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Case of the Appam

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THE CASE OF THE APPAM[1]

On February 1st a German prize crew brought the British steamer Appam into Newport News and asked for her internment. The British government at once put in a claim for the restoration of the vessel on the ground that the ship could not be granted an asylum in an American port without a violation of neutrality. The British owners of the ship likewise brought suit in the Federal District Court to recover possession of the ship and cargo. The German government protested to the Department of State against the institution of judicial proceedings against the ship. The Appam, it was contended, was a legitimate prize and as such was entitled to enter and to remain as long as she pleased in an American port. The Secretary of State, however, took the position that the Appam did not fall within the express provisions of the Prussian treaty and that she was entitled to those privileges only which were generally granted to prizes, "namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions or necessity of repairs, but to leave as soon as the cause of their entry has been removed." Mr. Lansing accordingly declined to interfere with the proceedings before the court. The question of the court's jurisdiction, he maintained, "was one for judicial ascertainment and not for executive determination." Meanwhile the District Court proceeded with the hearing of the case.

1. (1916) 234 Fed. Rep. p. 389.

The judgment of Judge Waddill is a sweeping refutation of the whole German contention:

> The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the imperial government of the German Empire; and it will be so ordered.

The case raises a number of most interesting questions in international law: (1) As to right of entrance and asylum for German prizes in American ports under the Prussian treaties. By Art. 19 of the treaty of 1799,[2] renewed in part by Art. 12 of the treaty of 1828, it was provided that "the vessels of war, public and private of both parties, shall carry freely wheresoever they please, the vessels and effects taken from their enemies * * * nor shall such prizes be arrested, searched or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions." In construing this article, the Court follows closely the views of the Secretary of State in laying down that in the light of contemporary interpretation of similar clauses in other treaties,[3] "prizes cannot be brought into the waters of the United States for the purpose of laying up by a prize master but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize and then not for an indefinite period, but for the temporary causes recognized by international law."

But in restricting the enjoyment of the hospitality of the port to prizes under escort only, the Court, it is submitted, is observing the letter rather than the spirit of the treaty.[4] During the wars of the 18th century it was the recognized custom for warships to place prize crews on board captured vessels and send them into

2. Malloy, Treaties, Conventions, etc. vol. 2, p. 1492.
3. Moore, Digest of Int. Law. vol. 7, p. 935-6.
4. 16 Columbia Law Rev. Nov. 1916, p. 587.

neutral ports for sequestration. From the standpoint of the principles of neutrality it did not make a particle of difference whether the prize came in under convoy of the captor or in charge of a prize crew. The Prussian treaty, it is reasonable to assume, was made with a view to preserve this well understood right and should be interpreted in accordance with the international practice of that day. And such in fact has been the construction which the United States courts have placed upon the corresponding article of the treaty of Amity and Commerce with France in 1778.[5] In *Salderondo v. The Nostra Signora del Carmino,*[6] the captured ship was brought in by a prize crew and yet the Court ruled that the 17th article of the treaty was conclusive in excluding the jurisdiction of the Court. The decision in *Reid v. The Vere*[7] was to a similar effect. In neither of these cases was it even suggested that the presence of the capturing ship was essential to the enjoyment of the right of sequestration. The Court assumed without question that the protection of the treaty was intended to operate as much to the advantage of the prize crew as to the original captor.

The Court is on somewhat stronger ground, it would seem, in maintaining that the treaty does not grant the right to a permanent asylum in American ports. The restricted interpretation of the Court on this point is not only warranted by the express language of the treaty itself, but is also supported by the opinion of President Jefferson and of other public officials.[8] It is interesting to observe, moreover, that in the two above cited cases, the captors expressly pleaded that the prizes were only temporarily in the waters of the United States in the course of their voyage to the home port for adjudication. There is, in fact, an essential difference in principle between a temporary sojourn and a permanent deposit of a prize in a neutral port. For the neutral to grant the former is a mere act of courtesy such as is extended to all public ships. But to permit the latter is essentially an unneutral act; it is equivalent in effect to a use of the territory as a base of hostile operations since it not only preserves the prize from the danger of recapture, but it relieves the belligerent of the burden of taking the prize to a home port for adjudication.[9]

