morning. Captain Pfeiffer "thinks" that they were received by Morse code from the Schellinghorn signal station. He also "thinks that it was also said that 'S 116' had been sunk, but he cannot say for certain, and he thinks that it was even mentioned that there were nine survivors, or something of that kind." He is, however, quite certain that he never was given any statement as to the place where the torpedo-boat was sunk,

except that it was at the mouth of the Ems, and equally certain that he never asked anyone where the spot was, and did not know it on the 8th. On receipt of the order at 8:30 P.M. on the 6th the "Ophelia" got her anchor and proceeded to sea, having taken a pilot on board, from whom, of course, it is possible that Captain Pfeiffer got some of the information of which he cannot recollect the source. On passing the German warship "Beowulf," which apparently was acting as guardship somewhere to the west of the entrance to the Weser, she received orders to return. This was a verbal order, and the captain's memory is again at fault as to the particulars of it. In the log the entry is "Received counter-orders, steamed back." The captain "thinks" that the reason of this order, either stated or conjectured, was that navigation was dangerous at night, which when lights were extinguished and buoys removed was probably the case; but if there had been a reasonable prospect or real idea of saving life the risk, one would think, would have been run. On the following morning, about 9:30, orders were received again from Schellinghorn signal station to proceed "*to the place of the accident.*" These orders are not entered in the log, although both the orders of the previous evening are, and they are stated only on the recollection of the captain. He does not appear surprised at receiving orders to go to a place he did not know, and again he asked no questions.

They weighed anchor at 10 A.M. and got off the Eastern Ems buoy at 5:40 P.M. They apparently anchored outside of Borkum to wait for a pilot, and having taken one on board at 7:30 P.M., proceeded and came to anchor for the night in the Ems, somewhere off Borkum at 8:30 P.M. There were some discussions as to the place of anchorage, but it does not seem very material. There was no information obtained from the shore except such as may have been obtained from the local pilot, and Captain Pfeiffer does not say that he asked for any information from him as to the place of the accident, and does not say that the pilot, who either remained on board or came on board again to take them out on the morning of the 8th, knew it.

It seems very odd that no enquiry should be made for the information which would appear so necessary, and which, it is said, was never given, and it is impossible to avoid a suspicion, in the absence of any reliable record of the signals received, that there were some directions given as to what was to be done which were of a nature that it is not desirable to disclose.

At 6.50 on the morning of the 8th October the "Ophelia" got her anchor and, to use the words recorded in her log, "Steamed under directions of the pilot out of the Ems by land and sea marks on the search for a sunken torpedo-boat." The movements of the "Ophelia" on that day were the subject of much controversy, both in the Court below and on the argument of the appeal. Indeed, the counsel for the appellant devoted a large part of his argument to the events of that day, and contended strongly that the President was wrong in the

view he took of these events, and in his finding as to the speed of the "Ophelia," which was material in its bearing on the events of the 8th October and possibly on the credibility of the German witnesses, who all swore most positively that the "Ophelia" was incapable of going faster than about $9\frac{1}{2}$ knots.

A British submarine was on that day on patrol duty off the mouth of the Ems, and her commanding officer, Lieutenant-Commander Moncreiffe, makes an affidavit as to what he observed, which he thought so suspicious that he reported it at the first opportunity to his superior officer. This affidavit was sworn before Commander Moncreiffe had any information as to the German version of the events of the day, except by seeing a copy of the "Ophelia's" log. The affidavit of Captain Pfeiffer verifying the claim makes no mention of the 8th October. Commander Moncreiffe, in reference to the entry in the log quoted above, says that he was quite certain that the "Ophelia" was not searching for a sunken torpedo-boat or any sunken vessel, and that, of course, is absolutely true. It is clear from the German evidence, as well as from Commander Moncreiffe's own observations, that she was not sweeping the bottom to locate the position of the sunken wreck, and the entry in the log is, taking it literally, clearly untrue; but it would, perhaps, be unfair to take the words so literally and not to assume that the words used refer to a search for floating wreckage, survivors, and corpses from the sunken vessel, rather than to a search for the wreck itself at the bottom of the sea. The result, however, is that Commander Moncreiffe has not dealt with the story now told by the German witnesses, on this and on some other points. No notice to cross-examine him on his affidavit having been given, the Crown did not think it necessary to call the witness away from his naval duties, and he was not in attendance at the trial, otherwise he might have cleared up, one way or the other, several of the matters which have been the subject of much argument.

