Privy Council Appeal No. 39 *of* 1921.

In the matter of the steamships "Blonde," "Prosper" and "Hercules."

Danziger Rederei Aktien Gesellschaft - - - - *Appellants*

v.

His Majesty's Procurator-General - - - - - *Respondent*

FROM

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

Privy Council Appeals Nos. 51, 52, 53, 54, 63 *and* 64 *of* 1915.

In the matter of Petitions re *the steamships "Rabenfels," "Werdenfels," "Lauterfels," "Aenne Rickmers," "Gutenfels" and "Barenfels."*

Deutsche Dampscheffartsgesellschaft Hansa - - - *Appellants*

v.

His Majesty's Procurator in Egypt - - - - - *Respondent*

FROM

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

Privy Council Appeals Nos. 149 *of* 1917 *and* 1 *of* 1918.

In the matter of Petitions re *the steamships "Prinz Adalbert" and "Kronprinsessin Cecilie."*

The Hamburg-America Steamship Company - - - *Appellants*

v.

His Majesty's Procurator-General - - - - - *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1922.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

These are consolidated appeals from the President's judgment rejecting the claims of the appellant company for release with compensation and condemning the vessels in question, the "Blonde," the "Prosper" and the "Hercules." They were small German steamers, two under 800 and one under 1,100 tons gross, which at the outbreak of the war happened to be in London and Liverpool, and were seized and proceeded against in Prize.

Orders were in due course made for their detention in the form which was settled in the " *Chile* " [1914 P. 212], and followed in many cases during the war. Shortly afterwards they were requisitioned by order of the Court for the use of His Majesty, and passed into the service of the Admiralty. Two have since been lost while under requisition—the " Blonde " by grounding off Flamborough Head, and the " Hercules " through being struck by an enemy torpedo. The " Prosper " still remained in the hands of the Crown under the requisition order at the time when the case was heard.

The appellants are a shipping company registered and carrying on business at Danzig, where the ships also were registered, and at the outbreak of war they owned a number of the shares in each vessel, though not all ; but they have been throughout treated as the full owners for all present purposes. Danzig having become a Free City under the Treaty of Versailles, the appellants, as citizens of Danzig, claim to be in a better position in these proceedings than if they had still been subjects of the German Empire, and no point has been taken on behalf of His Majesty's Procurator-General that, as Danzig was not a party to the Hague Conventions, citizens of Danzig should not be allowed to claim the benefit of them. All that is said is that, in respect of Germany's actions during the war, the appellants, as they enjoyed the benefit, must also take the burden, although, as regards disabilities and liabilities imposed on Germany by the terms of the Treaty of Versailles, they may escape, having ceased to be Germans at the moment when the treaty first became operative. The principal point is one turning on the Hague Conventions of 1907, which, though not argued below owing to some misunderstanding as to the state of the authorities, must be dealt with on one or other of the present groups of appeals. The appellants claim the benefit of the Sixth Convention, or in the alternative of a supposed agreement to the like effect, arrived at *ad hoc* by Great Britain and Germany in the early months of the war. The Procurator-General denies that the Sixth Hague Convention ever became applicable, firstly, for want of ratification by all the belligerents, and secondly, because Article II, on which the appellants rest their claim, would only apply if Great Britain had put Article I in force, which never was done. As to the supposed agreement *ad hoc*, he says that the negotiations were entered into for other purposes and, further, broke down without any conclusion.

The history of the matter is this. Early in August, 1914, pursuant to an Order in Council of the 4th of the month, a proclamation was issued, which declared that German ships in British ports would be detained, but that His Majesty proposed ultimately to apply the Sixth Hague Convention, provided that a Secretary of State certified, before midnight of the 7th August, that he was satisfied, from communications received, that Germany had expressed a similar intention. This period expired without the receipt of any sufficient communication, and the fact was duly intimated to the Admiralty. Thereupon, it is said, the

Sixth Hague Convention, so far as Great Britain and Germany were concerned, failed to come into operation, and accordingly the provisions of Article II had no effect in the late war.