5. Ibid.
6. (1794) Bee 43, 21 Fed. Cas. No. 12,247.
7. (1795) Bee 66, 20 Fed. Cas. No. 11,670.
8. Moore, Digest of Int. Law. vol. 7, p. 935-6.
9. "There is high authority for the position that a prize may be carried

But apart from the treaty, the further question arises: What are the rights of the Appam under general international law? Has she a right to enter and find a refuge in the waters of the United States? Upon this point the Court declares:

> The generally accepted doctrine now is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is, consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

In support of this position, the Court appeals to the provisions of the Hague Convention of 1907[10] in regard to prizes and to the frequent declarations of American officials and international jurists, as affording conclusive evidence of the non-existence of a right of asylum according to international law.

But the judgment of the Court, it is again submitted, is open to serious question both from the standpoint of law and practice. The provisions of the Hague Convention on this point have no direct application to the case.[11] By Art. 28 it is expressly provided that the convention shall not apply except as between con-

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into a neutral port and there sold, but considerations of expediency should lead the neutral sovereign to exercise his undoubted right of prohibiting such sale. It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent or a depot for his spoils and prisoners." Wirt, Att. Gen. 1828, 2 Att. Gen. Op. 86. Moore, Digest of Int. Law, vol. 7, p. 936.

10. Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not the neutral power must order it to leave at once. Should it fail to obey the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew. Art. 22. A neutral power must similarly release a prize brought into one of its ports under circumstances other than those referred to in Art. 21. Art. 23. A neutral power may allow prizes to enter its ports and roadsteads whether under convoy or not when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

11. The Senate rejected Art. 23 on the recommendation of the American delegation to the Hague.

tracting parties and then only if all belligerents are parties to the convention. The Senate of the United States ratified Arts. 21 and 22 of the convention but as England was not a party to the convention, it is manifest that she has no legal claim against the United States, save in so far as the Convention may be declaratory of the general principles of international law.

What, then, is the general rule of law in respect to the exclusion of prizes. Upon this point it may be said that the practice of nations has varied. During the Napoleonic wars, the British navy frequently carried its prizes into neutral ports and the legality of such acts was clearly recognized.[12] The practice was continued during the Crimean war though subject to stricter limitations in favor of all neutral states.[13] The British naval regulations of 1888 also provide that prizes may be carried into neutral ports subject to the consent of the neutral nation.[14] The more recent policy of the English government, however, has been to deny a right of asylum in neutral territory. This policy has been followed during the Franco-Prussian, Spanish-American, and Russo-Japanese wars.[15]

The practice of the United States has been far from consistent. During the eighteenth and nineteenth centuries the United States government permitted prizes to be brought into American ports and sold even prior to condemnation.[16] This permission, however, was looked upon as a favor, not as a right, save in the case of express treaty obligations.[17] In later years, however, there has been a marked tendency to follow the example of England in the matter of exclusion, but it is only in exceptional cases that the government has absolutely refused the privilege of entrance.[18] The majority of American jurists have recognized the legality of the practice of admitting prizes though they have generally deplored its continuance.[19] The United States courts

12. The Flad Oyen, (1799) 1 C. Rob. 135. The Henrick and Maria, (1799) 4 C. Rob. 43. The Peacock, (1802) 4 C. Rob. 185.
13. The Polka, (1854) Spinks Prize Rep. 447.
14. Manual of Naval Prize Law. p. 85.
15. Naval War College, Int. Law Situations, 1905, p. 68.
16. Consul of Spain v. Consul of Great Britain, (1808) Bee 263, 6 Fed. Cas. No. 3138.
17. Moore, Digest of Int. Law, vol. 7, p. 936. 16 Columbia Law Rev. Nov. 1916. p. 587.
18. Naval War College, Int. Law Situations, 1908, p. 75. Moore, Digest of Int. Law, vol. 7, p. 938.
19. Naval War College, Int. Law Situations, 1908, p. 63.

have laid down the same general principle of the qualified right of admission.[20]