His account of the matter shortly is that about 9.15 English time, by his clock (which he does not vouch as quite accurate), he saw to the south-east the smoke of a vessel, which afterwards proved to be the "Ophelia," coming from the Huibert Gat (the southernmost of the three passages into the Ems between the shoals) and proceeding in a westerly direction. He proceeded in a southerly direction, and at 9.28, when in latitude $53^{\circ} 45' N.$ and longitude $5^{\circ} 46' E.$, he sighted the masts and funnel of the vessel, which had then altered her course "to the northward." Comparing this with the account of the "Ophelia," she started at 6.50 German time, or 5.50 English time, and went out of the Huibert Gat. On the way out she passed close to the German torpedo-boat No. 119, the commanding officer of which was called as a witness at the trial, he being then a prisoner of war. The "Ophelia" made no enquiry of that torpedo-boat as to the place of the accident, and received no information on the point. At 9.50 German time (8.30

English) she sighted an English submarine to the north or north-west, "about eleven miles off Schiermonnikoog," according to her deck log. The deck log gives no courses, which, however, can be accounted for if she was at first following a channel and afterwards zigzagging on a search; but as the engine-room log records running full speed ahead from 7 to 10 A.M. (6 to 9 English time), she would, if running on anything like a straight course, have been well outside the Huibert Gat, and at least as far to the westward as the place where she is described by Commander Moncreiffe as being at 9.15 and 9.28 English time. She might even have done some zigzagging, and still have been as far out as that. The "Ophelia's" engine log records that between 10.10 and 10.28 she twice stopped, went full speed astern, and then ahead again. These would be the manœuvres of a steamer picking up a boat or anything floating, and Captain Pfeiffer at first explained them by saying he picked up a pilot, but afterwards corrected this, and said that he did that before coming out of the Ems, so it could not have been after 10 o'clock. Pfeiffer also said that at some time, which, however, he puts as happening on the return journey, while searching on this day they sighted a floating object, which might have been wreckage but turned out to be a fisherman's basket. This cannot be the explanation of the manœuvres between 10 A.M. and half-past. Whatever those manœuvres were, they were not observed by Commander Moncreiffe, the vessel being hull down when they began; but the time when they ended and when the "Ophelia" went full speed ahead again corresponds with the time (9.28 English, 10.28 German) when Commander Moncreiffe made out the two masts and funnel of the "Ophelia," and saw that she had altered her course "to the northward," which would not of course necessarily mean that she was heading due north. So far there is little, if any, contradiction, and nothing making it clear that the story of the "Ophelia" taking zigzag courses in order to search was untrue. At 9.45 Commander Moncreiffe speaks of another alteration of the "Ophelia's" course, and he then made out she was painted as a hospital-ship. At 10, he says, she evidently made out his presence and "hoisted" her Red Cross flag. Later on he said that she "hailed down" that flag. If that means that the commander actually had his glasses to his eyes and saw the flag actually going up or coming down it is significant, although not quite easy to say why she should do it; but if it only means that he saw the flag flying and then shortly afterwards failed to see it when he looked for it and thought it was hauled down, it means very little. A steamer's flags in a moderate wind will not fly out when she is going with the wind. It happens that at the time he says the flag was hoisted, the "Ophelia" was heading north-west and then north, and on either course, the wind being W.N.W., the flag would fly out well, and when he says it was hauled down she was heading very nearly east down wind and, he was very nearly

astern of her and to windward, and would not be very likely to see her flag. It is unfortunate that the commander could not be called to clear up the doubts which arise on his affidavit made under the circumstances it was. The next thing stated by the commander is that after standing to the northward for five minutes from 10 to 10·5 the "Ophelia" altered her course to east, and at 10·18 was steering S. 85° E. true (that is, very nearly E.), and being right ahead of him on the same course he could at this time speak with absolute accuracy as to the course she was steering, whereas before he could only do so approximately.

