Privy Council Appeal No. 51 *of* 1917.

In the matter of Part Cargo *ex* Steamship "Anglo-Mexican."

His Majesty's Procurator - - - - *Appellant,*

v.

Mayer - - - - - - - *Respondent,*

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 13TH DECEMBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARKER OF WADDINGTON.]

THE goods in respect of which this appeal arises were shipped at Savannah, U.S.A., shortly before the outbreak of the war, on the British steamship "Anglo-Mexican." They were shipped by and at all material times belonged to Reis and Co., a German firm with its head office at Friedrichsfeld, in Baden, but with branch offices at Boston, U.S.A., and at Salford, in the United Kingdom. The firm consisted of four partners, Edwin Reis and Ludwig Reis, German subjects residing and carrying on the firm's business at Friedrichsfeld; K. B. Straus, a German by birth, but naturalised and resident in the United Kingdom, who was in charge of the Salford office; and the respondent, Richard Mayer, also a German by birth, but naturalised and resident in the U.S.A., who was in charge of the Boston office. Richard Mayer's interest in the partnership concern was one-fifth share. The President has ordered the release to him of one-fifth of the goods in question or their proceeds, on the ground that he was a neutral subject domiciled

and resident in a neutral country, though a partner in a German firm, and that the goods were shipped before the outbreak of the war. The Crown is appealing from this order.

The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends *primâ facie* on his domicile, and domicile is, according to international law, a matter of inference from residence. Thus, if a neutral subject is at the commencement of or during the war to all appearance permanently resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country, and in effect becomes one of its subjects. If, therefore, while this state of things continues, goods belonging to him are seized as prize, such goods will *primâ facie* be treated as enemy goods. But an acquired domicile may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicile in the country of the enemy, the goods will *primâ facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicile. This point was much discussed in the "Venus" 8, Cranch 253. In that case the majority of the Judges of the Supreme Court of the United States decided against allowing any interval for election. It was not, they thought, desirable that a neutral after the outbreak of hostilities should be able for any interval, however short, to sit, as it were, on the fence ready to come down on either side according as it might prove to his advantage. The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany. His domicile was in the United States.

Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character. But a neutral having such a commercial domicile in a country which becomes an enemy country on the outbreak of hostilities ought, according to the views taken by British Prize Courts, to be allowed a reasonable interval during which he may discontinue or

disassociate himself from the business in question. If he has done this prior to the capture at sea of any goods belonging to the business, such goods or his interest in them will not be confiscable. If he has not done this prior to the capture, but the Court is of opinion that a reasonable interval for this purpose had not then already elapsed, the Court will take notice of what he has done in that behalf since the capture, or will in a proper case even let the question of condemnation stand over to enable further action to be taken. If, on the other hand, he has already had a reasonable opportunity of discontinuing or disassociating himself from the business in the enemy country and has failed to take advantage of it, or if he has done some unequivocal act indicating an intention to continue or retain his interest in such business, the goods or his interest therein will be condemned as lawful prize.

It may happen that a neutral or the firm in which he is a partner has, besides the house of business in the enemy country, branch houses in other countries. In such a case nice questions may arise as to whether the captured goods ought properly to be regarded as appertaining to the enemy house or to one or other of the branch houses. A question of this sort came before their Lordships' Board in the case of the "Lützow," in which judgment is about to be given, and the original claim put forward on the respondent's behalf in the present case appears to have been framed on the contention that the goods now in question appertained to the American or to the English branch of the business of Reis and Co., and not to their German branch. Had this claim been made out, the interest therein of the respondent would not have been confiscable as enemy property. The claim, however, in this form was abandoned in the Court below, it being admitted that the goods in question could not be regarded otherwise than as appertaining to the German house.

In support of the views above indicated, their Lordships refer to the "Garasimo," 11 Moore's P.C., p. 96, where Lord Kingsdown, in delivering the opinion of the Board, states the general principle as follows: "The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war."

Their Lordships also refer to the following important passage in Mr. Justice Story's Notes (Pratt's "Story," at pp. 60–61):—

"In general a neutral merchant trading in the ordinary manner with a belligerent country does not, by the mere accident of his having

a stationed agent there, contract the character of the enemy. But it is otherwise if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy, for then it is in effect a hostile trade. So if the agency carry on a trade from the hostile country which is not clearly neutral, *and if a person be a partner in a house of trade in an enemy's country,* he is, as to the concerns and trade of that house, deemed an enemy and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country; for the domicile of the house is considered in this respect as the domicile of the partners. But if he has a house of trade in a neutral country, he has not the benefit of the same principle, for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. However, where a neutral is engaged in peace in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of the war, confiscated; but if he continues in the house after the knowledge of the war, it is liable, as above stated, to confiscation. It is a settled principle that traffic alone, independent of residence, will in some cases confer a hostile character on the individual."