In spite of this notice to the Admiralty, communications passed between the two Powers through the good offices of the Diplomatic Service of the United States. Letters and telegrams were exchanged, and sometimes they crossed one another. The German Government were concerned not merely as to the treatment of detained ships under the Sixth Convention, but also as to that of the crews under the Eleventh. They asked whether His Majesty's Government intended to observe the provisions of these Conventions, and in what sense they understood some of their obscurer terms. By the end of September or the beginning of October both parties had stated distinctly that the Sixth Convention would be observed, and had expressed their construction of it, in senses which were substantially identical. As to the Eleventh, though not far apart, it does not appear on the documents which are forthcoming, that they were ever in absolute accord. Their Lordships were not informed that His Majesty's Government ever published this correspondence at the time as the formal record of a new agreement therein arrived at.

The learned President came to the conclusion that this correspondence, viewed as a negotiation for a final agreement, never passed beyond the stage of mere negotiation, the discussions as to the two Conventions not being severable and no agreement having been arrived at as to the Eleventh Convention. The contrary was strenuously urged before their Lordships. Logically, however, there is a prior issue, namely, whether this correspondence was entered upon or was pursued as a negotiation intended to lead to a new international agreement at all. The treaties and conventions, which Courts of Prize are accustomed to construe and give effect to, are written instruments duly executed and ratified. It is a novelty to call on them to spell out such an agreement from a series of messages passing to and fro. Here there is not so much as a protocol, and although no doubt *consensus ad idem* is fundamentally necessary to an international agreement, as it would be to a private offer and acceptance under municipal law, it does not follow that in the intercourse of sovereign States every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon as the parties have reached the stage of affirming identical propositions. Each Power was anxious to know the intentions of the other, and in their Lordships' opinion their object, and their sole object, was to ascertain whether and in what way effect would be given to the old agreement, namely, the Sixth Hague Convention, and was not to enter into a new agreement, dealing with the same subject and tending to the same effect, but concluded under conditions as embarrassing and with a result as superfluous as could be imagined.

It is true that expressions are to be found on the German side, in the latter part of these communications as well as at the

outset, which are not inappropriate to a negotiation for, and to the conclusion of, a new agreement. The German Government in August states its acceptance of a British proposition to release merchant ships, made in the Order in Council of the 4th August, and in October declares that "there now exists between the German Government and Great Britain an agreement as to the treatment of merchant ships." These expressions were not, however, adopted by His Majesty's Government. They throughout stated their intention to abide by the Sixth Hague Convention, provided Germany would do the same, and there are despatches from Germany at the end of August and in September which show that this, which was the real aspect of the matter, was fully recognised by the German Government. The language of the communications, when carefully examined, does not support but displaces the theory that a new agreement was in negotiation between belligerents to effect what could have been better secured by reciprocal recognition of a Convention, to which both parties had adhered while they were still at peace.

In the result His Majesty's Government became satisfied that there existed on the German Government's part such an intention to observe the Convention reciprocally as justified them in proceeding publicly to observe the Convention for their own part, and thenceforward orders were made in the Prize Court, at the instance of the Crown, which were always regarded as being framed to carry out the obligations of the Sixth Hague Convention, while securing the interests of this country in the possible event of Germany's failing at the conclusion of the war to be of the same mind as to her obligations as that which had been manifested at the beginning. Their Lordships may further observe that, on balance of the importance of the German merchant ships detained by Great Britain against that of British merchant ships detained by Germany, the latter Power had a strong material interest in continuing to execute the Convention to the end, and was little likely to intend to abandon or to desire to forfeit the ultimate advantages, which observance of the Convention would assure. It therefore becomes necessary to consider in what the obligations of that Convention consist according to its terms.