The log of the "Ophelia" records that at 11 o'clock (10 o'clock English time) she steered back up the Ems. She went up the Western Ems Channel, and S. 85° E. true would be a course which would take her up that channel. There is, therefore, a remarkable coincidence here. Although the German log is very meagre and possibly not very reliable, this entry must have been written in without the writer knowing Commander Moncreiffe's story. According to the plotting on the chart of the course of the two vessels given to the Board on behalf of the Crown, after correction of an obvious error in the first plotting, the "Ophelia," when at 10 o'clock English and 11 o'clock German time, she turned to the east, was a long way north of the entrance to the Western Ems Channel, and after standing in that direction for something like three-quarters of an hour had to come to the southward to make the entrance. This depends on the accuracy of the plotting; and that further depends upon the exact correctness of the courses of the "Ophelia" as estimated from the submarine. It is remarkable that the affidavit, in rather curious language, states that at 10 o'clock the "Ophelia" was "in a position which would be accurately described as near Schiermonnikoog." If she was at the position plotted she would be somewhere about 18 miles from Schiermonnikoog, which could hardly in any sense be called near; whereas if she was near the Western Ems Buoy, and about to proceed up the Western Ems Channel, she would only be about 8 miles from Schiermonnikoog; and if, as is more probable, she was to the westward of the position of that buoy, but at a point from which the Borkum Island Lighthouse bore anywhere near S. 85° E. (true), she would be a very great deal nearer to Schiermonnikoog than if at the plotted position, and if steering that course from such a point she would get to the entrance to the Western Ems Channel and a long way up it without having to alter the course. This rather suggests that the plotting cannot be right. At this point the question of the speed which the "Ophelia" was capable of going becomes material. Commander Moncreiffe says that she was obviously running away from him, and appeared to have increased her speed by 2 to 3 knots, and that finding he could not "overtake" her he gave up the chase. He made no signal for her to stop. He was going 11 knots. She was shortly before this 4½ to 5 miles away from him, and, putting it at only 4 miles,

it would have taken him two hours to catch her if she was only going 9 knots (her admitted speed) to his 11, and by that time, if she was going where she says, both would have been near Borkum, or beyond it, and he would have been in a trap, with the difficulty a submarine has in diving in shallow water or among shoals. If, however, both were considerably to the northward, he would have had plenty of sea room, and if going faster than she was would of course have caught her. It is suggested that in saying he could not "overtake" her he merely meant that she would have got into shelter before he could do so, and that, as to running away, the "Ophelia" was, it is true, going straight away from the submarine, but was on her proper course home. Why, however, she should have started for home when she did with plenty of daylight left, and without having searched all the channels into the Ems, is quite unexplained.

The President expressed the opinion that the "Ophelia" must be able to go more than 9 knots, because it appeared by her log of the 5th August that she had done so when escaping from England at the outbreak of the war. According to the readings of the patent log, on that day, as entered in the log-book, she undoubtedly in some hours did more; but it has been pointed out on the argument of the appeal that there are obvious inconsistencies in the readings for that day, and that there must be some mistake. On the other hand, the Attorney-General produces the figures from the log of other voyages of the "Ophelia" when she was a German trading vessel, which, if correct, show that she then constantly averaged 11 knots. The account of the German witnesses on this matter is peculiar, as most vessels can at a pinch do more than their usual so-called maximum. On the whole, it certainly seems probable that she can go faster than her witnesses swear to, and the experienced officer who thought she was running away was probably in the right on such a point. Certainly the movements of the "Ophelia" on the 8th October are most suspicious. The evidence shows that at that time there was in the Ems the flotilla of German torpedo-boats which a few days afterwards made a dash out of the Ems on some unknown destination and which were then intercepted by a British squadron, pursued in a north-easterly direction, and sunk on the 17th October near the spot where the "Ophelia" afterwards appeared again. Probably this flotilla was on the 8th October looking out for an opportunity to make this dash, and if the German naval authorities were unscrupulous enough it would have been very useful to them to use the "Ophelia" in order to ascertain whether the British submarines were still off the mouth of the Ems, rather than to have to send out one of the torpedo-boats to scout when she might have met with the fate of "S 116." It is also possible that the "Ophelia" may have been trying to tempt the submarine into a trap. But the question is whether there is proof of this, or merely suspicion. Having regard to the fact that a search by a hospital-ship for