If the principles thus laid down be applied to the facts of the present case, it would appear that the interest of Richard Mayer in the goods in question ought to be condemned by reason of his commercial domicile in Germany. He might, it is true, have avoided this result by taking steps within the reasonable interval allowed by law to dis-associate himself from the enemy firm in which he was a partner. But it is not suggested that he took any such step or that such reasonable interval has not elapsed. On the contrary, it is admitted that since the outbreak of the war he has been actively engaged in the affairs of Reis and Co in Germany.

The contention of the respondent is based entirely on the following consideration: The goods in question were shipped in time of peace. There could therefore be no enemy taint affecting them when the war broke out. Since the outbreak nothing has been done in respect of them by virtue of which they could have acquired an enemy character. The criterion of character is therefore personal domicile. It will be observed that this contention with regard to goods at sea at the commencement of a war entirely ignores the doctrine of commercial domicile as determining the character of the goods. It leaves the character of such goods to depend on personal domicile, subject to the question whether the owner has done anything to impress upon them or taint them with an enemy character. In other words, it creates an exception to the theory of commercial domicile, and deals with the excepted cases on different principles. Counsel for the respondent was unable to suggest, and their Lordships have been unable to find, any logical justification for such an exception. If it exists at all, it must be attributed, as counsel for the respondent attributed it, to an over-scrupulous desire on the part of our Prize Courts to protect neutral interests. Further, if the exception exists, the rule

which allows a reasonable interval in which the neutral owner can discontinue his commercial domicile in the enemy country will be reduced within very narrow limits, if it is not abrogated altogether, for a neutral owner will, by shipping goods after the war, or by otherwise taking part after the war in the affairs of the enemy house of business, have elected to continue his commercial domicile in the enemy country, and so brought the interval to an end. Nevertheless, the exception is said to be supported by authority, and their Lordships will therefore proceed to consider the several authorities on which reliance is placed.

The three earliest authorities referred to are the "Jacobus Johannes" (1785), the "Osprey" (1795), and the "Nancy" (1798), all of them decided by the Lords Commissioners in Prize Cases. The decisions are unreported, but the printed cases and appendices which were before the Lords Commissioners are preserved in the Admiralty Library, and their Lordships have had access thereto.

In the "Jacobus Johannes" the goods in question belonged to a firm carrying on business in the Dutch island of St. Eustatius. The goods had been shipped from St. Eustatius on the 5th December, 1780, on board a Dutch vessel bound for Amsterdam and were deliverable at Amsterdam. Hostilities between this country and Holland commenced on the 20th December, 1780. On the 3rd February, 1781, St. Eustatius was occupied by His Majesty's naval forces. On the 4th February, the "Jacobus Johannes" with its cargo was captured at sea. The firm which owned the goods consisted of two partners, namely, Haason, a Danish subject, but domiciled in St. Eustatius, where he carried on the business of the firm; and Ernst also a Danish subject, but domiciled at Copenhagen. Shortly after the occupation of the island by the British, Haason proceeded to wind up the firm's business and finally left the island in April 1781. It is to be observed on these facts that Haason's personal domicile being Dutch at the date of capture he was *primâ facie*, at any rate, an enemy. If, according to the English as well as the American view of international law, he was not entitled to an interval after the commencement of hostilities in which he could abandon his acquired domicile, his share in the goods would in any event be confiscable. If he was entitled to an opportunity of abandoning his acquired domicile, the question would arise whether he had done so within a reasonable time. On the other hand, Ernst, who was domiciled at Copenhagen, could only be regarded as an enemy by virtue of the commercial domicile of the firm, and he was clearly entitled to a reasonable interval in which he might disassociate himself from the firm. The interest of Haason was condemned and that of Ernst released. It does not appear what were the reasons for this decision. It is quite possible that the case turned wholly on personal domicile, the doctrine

of commercial domicile being yet undeveloped. It is also possible that, in the opinion of the Lords Commissioners, the connection of both partners with an enemy business had in fact been determined within a reasonable interval, and that such determination would justify the release of Ernst's interest, but would not improve the position of Haason whose personal as well as commercial domicile at the date of capture was Dutch. Under these circumstances, their Lordships fail to see how the case can be relied on as an authority for the alleged exception to the general rule.