The sixth article of the Sixth Convention of 1907 declares that "the provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention." The French text for the last part of this sentence reads : "et seulement si les belligérants sont tous parties à la Convention," and there may be significance in the different positions in the sentence occupied by the respective words "all" and "tous." Of the Powers belligerent in some theatre or other and against one combination of opponents or another during the late war, Serbia and Montenegro never ratified the Convention in question. The United States were not parties to it at all. At the time when the ships now under discussion were first detained, Germany had not declared war on Serbia, nor had

Serbia become formally the ally of Great Britain, and, so far as their Lordships are aware, actual hostile action by Germany against Serbia and actual military support to Serbia by Great Britain both belong to later stages in the war. A nice question arises, therefore, whether Serbia was a belligerent in such a sense that her failure to ratify the Convention prevents its being applicable as between Germany and Great Britain in the matter of these ships? If the position of Serbia does not prevent the obligations of the Convention from attaching, still less can this result from that of the United States, who were not one of the "contracting powers." To put the point otherwise, are the "belligerents," who are to be taken account of for the purposes of this article, the belligerents merely who detain or suffer detention, or are they all the Powers who are simultaneously engaged in war, whether acting in alliance or in direct conflict with one another or not? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the Powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the Convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the Convention, or is it imperfect, so as to prevent the application of the Convention, unless and until other Powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the Convention, whether or no they have ships or harbours, and whether or no they make or suffer captures or are ever directly affected by maritime war at all?

It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them. Their Lordships, however, have not found it necessary to give a final answer to these questions. Whether in the circumstances of these cases the Convention was applicable or whether it might be successfully objected that it had never become applicable, the result is the same, for the objection is clearly one that can be waived, and in their Lordships' opinion it was waived by His Majesty's Government, alike by the whole tenor of the above-mentioned correspondence and by the whole attitude of the Crown in matters of prize affecting such cases as these throughout the war. *De facto* as well as *de jure* the position of Serbia and the other powers, as regards both the Convention and the conduct of the war, was well known to His Majesty's Government at all material times. Yet days of grace were in fact allowed to Austrian

ships by proclamation dated the 15th August, 1914, as to which see the "*Turul*" (1919, A.C. 515). The "*Chile*" order was wholly inept if the Convention had and could have no application, and the Crown should have applied to the Court not for leave to requisition, but for decrees of condemnation. The fact that, in spite of the doubt expressed by Sir Samuel Evans P. in the "*Möwe*" (1915, P. at p. 12), the Crown acquiesced in numerous orders in that form and never asked for condemnation of these detained ships so long as hostilities lasted, is conclusive to show that any right to rely on the non-fulfilment of Article VI was waived. The arguments of the Attorney-General on behalf of the Crown in the case of the "*Gutenfels*" (1916, 2 A.C. at p. 115) and *His Majesty's Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft* (1919, A.C. 291) are of especial importance in this connection.

In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many Powers, in which none can expect without some concession to insist upon his country's interests, its language or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the Powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions, which are expressed without much detail and sometimes only in outline.

On the other hand, it is specially necessary to discover and to give effect to all the beneficent intentions, which such instruments embody and which their general tenor indicates. It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any Power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasising the absence of express words, where the sense to be implied from the purport of the Convention is reasonably plain. Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument in any narrow sense, such as would reserve for them future loopholes of escape from its general scope.

Turning to Articles I and II of the Sixth Hague Convention, it is important to remember that, before its date, and since its date whenever it is not in force, the law of nations permitted and entitled a belligerent to make prize of an enemy merchantman found within his ports at the outbreak of war (*Lindo* v. *Rodney*,

2 Doug. 612 *n.*). It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognised by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the Power entitled to capture, was a thing desirable indeed, but not obligatory.

Under these circumstances it is asked with much force: Why should Powers, who could not agree that days of grace should be given at all, find themselves able to concur in a more extensive modification of the law then existing and to agree that ships, unable to avail themselves of permission to depart, should not be made prize but should only be detained? The argument finds some support in the fact that the article dealing with days of grace precedes that limiting the right to such condemnation, and in the further fact that Article II certainly is closely allied with Article I and is so far dependent on it that, instead of stating the circumstances in which it applies, as a self-contained Article might be expected to do, it finds their definition only in a reference to the first Article and to those circumstances mentioned in it, which depend on the choice and the clemency of the capturing Power. Why, then, should Powers, which fail to agree to such a modification of belligerent right as is involved in the grant of days of grace, be deemed capable of the graver modification, which is involved in abandoning the right to capture and being content with a right to detain?