corpses of sailors drowned by the sinking of their ship would be a legitimate operation for such a ship, even after a search for survivors had become practically hopeless, and that such a search, if made four tides after the disaster, must be made over rather a wide area and would be made at a fair speed, with men on the look out for floating objects; and having regard to the matters which appear somewhat ambiguous in Commander Moncreiffe's affidavit, their Lordships would probably hesitate to find it proved that the "Ophelia" was scouting on the 8th if there was no other case proved against her; but when subsequent events are considered there is much more to show her to be a scout.

After anchoring on the 8th Captain Pfeiffer landed at Borkum and sent a telegram, a copy of which was not produced, and which, he says, was only to ask for orders. In the course of that night he got, by Morse signal, orders to go to Hamburg to clean boilers. They did go to Hamburg, and remained about five days; the boilers are said to have been cleaned, and the masts were then lengthened, and the signalling equipment altered as already mentioned. There is no entry in the log of the cleaning of the boilers or of the orders to do it, and it looks rather as if the real object of the visit to Hamburg were to have the signalling equipment improved. They left Hamburg on the 15th and, after stopping a night at the mouth of the Elbe, arrived at Heligoland on the 16th. On the evening of the 17th (at 7 P.M.) they are said to have received an order by wireless telegraphy. When the ship was captured on the 18th there was produced what purported to be the original copy of this message as taken down by the operator. That original was produced on the hearing before the President and on the argument of the appeal, and a translation is at page 12 of the Record. The original was on a form which has on it the three words, "open," "sealed," "decoded," for the purpose, apparently, of the inappropriate words being struck through. On the copy produced, the words "open" and "decoded" are struck through, "sealed" being left, and this was in accordance with the evidence that this message came in the second German code known as "H V B." This code was used by non-combatant Government ships. Warships had another secret code for use between themselves, but they also had copies of the "H V B" code in order to communicate with auxiliary ships. Wireless messages to the "Ophelia" were taken down on a pad, and, obviously, when in code they must be taken down as they come and be afterwards translated or decoded. They could not, therefore, be taken down when heard on the form produced. The operator Grau was called as a witness and explained that he did not know the code without the book. There were also on the form printed words with spaces for the time and date to be filled in, and this was done on the message of the 17th. The message of the 17th, which there is no reason to suppose was not genuine, reads "Go at once to the Haaks Lightship. Further instructions

to follow." At the trial evidence was given both by Pfeiffer and Grau that a book for entering wireless signals in was kept; that signals which had been sent by the "Ophelia," on ordinary ship's matters when at Kiel were entered in it. In the preliminary affidavit sworn by Pfeiffer on the 13th February, 1915, he had said that "a separate log for wireless messages was intended to be kept, but had not, in fact, been opened at the time of capture, as the messages were so few." The accounts of the witnesses as to the books which were kept were by no means clear and consistent, and whatever it was that they kept, it was thrown overboard, as will hereafter appear.