In the "Osprey" the property in question was a ship employed in the Southern Whale Fishery with her cargo of whale-oil and whale-bone. She had left Dunkirk on her whaling adventure on the 24th May, 1792. War broke out between this country and France in February 1793, and on the 15th May, 1793, the ship and her cargo were seized as prize. The ship belonged to three persons, all subjects of the United States of America, two of whom were domiciled at Dunkirk and the third, one Rodman, was domiciled at Nantucket. The cargo belonged to the owners of the ship and the master and crew in shares, which were apparently settled by the custom of the fishery. Among the crew were other subjects of the United States, no doubt domiciled in America. The Lords Commissioners ordered a release of Rodman's share in the ship and cargo, and of the shares in the cargo of the American members of the crew. The reasons for this decision are again unknown, but, as in the case of the "Jacobus Johannes," the case may have turned entirely on personal domicile. It should be observed that there was really no commercial domicile in an enemy country, the whole adventure being a high-seas adventure. Further, the whole adventure, except the return voyage, had apparently been carried out during peace, and had come to an end when the ship and cargo were seized as prize. There was in fact nothing from which, when the war broke out, the neutrals interested could disassociate themselves. Again their Lordships fail to see how this case can be relied upon as an authority for the alleged exception to the general rule.

In the "Nancy" the goods in question had been shipped early in July 1793, a state of open war having existed between this country and France since the 14th February, 1793. The shipment was made at Port-au-Prince, in the island of St. Domingo, by Stephen Zaccharie, the cargo being consigned to Zaccharie, Coopman, & Co., of Baltimore. It was not quite clear on the evidence whether the goods belonged to Stephen Zaccharie, and were deliverable to Zaccharie, Coopman, & Co. on his account, or whether they belonged to Zaccharie, Coopman, & Co. The partners in this firm were Stephen Zaccharie and two others — Coopman and Vochey. Coopman was an American by birth, and Stephen Zaccharie and Vochey, though French by birth, claimed to have

been naturalised in the United States. All of them claimed to have an American domicile, but Coopman and Stephen Zaccharie were both of them in St. Domingo at the time of shipment, and also at and after the capture. The Judge of first instance released the goods to Stephen Zaccharie, on the ground that they were at the time of capture his property, and that he was an American citizen. The Lords Commissioners reversed this decision, and condemned the goods as enemy property. It is not clear to whom they considered the goods to belong, but if they belonged to Stephen Zaccharie it is quite clear that he was at all material times actually trading in enemy territory; and if they belonged to the firm, it is equally true that two of the firm were at all material times trading in the enemy country on behalf of the firm. In respect, therefore, of the goods in question, there was, whoever was the owner and wherever such owner was personally domiciled, a commercial domicile by virtue of which the goods were confiscable. There could be no question of any reasonable interval for the owner to discontinue or disassociate himself from the trade in the enemy country, for the transaction originated after the outbreak and with full knowledge of the state of war. In this respect the case differed from the "Jacobus Johannes" or the "Osprey," where the transaction originated in the time of peace. It has even less bearing than these cases on the point at issue.

The three cases of the "Jacobus Johannes," the "Osprey," and the "Nancy," were commented upon by Sir William Scott in the "Vigilantia" (1 C.R., at p. 15). After mentioning the "Jacobus Johannes" and the "Osprey," he says that from these cases a notion had been adopted that the domicile of the parties was that alone to which the Court had a right to resort. From this it appears that, according to the general opinion, both the "Jacobus Johannes" and the "Osprey" had turned entirely on the personal domicile of the claimants, the doctrine of commercial domicile being wholly ignored. But Sir William Scott proceeds to say of the "Nancy" that it had been decided on different principles, the Lords Commissioners distinguishing the former cases on the ground that "they were cases merely at the commencement of a war, and that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce, and that it would press too heavily on neutrals to say that immediately on the first breaking out of a war their goods should become subject to confiscation." Sir William Scott adds that it was expressly laid down in the "Nancy" that if a person entered into a house of trade in the enemy country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country

Sir William Scott had been counsel for one of the parties in the "Nancy," and his account of what was said by the

Lords Commissioners is no doubt based on personal knowledge. It is reasonably clear, in spite of a slight ambiguity in Sir William Scott's language, that the Lords Commissioners in the "Nancy" distinguished the two earlier cases on the ground that the goods in question in these cases had been shipped before the war, whereas in the case of the "Nancy" the shipment was after the commencement of hostilities. This was a perfectly legitimate ground of distinction, but it is a fallacy to suppose that a Judge necessarily approves every case which he distinguishes from that with which he is himself dealing, and a still greater fallacy to suppose that he approves of it on any particular ground. The rule which Sir William Scott states to have been laid down in the "Nancy" is the rule by which an enemy character is imposed on goods by virtue of the commercial domicile of the owner, not a rule which leaves the personal domicile as the criterion of character, subject to a possible enemy taint imposed by the action of the owner. It is stated without exception. If Sir William Scott had considered that the Lords Commissioners were countenancing or even suggesting an exception to the rule, he would certainly have said so, more especially as cases within the exception would fall to be decided on principles independent of commercial domicile.