The true question, however, is not why they should have but whether they have done so, and it may be usefully met, if not completely answered, by asking another. The Powers, great and small, assembled at the Hague in 1907 in what was undoubtedly a great effort, involving mutual concessions and separate sacrifices, to regulate and to humanise the practices of maritime war. Is it consistent with their dignity or with the seriousness of the negotiations to read a part of their handiwork as meaning that a belligerent need not spare an enemy ship in his own port at all unless he chooses, but that if, from good nature or improvidence, he waives his right to bar her exit absolutely, he is to be bound by convention to do more than he chooses to do by express grace, and may then only detain, when otherwise he could seize? To say that the compact expressed in Article II has been providently entered into in case two belligerents should reciprocally grant days of grace under Article I, but that until that event happens it is a mere foretaste of things to come, is to attenuate this Convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the article because the length and character of the opportunity for departing in peace rests entirely with the grantor of it. In itself a concession requiring immediate departure differs only notionally

from a belligerent act inhibiting departure altogether. Is the modification of belligerent right to take place only in the one case and not in the other ? and, if so, on what show of reason can it be founded or to what inveterate prejudice or ingrained self-interest has so illogical an arrangement been conceded ?

Articles III and IV, however, which are strictly *in pari materia*, seem to place the matter beyond doubt. Article III contains no reference to Articles I and II. It deals with a case to which days of grace and opportunities of departure have no application—that is, to ships that are found by their enemy at sea on the outbreak of war. The argument is unaffected by the fact, that as to this Article Germany made reservations at the time when the Convention was ratified, for the effect of the reservation is limited to the Article with which it deals. A reservation as to a part of the Convention is quite consistent with adoption of the rest of it. The Article, clearly and independently of the others, requires that such ships, though by the law of nations good prize, may not be confiscated—that is, seized and brought before a Court of Prize for condemnation. They may only be detained—of course, under the order of such a Court and upon conditions imposed by it. Further, when Article IV comes to deal with cargo on board " vessels referred to in Articles I and II," it prescribes the same measure of liability as that laid down in Article III, and describes that prescription as being an identical principle. Their Lordships, therefore, think it clear that in effect this Convention says : " Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave or if they unavoidably overstay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace." In effect, while Article I is only optional, Article II is obligatory. They reject the construction, which makes the prohibition upon confiscation depend on a prior election to do, what Article I desiderates but does not require.

Assuming that the Sixth Convention was binding on this country in the early stages of the war in such a sense as would prevent the condemnation of these vessels at the end of it, the Procurator-General further contends that during its progress Germany has by her conduct given this country the right to refuse to be bound any further by its terms so far as German ships are concerned. It appears that in 1915, though the fact did not become known to His Majesty's Government till afterwards, the German Foreign Office instructed the German diplomatic officials in Spain to inform the owners of these detained ships of the arrival of any of them in Spanish ports when navigating under requisition. The object of this instruction seems to have been to give the owners the opportunity of taking proceedings in Spanish Courts, if so advised, for recovering possession of them in Spanish waters under judgments pronounced for the purpose. It does not appear whether any such proceedings were ever taken, or, if so, with what result. Furthermore, in correspondence with the Goverment of the King of Siam the German Foreign Office had advanced,