On the 17th October, the day when the message was received by the "Ophelia" at 7 P.M., the four German torpedo-boats which were in the Ems on the 8th October were sunk by a British squadron between 2.30 P.M. and 4.30 P.M. Greenwich time (3.30 P.M. and 5.30 P.M. German time) within a radius of 6 miles from latitude $53^{\circ} 7' N.$ and longitude $3^{\circ} 40' E.$ These torpedo-boats, when on their flight before the British squadron, no doubt sent wireless messages to Norddeich of their peril, and no doubt this was the reason for the wireless message to the "Ophelia"; but the German authorities could hardly have known the particulars of the disaster, and certainly not the exact place of the sinking of their boats when the message was sent off. The Haaks Lightvessel's situation is $52^{\circ} 57' 8'' N.$ and $4^{\circ} 18' 3'' E.,$ and was therefore a suitable point to direct the "Ophelia" to go to, and doubtless it was intended to send her further instructions whilst she was on her way there. She got under way at 7.30 and proceeded along the coast towards the position where the Haaks Lightship, which of course had been removed, should have been. The deck log had not been written up at the time of her capture, but we have the loose sheets torn out of the rough log and also translations of them. The figures on the originals are almost undecipherable. The track of the vessel as indicated by the entries on the rough log has been plotted out on the chart handed up, and if this plotting is correctly done it shows that the "Ophelia" did not after noon of the 18th steer straight for the Haaks Lightship, but considerably to the west of it, that is to say, very nearly towards the place of the engagement. A British squadron was at midday of the 18th approaching the place of the engagement of the previous day. At 1.20 P.M., James Alexander Cox, the wireless operator on H.M.S. "Lawford," one of this squadron, heard a very loud signal in code on the 300-metre wave used by German ships. He did not hear the beginning of the message, but he took down and recorded what he did hear, and the letters are set out in his affidavit, page 13 of the Record. He found it was a message from a German ship using the call letters D O P to K A V which means Norddeich. At the end of the message he heard an answering signal from Norddeich apparently answering or indicating the receipt of the message he had taken down. At 1.30 he reported to his

captain that a German ship in their vicinity was making code messages to Norddeich, and in a very few minutes the ship was sighted and proved to be the "Ophelia." From the affidavit of the captain of the "Lawford," it appears that the "Lawford" at 1:30 was in latitude $52^{\circ} 56'$ N. and longitude $3^{\circ} 50'$ E. The "Ophelia" when sighted was about 6 miles from the "Lawford," and, from the affidavit of Lieutenant Peters, of the "Meteor," another ship of the same British squadron, it appears that the "Ophelia," when sighted, was to the eastward of the squadron, and proceeding westward. The position of the "Ophelia" at the time she sent the message which was overheard by Cox must therefore have been approximately latitude $52^{\circ} 56'$ N. and longitude 4° E. The time when she sent that message was 1:20 P.M. English time, 2:20 P.M. German. It is most important to bear in mind this time and this approximate position.

The "Ophelia" was stopped and was boarded by Lieutenant Peters, who gives his account of what happened in an affidavit. He requested to see the ship's papers, and was shown the certificates of the ship being adapted for a hospital-ship, and of her name having been sent in, which he states appeared to him to be in order, as in fact they were. He was told that the ship had been ordered to proceed to latitude $52^{\circ} 51'$ N. and longitude $3^{\circ} 55'$ E. and to look around. The lieutenant asked if these orders were in writing. He was told by Captain Pfeiffer that in the first instance he had been ordered to proceed to sea, but that, "*when outside* the harbour," he had received the order as to the locality by wireless telegraphy. The harbour being Heligoland, which he had left on the previous night, this would be a curious way of saying that he received the orders about an hour and a half or less before the conversation. On demand, the paper purporting to be the wireless message was produced, and it was produced before their Lordships. It is on a similar form to the previous message, but the time and date of its receipt are not entered in the space provided for the purpose. The words "open," "sealed," "decoded," are all left unstruck through, but it was stated at the trial by the German witnesses that it was an open message. The captain told Lieutenant Peters that he did not know what he was to look for, but possibly it was dead bodies. He was unable at the trial to say for certain when he first heard of the sinking of the four German gunboats, but he thinks that it was Lieutenant Peters who told him of it. Nothing appears to have been said on Lieutenant Peters' visit as to any wireless message being sent from the ship, either asking for orders or any other message, and Lieutenant Peters did not tell Pfeiffer that any message had been overheard. The vagueness of the answers given and the circumstances generally excited suspicion, and the "Ophelia" was ordered to follow the "Meteor" to Yarmouth, which she did. In the affidavit of Pfeiffer of the 13th February, stating the grounds of the claim