The President appears to have treated the cases above referred to as authorities in the respondent's favour, and says that the doctrines there laid down have been followed by America and this country ever since. He refers in particular to the "Antonia Johanna," 1 Wheaton 159; the "Friendschaft," 4 Wheaton 104; the "San José Indiano," 2 Gallison 267, and the "Cheshire," 3 Wall 231. These are all of them American authorities, which upon examination appear to support the general principle of the effect of a commercial domicile acquired in an enemy country by a person whose personal domicile is in a neutral country. They do not support the exception to the general principle for which the respondent contends.

In the "Antonia Johanna" the goods in question were held to have been shipped for and on account of a house of trade in the neutral country, and the case therefore fell to be decided on the personal domicile of the partners in the neutral house of trade.

In the "Friendschaft" the goods in question belonged to a house of trade established in the enemy country. They had been shipped during the war. The doctrine of commercial domicile is stated by Mr. Justice Story, and the goods were condemned. No exception to the rule is mentioned.

In the "San José Indiano," the authorities on which the doctrine of commercial domicile is based are discussed at some length. The cases of the "Jacobus Johannes," the "Osprey," and the "Nancy" are mentioned, but not as creating any exception to the general doctrine.

Similarly in the "Cheshire," there is a statement of the general doctrine, but no allusion to any possible exception.

With regard to the British authorities, their Lordships have failed to find any authority for the respondent's contention, unless it be the "Jacobus Johannes," the "Osprey," and the "Nancy," and Sir William Scott's comments on them in the "Vigilantia."

In their Lordships' opinion, these cases and comments afford a very slender support for the contention in question. It appears from the facts in each case that the point did not necessarily arise for decision. Each case is explicable without it having been raised or decided. The whole superstructure of the respondent's argument is ultimately based on what is said by Sir William Scott in the "Vigilantia." But as above indicated, this is quite consistent with the general rule deduced from the other authorities.

Under these circumstances, their Lordships have come to the conclusion that there is no such exception to the general rule as that for which the respondent contends. A neutral owning or being a partner in a house of business in an enemy country, has a commercial domicile in that country. This commercial domicile imposes an enemy character on his property or interest in such house of business. There is no question of any particular act on his part by which any particular goods belonging to him or his interest in any particular goods may be tainted. If having such a commercial domicile in a country which by the outbreak of war becomes an enemy country, he desires to avoid the consequences entailed by such domicile, he may avail himself of the interval allowed by law to discontinue or disassociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or disassociation taking place after the capture, or will even adjourn proceedings in the Prize Court to give an opportunity for such discontinuance or disassociation. In the case of goods shipped after the commencement of the war, the circumstances of the shipment must be considered The shipment may have been made by or with the privity of the claimant in the ordinary course of the business in the enemy country. In such a case, the claimant will have elected to continue the business, and there will be a case for condemnation. Only if the shipment was made without the privity of the claimant or as a step in discontinuing or disassociating himself from the enemy connection can there be any question of their release. Such a case will be determined in the same way as like questions, with regard to goods at sea when the war commenced. There is, in their Lordships' opinion, no principle upon which any such exception as that set up in the present case can be based. It is the duty of the Court to hold an even hand between belligerents and neutrals, and not to create in favour of the latter, and at

the expense of the former, exceptions or exemptions not clearly justified by the principles of international law.

Their Lordships are of opinion that the respondent's interest in the goods in question ought to have been condemned for the reasons above stated. It therefore becomes unnecessary to deal with the second argument put forward on behalf of the Crown, namely, that which was based on the alleged attempt of the respondent to deceive the Court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, with costs, and the respondent's interest in the goods in question condemned accordingly.

In the Privy Council.

In the matter of
PART CARGO *EX* STEAMSHIP "ANGLO-MEXICAN."

HIS MAJESTY'S PROCURATOR

v.

MAYER.

DELIVERED BY

LORD PARKER OF WADDINGTON.

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1917.