The general neutral practice, says Dana, has been tending toward refusing the privilege of entrance of prizes except in cases of necessity.[21] The practice of nations in the Spanish-American and Russo-Japanese wars tends to confirm Mr. Dana's conclusions. The declarations of neutrality in these wars are practically unanimous in forbidding the entrance of prizes into neutral ports except in cases of stress of weather or lack of provisions.[22] Brazil, Denmark, France, Great Britain, Italy, Japan, Holland, Portugal, China, and Sweden all issued proclamations to this effect. Similar proclamations were issued by most of the neutral nations at the outbreak of the present war. But the United States is the great outstanding exception to the rule. In its proclamation of neutrality no mention whatever is made of the question of prizes.[23] The Executive of the United States evidently did not consider its ratification of the Hague Convention as furnishing the measure of its legal responsibility in the matter of prizes.

In view of these historical precedents, it seems safe to conclude that the views of the District Court are considerably in advance of the generally accepted principles of international law. The doctrine laid down by the Court is undoubtedly gaining in favor, but it has not yet received the confirmation of all members of the family of nations.[24] In the absence of a general declaration of the United States to the contrary, it would seem that the German captors were entitled to assume that they had the right to bring in their prize for sequestration.[25]

Closely associated with the question of the admission of prizes

20. Jecker v. Montgomery, (1851) 13 Howard, 498.
21. Naval War College, Int. Law Situations, 1908, p. 67.
22. Ibid. p. 70.
23. Supplement to the Amer. Jour. Int. Law, vol. 9, p. 110.
24. The question of the admission of prizes, is at present essentially a political issue. It is a question of the conflicting interests of England and of certain of the larger continental states. Thanks to her vast imperial domain, England is able to find convenient ports into which to bring her prizes. She has a great naval advantage of which she is anxious to make full use. But the other nations are not so favorably situated; they are forced to look to neutral ports as a temporary refuge for their prizes. Under these circumstances it is exceedingly difficult to reach any general agreement upon the question. From the standpoint of international law, the exclusion of prizes would undoubtedly be a great gain, but from the standpoint of naval expediency, it would appear to be a dangerous principle for the United States government to adopt.
25. The right of asylum, Attorney General Cushing declared, "is presumed where it has not been previously denied." Cushing, Atty. Gen. 1855, 7 Att. Gen. Op. 122.

is the further question of the right of a belligerent court to pass judgment upon a vessel within the jurisdiction of a neutral country. In opposition to the German contention that title to the prize was acquired by right of capture, the Court laid down that the title did not pass until a decision had been reached by the courts of the captor condemning the vessel as lawful prize and that such decision could not legally take place in the captor's country while the prize was lying in a foreign port. But however advantageous the principle here asserted may be in theory, the decision of the Court, it may safely be asserted, has gone very much further than any previous adjudications of the courts. The general attitude of the American as also of the English courts[26] has been strongly opposed to the exercise of jurisdiction over war prizes in foreign ports. Nevertheless, they have clearly recognized the validity of such jurisdiction on more than one occasion. In the case of *Jecker v. Montgomery,*[27] the Court held that although it was the duty of the American captor to bring his prize to a home port for adjudication, there might nevertheless be valid reasons for carrying it into neutral waters. And in *Arabella v. Madeira,*[28] Justice Story declared that according to both English and American precedents, the courts of a belligerent country could render judgment concerning a captured ship lying in a neutral port. The legality of the practice has likewise been affirmed by leading authors on international law, though many of them deprecate the practice.[29] In view of these decisions, it is difficult to accept the opinion of the court in respect to the invalidity of the proceedings before the German prize court upon the Appam. The decisions of a prize court would undoubtedly take on a much higher and more authoritative character if the judgment of Judge Waddill should prevail, but meantime it must be confessed that the United States courts alone can scarcely lay down a principle which will bind foreign governments and courts in opposition to the general practice of nations.