he swore (paragraph 5): "To the best of my knowledge, the wireless telegraphy apparatus on board the said ship was used on two or three occasions only to receive urgent orders. No wireless message was sent from the ship, except one to Norddeich on the 18th October, asking for orders, which message was evidently heard by the British squadron. . . . A true record of all messages received or sent by this means during the voyage was kept on slips of paper, intended to be copied into a log, to which slips I crave leave to refer. A separate log for wireless messages was intended to be kept, but had not in fact been opened at the time of capture, as the messages were so few."

This is, of course, not in strict accordance with the facts as afterwards stated by him in evidence. In evidence Pfeiffer stated that he got to the place of the Haaks Lightship at noon of the 18th. That he *then* sent a wireless message to Norddeich, of which there was no copy, but which he recollected to be: "Please send on following message to Württemberg. Am at Haaks Lightship. Request further instructions."

Being asked at what time this message was sent he said: "It must have been about 1 o'clock, but it may have been half-past 12 or later."

Then he said that he received the reply, "Search 3° 55' E. 52° 51' N. and neighbourhood," and that he received that message about 2 o'clock. In cross-examination by the Attorney-General, when asked about the two messages to the ship, he said: "The latter [*i.e.*, the message to the ship in *code*] was chronologically the earlier. It was on the 17th, while the other (*i.e.*, the open one) was on the 18th *at noon*."

Then at question 435 he says that message from the ship was sent about 1 o'clock. Captain Ridder, the navigating captain of the "Ophelia," in his evidence said that they got near the Haaks Lightship about 1 o'clock, and that they then had had no further instructions; that he did not know what messages were sent or received, but that he afterwards had instructions from Pfeiffer to go to a particular latitude and longitude, which he could not remember. Grau, the wireless operator of the "Ophelia," deposed to the receipt and sending of the various messages on the 17th and 18th. As to the time of his *sending* the wireless message he said, "That was towards noon—about noon." This was wholly inconsistent with the case of the claimant, which was that the message overheard by Cox at 1·20 English time, 2·20 German, was that sent by the "Ophelia" asking for directions. An effort was made to explain Grau's evidence by suggesting that by noon he merely meant midday, and that this would not be inconsistent with 2·20 P.M., but that cannot be accepted.

At the trial the then Attorney-General assumed that the overheard message was, as the other side asserted, a message asking for further directions, but the learned President evidently was not satisfied about this. Question 437 shows this, and

also his examination of the witness Grau (questions 1388 to 1392) as to there being in the code used four letters to every word. In a passage not printed in the Record, but which was read by counsel from the shorthand notes of the Solicitor-General's reply, the President said—

“At the present moment the message which was intercepted has been rather assumed to be the message which was said to have been sent; but it might not have been, and I was trying to get from the witness this morning something which would enable me to say whether that was so or not.”

In giving judgment the President no doubt proceeded on the assumption of the Attorney-General that the messages were the same. On the argument of the appeal it was contended that it was not open to the present Attorney-General to rely on the point that the overheard message could not be that which the German witnesses say that it was. Their Lordships are not of that opinion. If the claimant had been induced by the late Attorney-General's conceding this point to him, to refrain from tendering evidence which he otherwise might have given, it might have been otherwise; but that was not so. The evidence was all given and it is upon that evidence that the point arises. If the judgment below had been against the Crown, it might have been more doubtful whether an appeal could have been supported on a ground not taken, but it is clearly admissible to support a judgment upon a point not relied on below where the evidence which raised the point is all before the Court.