as a ground for refusing to be bound by the Eleventh Hague Convention, that it had never been ratified by all the then belligerent Powers. Finally, it was contended that the many outrages and indefensible measures adopted by Germany during the war and especially her defiance of the Hague Conventions applicable, notably by the use of poisonous gas and of contact mines, by the destruction of hospital ships, the deportation and forced employment of civilians and the bombardment of open towns, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional obligations, as to the conduct of war, and thus gave to Great Britain the right to treat herself as released from her correlative obligation under the Sixth Hague Convention of 1907. There are two obvious flaws in this argument. First, so far as concerns the intentions of Germany she may have flagrantly disregarded obligations, which fettered her freedom of action to her disadvantage. It does not necessarily follow that she intended to repudiate a convention under which she stood to gain largely in the long run. There is, in fact, no evidence of any conduct on Germany's part down to the conclusion of the Armistice which put it out of her power to return detained ships in pursuance of Article II. Secondly, so far as concerns the consequent rights of this country, even if the rules of English municipal law as to the discharge or dissolution of contracts be applicable to a case arising between sovereign Powers, repudiation by Germany could do no more than give to this country the right to accept that repudiation and to treat the Convention as no longer binding. There is no evidence whatever that this was ever done; indeed it is plain that His Majesty's Government continued, down to the conclusion of hostilities and even to the conclusion of peace, to treat this Convention as binding. Most, if not all, of the "*Chile*" orders had been made by the end of 1916, since which date, as well as before it, most of the facts now relied upon were notorious, yet no step was taken to obtain a "further order" in any case, and it is to be observed that the reason for making provision for a "further order" was not doubt as to the declared intentions of Germany with regard to recognition of the Convention, but uncertainty as to the continuance of that intention on her part. If so, in the language of the English cases, the contract was kept alive for the benefit of both parties, since one party cannot of his own choice put an end to it by disregarding its obligations, and so long as the contract subsists, each party can claim the fulfilment of the provisions which are in his favour, just as he remains bound to answer for his disregard of obligations which he ought to satisfy. Their Lordships, however, do not rest their conclusions on rules applicable to private contracts in English Courts. The principle of ascertaining the intention of the parties to an agreement by giving due consideration to what they have said is no doubt valid in international matters, but there are many rules both as to the formation, the interpretation and the discharge of contracts, which cannot

be transferred indiscriminately from municipal law to the law of nations. They prefer to rely on a wider ground. It is not the function of a Court of Prize, as such, to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters which come before the Court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behaviour of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which, when confined within recognised limits and embodied in due form, a Court of Prize is bound to give effect. In a matter, however, which turns on the obligation of a single and severable compact, the Court must inquire whether that very compact has been discharged, and ought not to be guided by considerations arising only out of the general conduct of war. Their Lordships are clearly of opinion that neither in regard to the instructions given to the Germany Embassy in Madrid, which were after all a domestic matter and were at most a threat never communicated by Germany to His Majesty's Government; nor to the answer given to the Government of the King of Siam, which not only was *res inter alios acta* but related to a separate Convention and proved nothing as to the German Government's intention to observe Convention VI; nor in regard to the general delinquencies of the German forces during the war, is it possible to find juridical grounds for releasing His Majesty's Government from their obligations under the Sixth Hague Convention, when once they had attached. It has not even been shown that on the termination of the war Germany was not willing to return such British ships as she had detained, in so far as they had not been previously released under the Armistice or otherwise.

It would follow from the foregoing considerations that the owners of the vessels in question would be entitled to orders of release, but now arises the difficulty, that of these vessels only one survives, and that all matters occurring during the war are, as between German claimants and the Procurator-General, now to be considered in the light of the Treaty of Versailles.

Article II of the Sixth Convention, after prescribing that the belligerent's right is limited to detention of the ship "under an an obligation of restoring it after the war without compensation," proceeds: "or he may requisition it on condition of paying compensation." What is this compensation, and when and in what events is it to be paid? The question is material, because during the period of requisitioning the "Blonde" was lost by perils of the sea, without fault on the part of any one responsible, and the "Hercules" cannot now be restored, because the German combatant forces themselves destroyed her, purporting to do so as a legitimate act of war. The provision is that a detained vessel is simply to be restored without compensation. Nothing is said to impose on the belligerent any duty to provide for her safety or to effect repairs. If he restores her, he does so without compensation, and meantime she has been detained at her owner's risk. Next,

the belligerent is given an express right to requisition, but on condition of paying compensation. Whether requisition has the same meaning in the Convention that it has in Order XXIX, or whether, in addition to the right to use, it includes a right to appropriate, are questions not now material; for present purposes it is sufficient to assume that the meaning of the word in both instruments is the same. While on the one hand nothing is stipulated as to payment of freight or of compensation for the use of the ship while under requisition and nothing is expressed as to repairs, on the other hand, apart from circumstances, which discharge the requisitioning Government from all the obligations of the Convention, the exercise of the right to requisition during detention involves that, if she is not restored at all, compensation takes her place, and for this purpose her money value, when requisitioned, is the obvious substitute for the ship herself in specie.