The final question arises as to the jurisdiction of the United States courts over the prize. As the entrance of the Appam into a United States port to escape capture constituted in the opinion of the court, a violation of neutrality, there could be no doubt

26. The Henrick and Maria, (1799) 4 C. Rob. 43.
27. (1851) 13 Howard, 498.
28. 2 Gallison, 368, 1 Fed. Cas. No. 501.
See also The Invincible, (1814) 2 Gallison, 29, 39. Hudson v. Guestier, (1808) 4 Cranch, 293.
29. Naval War College, Int. Law Situations, 1908, p. 62.

as to the right of a United States court to vindicate the neutrality of the country by entertaining an action for the restoration of the ship to the original owners. The opinion of the court upon this point is based on various alleged precedents, none of which seem to be particularly in point with the exception of the case of *Queen v. The Chesapeake.*[30] In this case a British colonial prize court laid down that "for a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture."

The judgment of the Court in that case goes much further than any decision of an American court. In the case of *Hopner v. Appleby,*[31] the Court held that the courts of a neutral nation have no right to decide upon the lawfulness or unlawfulness of a capture made by one belligerent from another except in the case of a violation of neutrality by capture of the prize in its territorial waters or by fitting out of the capturing ship in one of its ports. And there are many other decisions to a similar effect.[32] The United States courts have hitherto never gone so far as to assert that the mere entrance of a prize into an American port would violate the neutrality of the United States and hence afford just ground for the exercise of jurisdiction on the part of the American courts. The Appam, as Mr. James Brown Scott has pointed out,[33] did not come in as a trespasser but in assertion of a right under the Prussian-American treaty. So long as the Department of State had not ruled to the contrary, the prize master was justified in believing that he enjoyed the right of entrance and sequestration. The Department of State, moreover, not only permitted the Appam to enter without question, but distinctly informed the British ambassador that her entrance did not constitute a violation of American neutrality. In view of these circumstances, it is difficult to see how the mere fact of entrance could give rise to an assertion of jurisdiction on the part of a United States court.[34] A continued sojourn after official notice to depart would doubtless constitute a violation of neutrality

30. (1864) 5 Nova Scotia Reports, 797.

31. (1828) 5 Mason, 71, 75.

32. The Mary Ford, (1798) 3 Dallas, 188, 198. The Josefa Segunda, 5 Wheaton, (1820) 338, 357. Hudson v. Guestier, (1808) 4 Cranch, 293.

33. Scott, The Case of the Appam. 10 Amer. Jour. Int. Law, 809.

34. In Hudson v. Guestier the Supreme Court declared that "a vessel captured as prize of war is then while lying in the port of a neutral still in the possession of the sovereign of the captor and that possession cannot

sufficient to warrant the intervention of the courts, but the occasion for such action has not yet arisen.[35]

In short, the decision of Judge Waddill on the matter of neutral rights and obligations would appear to be considerably in advance of the accepted principles of international law. He has been making rather than applying the law of nations. The principles he has laid down are excellent in themselves and some of them will doubtless be incorporated into the body of international law in the not distant future. But it is scarcely possible for a neutral court or government to modify the rules of international law to the disadvantage of one or the other of the parties during the course of a world-wide war. Inasmuch, therefore, as the interpretation of the Prussian treaty is in doubt, and the entrance of prizes into neutral ports is not expressly forbidden by international law, it would seem to have been the wiser policy for the court to have released the Appam until such time at least as the United States government should deny to it the further right of asylum.[36]

At the same time, it must be admitted that this government has gotten itself into an embarrassing situation by allowing its treaties and neutrality laws to fall so far behind the more enlightened practices of other nations. The government at Washington cannot well assert its full legal rights against all the belligerents unless it is prepared to live up to the strictest obligations of neutrality as set forth in the writings of its own international jurists, the general orders of the Navy Department,[37] the resolutions of the Senate and the general precepts of the Court. It is sincerely to be hoped that the decision of the District Court in the case of the Appam may awaken Congress to a realization of the need for a thorough revision of the neutrality laws if the country is to avoid further complications with foreign states. The Courts should not be obliged to assume the difficult task of bringing the neutrality laws of the United States up to date.

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be rightfully divested." 4 Cranch, 293.

35. Scott, The Case of the Appam. 10 Amer. Jour. Int. Law, 809.

36. 16 Columbia Law Review, Nov. 1916, p. 588.

37. General Order 492 issued by the Navy Department in 1898, states, Art. 20: Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.