As has been pointed out, not only was the time when the message was overheard quite inconsistent with the German story, but also the place where the vessel was when the overheard message was sent off was also inconsistent with it. The Haaks Lightship is situated (or would be if in her place) in latitude $52^{\circ} 57' 8''$ N. and longitude $4^{\circ} 18' 3''$. As already pointed out, the “Ophelia” when she sent off the message must have been approximately in latitude $52^{\circ} 56'$ N. and longitude 4° E. That is to say, if she ever was at the station of the Haaks Lightship, she had before asking for or getting the directions to go to $52^{\circ} 51'$ N. and $3^{\circ} 55'$ E. already by some prophetic instinct gone a considerable distance in the general direction she was afterwards ordered to go, and that without any knowledge of the disaster which had in fact taken place on the previous day. Further, the information which the President elicited from the witness Grau as to the character of the H V B code makes it difficult to see that the message as taken down by Cox could correspond with the message stated by Pfeiffer. He professes to swear to the exact words, but he might be clever enough to vary them in order to avoid giving a clue to the code, so perhaps this point is not a very strong one. Further, again, if the message to go to the named latitude and longitude which was not in code was really received after the message which was

overheard by Cox, it is remarkable that that open message was not heard either by Cox or any other wireless operator of the squadron. True, to hear it the operator must have been listening on the German wave, but that they probably all did from time to time as Cox did. On this evidence it appears certain that the "Ophelia" must have received the directions where to go to a considerable time before 2:30 German time when Cox heard her message in code, and if so that message could not have been a request for directions. There is, therefore, very strong reason on the evidence before the Court for distrusting the claimant's explanation of the message which the "Ophelia" was detected in sending. Apart from these reasons, the conduct of those in charge of the "Ophelia" was such as to disentitle them to credit, and it is on that ground that the judgment of the learned President mainly proceeds. There are three matters to be considered in their admitted conduct: First, the propriety of a hospital-ship sending any message in a secret code; secondly, the neglect to keep proper records of the orders to and the doings of the ship; and thirdly and most important, the destruction of such records as there were.

What The Hague Convention says as to wireless installation is that "the fact of the presence on board" ("le fait de la présence à bord") of a wireless installation shall not take away the protection, but it says nothing to justify sending messages—all of which when sent by a hospital-ship ought to be of innocent character—in a secret code. Counsel in arguing the appellant's case were able to put various cases where orders sent to a hospital-ship might be such as it would be justifiable to give in a secret code to avoid their disclosure to the enemy, but they were unable to suggest any message which it would be right for a hospital-ship to send and which could properly be concealed from the enemy. As to the message alleged by German witnesses to have been that sent by the "Ophelia" asking for instructions, there can be no possibility of suggesting any necessity for sending it in secret code. The message which is alleged to have been sent in answer to it was itself an open one. Their Lordships are quite unable to suggest any circumstances which could justify a hospital-ship in sending a message by a secret code; but without laying down an absolute rule that the mere sending by a hospital-ship of such a message would of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be said that if such messages are sent, a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence to produce of the messages which have been sent and of their innocent character and of the necessity for sending them in a secret code. It would not be necessary in such a record to set out the identical words so as to give a key to the code in the event of the message having been overheard and taken down. The effect might be stated, and in a regularly kept and apparently full signal log such entries would be entitled to considerable credit.

It would, in their Lordships' opinion, be the duty of a hospital-ship, even if not equipped with a wireless installation, and still more so when so equipped, to keep a full and correct log. It is a custom of the sea, very long established, that sea-going vessels shall keep logs. Originally, no doubt, logs would be required, as indeed they are now, for the navigation of the vessel, and when the weather prevented astronomical observations being taken, a ship would be ignorant of her position without a record of courses steered and estimated rates of sailing. But it has been the custom to make the log a full record of the voyage and all that happens on it. In some countries the log is legal evidence of the matters contained in it. In this country it is subject to the overriding rule of evidence that a man cannot (subject to some exceptions in case of death and the like) make evidence in his own favour by entries in his own books. But even in our Law Courts a well-kept log is in all disputes arising out of or in connection with the voyage, treated as of very great weight; and between merchants and underwriters and others doing business connected with the sea, it is in practice treated as conclusive, unless by external or internal evidence it is falsified.