It is no doubt paradoxical that, the ship having been lawfully requisitioned by the Admiralty without any obligation to pay for using her or for the consequences of mere use, His Majesty's Government should be called on to compensate her German owners because the German forces have sunk her by an illegitimate act of war. The question, however, is one of construction of the article. It begins by substituting detention for confiscation, thus ensuring to the owner the right to get his ship back, so far as the detaining belligerent is concerned. On this is engrafted a proviso for the benefit of the belligerent, of which he may avail himself or not as he pleases, and this proviso imposes on him an unqualified condition—that of compensation. This must be read literally, and as nothing further is prescribed in favour of the detaining belligerent, he cannot have the benefit of exceptions by implication. The convention says that requisitioning is to be on condition of paying compensation: the condition would be frustrated, if, though the obligations of the Convention had not been terminated, neither ship nor compensation were forthcoming.

The Convention furthermore does not define the compensation, or the mode of calculating it, or the time of payment. These are matters which it leaves for subsequent determination, and it is reasonable to infer that at any rate the determination of the Court of Prize, before which the vessel in question has been duly brought, is within the purview of the Convention. Accordingly, if the recognised procedure as to requisitioning has been followed, as was done in the present case, and if that procedure provides for the substitution of money for the ship, that money cannot be regarded as being other than the compensation to which the article applies. Under the Prize Rules and Orders the Court can allow the ship, which is in the custody of its Marshal, to be requisitioned by the Crown, and in the course of such requisitioning to be necessarily exposed to maritime and belligerent hazards. This

involves the Court's parting with the custody and with the immediate control. For the security of the owner the Court may require the deposit or a binding undertaking for the deposit in Court of the ship's appraised value, and although the Court by no means parts with its control over the ship for all purposes, or precludes itself altogether from ordering her redelivery, it treats the fund for all ordinary purposes as the subject on which subsequent decrees will operate. The advantage to the owner is obvious. This procedure substitutes for such a wasting asset as a ship, which in either event he cannot use, a money fund in Court, which possesses a relative stability and suffers no wear and tear. Their Lordships' conclusion is that under the Sixth Convention the subjects to be restored are the " Prosper," being a ship which is *in specie*, and the appraised values of the " Blonde " and " Hercules," which were lost. No question as to freight was raised before their Lordships.

A further point may be briefly disposed of. It was that in all cases where a ship is requisitioned otherwise than " temporarily " under Rule 6 of Order XXIX, the substitution of the appraised value for the ship is definitive, and no order can thereafter be made to take the ship herself out of the possession of the Admiralty. There is no authority for this. It is not supported by the special provision for a temporary, as distinguished from a general and indeterminate, requisitioning, which was only introduced by amendment into Order XXIX some considerable time after the beginning of the war, nor does the provision that such requisitioning may be without appraisement preclude the power of ordering appraisement, when on the destruction of the vessel it becomes necessary that a fund should be determined which will represent her. It is opposed to the nature of requisitioning, which is for the use of His Majesty (including, no doubt, consumption in the case of goods whose normal use consists in using them up), and would confound a thing requisitioned for use with a thing acquired for the purpose of sale. Furthermore, in cases where release *in specie* is the right of a claimant, the Court might prove to have disabled itself from making the due decree, if a mere order for leave to requisition were to operate as a final abandonment to the Crown. Apart from the Treaty of Versailles, their Lordships conclude that the " Prosper " must, as a matter of form, be restored by the Admiralty to the custody of the Marshal, in order that she may be released to the owners *in specie*.

The provisions of the Treaty of Versailles, which are invoked to the contrary, are twofold. There can be no doubt that Germany was competent on behalf of those nationals, who were German subjects within the operation of the Treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned. By Art. 1 of Annexe III of Part VIII of the Treaty

Germany ceded to the Allied and Associated Powers all vessels of 1,600 tons gross and upwards, and a part of those under 1,600 tons, and by para. 8 she further " waived all claims of any description against the Allied and Associated Governments or their nationals in respect of the detention, employment, loss or damage of any German ships," with an exception not now material. By Article 440 Germany further recognised as valid and binding all decrees and orders concerning German ships and goods made by any Prize Court of any of the Allied and Associated Powers.