In Prize Courts in particular the log has always been treated as a most important document. Formerly, no doubt, all entries connected with the voyage were in one book, *the log*, but at the present time often more than one log is kept: a steamer has her engine log, because the entries in it can thus be made direct by the engineer instead of his having to give details to the mate for entering in the ship's log. So it has become fairly common in vessels which do much signalling to keep a separate signal log, the entries in which are made by the signalling officer. In the case of the "*Ophelia*," the principal log, or deck log, is not very satisfactorily kept. It often omits courses and other things which would be useful to throw light on the employment of the ship. As incidentally remarked already, it occasionally contains an entry of a signal received, but omits to record the next signal said to have been received. This would be likely to occur if no separate signal log were kept. Having regard to the danger of improper signalling by hospital-ships, a signal log should certainly be kept by them. As to what was done in the way of keeping a signal log by the "*Ophelia*," the evidence is most confused and conflicting. Some of it has already been referred to.

As to the Morse signals, the witnesses say a book was kept, but no one knows much about it, and the signalmen who kept it are vouched but they are not called. The only signalman called was Grau, the wireless operator, and he, after giving a good deal of confusing evidence, finally said that he knew nothing about the Morse signals. As to wireless messages, he said he did make entries of them in what he called the F. T. book ("*Funk*en Telegraphie"), and that in that book he entered various quite unimportant messages which he sent on ship's

business at Kiel. At question 1260 he distinctly told the President there were two books: one the F. T. book and another for the wireless news of events supposed to be happening circulated from Norddeich for the benefit of the world in general. This evidence as to the F. T. book was, of course, in contradiction of the affidavit of Pfeiffer already referred to. There seems, taking the evidence as a whole, the greatest uncertainty as to what books recording signals were really kept; but the one thing which is certain is, that any which were kept, except the news log, were thrown overboard when it was seen that the vessel was about to be searched. If nothing but innocent signals had been sent, the signal log was the very book of all others which should have been preserved. The result, therefore, is that the appellant has nothing to show to vouch his story that all signals sent (including the one so unnecessarily, according to his account of its purport, sent in secret code) were of an innocent character. Further, the absence of such evidence, if any ever existed, is caused by his own act.

This leads to the subject of what is technically called spoliation of documents, on which the President, rightly, as their Lordships think, laid much stress. The authorities on the subject are carefully reviewed in his judgment, and these authorities and others were quoted on the appeal by the appellant's counsel. In considering these authorities it is necessary to recollect that the procedure in the Prize Court has been very substantially altered by the new rules abolishing the preliminary hearing. The alterations in modes of doing business in modern times may have made this preliminary hearing not quite so useful as it was formerly, and some modification of procedure may have been desirable; but the total abolition of a preliminary hearing seems to their Lordships, as has been remarked during the argument of this and other cases before this Board recently, to operate occasionally against the interests of the Crown. Certainly the procedure in the present case has given an advantage to the claimant which he would not have had under the old procedure.

In the cases as to spoliation of documents, the point has frequently arisen on the preliminary hearing on documents, and the question has been debated whether or not further proof should be allowed. This point cannot arise under the present procedure, and it may be that in some respects the old doctrine was rather technical. The substance of it, however, remains and is as forcible now as ever, and it is applicable not merely in prize cases, but to almost all kinds of disputes. If anyone by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.

In the present case there are two separate destructions of documents: one the throwing overboard documents when the vessel was about to be searched, the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at any rate be done that complaint could not be made of it. But Captain Pfeiffer naively admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few, and adds that the Morse signal book contained absolutely innocent messages, which could be read by anyone. That probably was so, but it may also have contained some which were not so innocent; and it is pretty obvious that when he threw it overboard he either knew it did, or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it except the consciousness that as something wrong had in fact taken place, it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that if wanted they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that their evidence cannot be relied on; that the evidence discloses facts of which no satisfactory explanations are or can be given; and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given. They are of opinion that the President was fully justified in finding that "the 'Ophelia' was not constructed or adapted *or used* for the special and *sole* purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and *used* as a signalling ship for military purposes." Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed, with costs.

In the Privy Council.

In the Matter of the
STEAMSHIP "OPHELLA."

DELIVERED BY
SIR ARTHUR CHANNELL.

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