In their Lordships' opinion, while Annexe III operates to transfer the property in all ships of 1,600 tons gross and upwards, they make no such transfer in the case of ships of less tonnage, at least until they have been selected for surrender as part of those, which under the Treaty are to be handed over. It is not suggested that the vessels in question have been so selected, and accordingly in their case this provision of the Treaty does not affect the owners' rights to restoration *in specie*. Had they been over 1,600 tons the property and rights of the owners would have been transferred by the operation of the Treaty, and they would have had no *locus standi* to appeal against any order dealing with them or with the money in Court or to be brought into Court after appraisement in substitution for them. Section 1 of the Third Annexe to Part VIII, being a cession by the German Government, " so as to bind all other persons interested," not only binds the German shipowners as persons interested in appraised values brought into or to be brought into Court, but also binds them in respect of their property in the ships, which, until duly divested by a decree having that effect, remains in them, even though it may be liable to be divested at any time ; accordingly it would be an answer both in regard to detained ships still *in specie*, whether remaining in the custody of the Court or under requisition, and to the funds, which represent them under the practice of the Court.

Their Lordships further think that para. 8 does not affect the matter. It would be otherwise, if the appraised value were regarded, not as a substitution for the requisitioned *res*, taking its place when lost, but as a payment in consideration of being allowed to requisition at all, for in that case there might be a claim, which para. 8 would bar. Their Lordships, however, reject this view. The owners of these detained ships have no claim against His Majesty's Government either for detaining or for using the vessels. Both were regular proceedings taken as of right under regular decrees, the validity of which Germany recognises by the Treaty of Peace. The loss of the vessels gave no claim, for the owners' rights arise not out of the loss, but out of the substitution of the appraised values for the ships, the release of which is the indemnity which the Convention provides for. There is therefore in this case nothing to waive.

The Treaty of Versailles contains a further provision

(Article 297),not specially applicable to shipping,bywhich the Allied and Associated Powers reserve the right to retain and liquidate all property within their territories belonging to German nationals or companies controlled by them at the date of the coming into force of the Treaty, the liquidation to be carried out in accordance with the laws of the Allied or Associated State concerned. It has been urged on the one hand and denied on the other, that an answer can be found to the claim of the Danziger Rederei Aktien Gesellschaft for the release of these vessels in the application of this Article to the ships and funds in question. Beyond observing that the contentions raised on both sides deserve full and careful consideration by the appropriate tribunal, their Lordships do not feel called upon to express any opinion about them, for they are satisfied that the Prize Court is not such a tribunal. Nor do the terms of the Armistice affect the matter. It is enough to say that Article 30, which was cited, does not purport to touch the obligations of the Crown under the Sixth Hague Convention, when duly determined by a Court of Prize whether before or after the conclusion of hostilities. It merely put it out of the power of Germany, when delivering the ships demanded, to insist on an anticipation of the actual end of the war by delivery of the detained German ships forthwith.

As soon as the conclusion has been arrived at that under the treaty obligations of 1907 this country is bound to restore the *res*, whether now existing *in specie* or only in the form of a substituted fund, the duty of the Prize Court *prima facie* is to give effect to that obligation and thereby to discharge itself and its officials from further custody of or control over it. The decision of course involves a duty to ascertain that the private party claiming is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession. Where rights and claims arise out of the way in which the prize has been dealt with prior to the decree for its release and the execution of that decree, no doubt the Prize Court retains its jurisdiction over them, notwithstanding that the *res* no longer remains in its custody. Here, however, there is no such case. Whatever rights may have been reserved to His Majesty, as one of the Allied and Associated Powers, to liquidate these ships or their value, they have not, so far as their Lordships have been informed, been hitherto put in force. The right referred to is not the right, existing independently of and prior to the Convention of 1907, to claim condemnation of these ships in prize in accordance with the law of nations, nor is the reservation of it equivalent to the discharge of the restrictions, which the Sixth Convention imposes. It is a right to liquidate in accordance with municipal law, that is to say a new right, which does not become effective unless and until it is exercised. If this were to be done hereafter, it would be a new act not arising out of dealings with the prize as prize, not modifying the rights of ownership as they now exist, and therefore it would be cognisable

by some other tribunal. Their Lordships are clearly of opinion that the Treaty of Versailles, which neither names nor seems to consider the Sixth Hague Convention, does not in this Article modify or annul the obligations, which arise under it. So much they decide but no more: the rest is open and, apparently, in accordance with the terms of Article 297, is cognisable by the High Court of Justice. As this potential claim has been brought to their Lordships' attention, they think that under any order of release the *res* should not be removed out of British territory for a reasonable time, lest otherwise the Treaty right might be defeated; but they see no reason for delaying the grant of a decree for release, since no ground remains for continuing the responsibilities of the Prize Court or prolonging its possession. The right course will be to release the *res* physically to the Public Trustee as Custodian of Enemy Property, or to such other officer as may be discharging such duties, to be retained by him for a reasonable time free of expense to the claimants, say for six months, in order that the Crown may have the opportunity of commencing proceedings if so advised, and in that case further until the final determination of those proceedings, but in any other case to be thereafter forthwith delivered up to the claimants.

It is unnecessary to express any opinion as to the appellants' claim to a special position as a company registered in and under the laws of the Free City of Danzig except as to one point. It was urged that a Court of Prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity; hence as against the subjects of a newly constituted State, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the Treaty, which does not deal with their rights but is directed to another and a very different object. Their Lordships think the contention groundless.

In the result the appeals succeed with costs; the decrees of condemnation should be set aside; the matter should be remitted to the Prize Court to make such orders as may be necessary for the appraisement of the "Blonde" and the "Hercules," and to make a decree releasing those appraised values and the "Prosper" *in specie* to the Custodian of Enemy Property to be delivered up to the claimants, if after the lapse of six months no proceedings have been begun for an order for delivery up to the Crown, but otherwise to abide the final determination of such proceedings. There is also an appeal by leave from the President's refusal of a rehearing, as to which nothing need be said beyond formally dismissing it.

Their Lordships will humbly advise His Majesty accordingly.

The *Rabenfels*, the *Werdenfels*, the *Lauterfels*, the *Aenne Rickmers*, the *Gutenfels*, the *Barenfels*, the *Prins Adalbert*, the *Kronprinsessin Cecilie.*

In these cases their Lordships, at various dates in the earlier part of the war, made orders on appeal that the ships should be detained until further order. All were over 1,600 tons.

The owners in the first, second, third, fifth and sixth now petition that orders be made for the release of such as remain and for payment of the appraised values of such as are lost, while the Crown petitions in all that orders condemning both may be made.

The relevant considerations have been fully dealt with in the case of the " Blonde " and other ships. In the case of ships of this size the Treaty of Versailles operates as a transfer of the former owners' rights, nor have they any *locus standi* before the Board to discuss how the Allied and Associated Powers may deal with them *inter se*. The petitions for release should be dismissed with costs.

As their Lordships understand that His Majesty's Government have come to arrangements with the Allied and Associated Powers with regard to the shipping surrendered and transferred under the Treaty, and that no question now arises as between them in relation thereto, they think that the proper course is to discharge the orders for detention previously advised by their Lordships; and to release the vessels to the Crown as the present owner.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

In the matter of the steamships "Blonde," "Prosper" and "Hercules."

DANZIGER REDEREI AKTIEN GESELLSCHAFT

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

In the matter of Petitions re *the steamships "Rabenfels," "Werdenfels," "Lauterfels," "Aenne Rickmers," "Gutenfels" and "Barenfels."*

DEUTSCHE DAMPSCHEFFARTSGESELLSCHAFT HANSA

v.

HIS MAJESTY'S PROCURATOR IN EGYPT.

In the matter of Petitions re *the steamships "Prinz Adalbert" and "Kronprinsessin Cecilie."*

THE HAMBURG-AMERICA STEAMSHIP COMPANY

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.