SGA/WHA/3 # 1

C. S. O.

0 3 9 3

0 3 9 3

(Formerly)

SUBJECT :

Seizure of two whaling ships "Unitas IV" and "Unitas V."

CONNECTED FILES.

NUMBER AND YEAR.

DESPATCHES AND TELEGRAMS.

To S. of S.			From S. of S.		
No.	Date.	Page.	No.	Date.	Page.
			Tel No 278	11.8.47	1
			Circ Note	27.5.48	33

EX. CO. MINUTES.

Date.	Page.	

DECODE.

No. 15.

TELEGRAM RECEIVED.

From SECRETARY OF STATE *to* GOVERNOR.

Despatched: 11. 8. 47 *Time:* 19.25 *Received:* 12. 8. 47 *Time:* 09.00.

No. 278. It is desired to institute proceedings in London Prize Court against 2 whaling ships "Unitas IV" and "Unitas V".

These vessels are at present at South Georgia awaiting advent of whaling season and Admiralty ask if arrangements can be made for both vessels to be seized as prizes by Customs Officer or by Police Constable or other official in South Georgia.

Thereafter affidavit of seizure, one for each ship and headed with name of ship (the name to be inserted being German name and not any later British name), should be sworn before Magistrate, South Georgia and forwarded by first opportunity to me for communication to H.M. Procurator General.

X When vessels seized please telegraph for the information of Procurator General date of seizure , together with full name and official title of individuals effecting seizure.

Affidavit should be in following form (begins).

In the S.S. "Unitas" IV (the S.S. "Unitas V) I, (full name)..... holding rank of ..... in South Georgia make oath and say as follows:-

On ..... day of ..... August 1947 in the Port (or Harbour) of ..... South Georgia I acting on instructions of Lord Commissioner of the Admiralty seized as prize on behalf of Crown the above named vessel.

Sworn by A ..... B ..... at ..... South Georgia this ..... day of ..... 1947 (Signed) A..... B ..... before me ..... Magistrate. (Ends.)

Reply at 8

See 3, 4, 5

SECRETARY OF STATE.

G.T.C.

LJH.

H.E. / cable sent on to Mag. S.G. re "Unitas IV" belongs to M.W.T. (says G.N. who has no

2

record of "Unitas V"). Both were built in Germany for "Unitas" & appear to have been taken over by M.W.T. when Germany was overrun. "Unitas" became "Empire history".

ABk
13/8

✓ MC 13/viii

3

DECODE.

TELEGRAM.

From The Colonial Secretary.

To The Magistrate South Georgia.

Despatched: August 14th *19* 47 *Time:* 16.30.

Received: ..... *19* .. *Time:* .....

No. 114. Following telegram received from Secretary of State repeated to you begins.

No. 278. It is desired to institute proceedings in London Prize Court against 2 whaling ships "Unitas IV" and Unitas V".

These vessels are at present at South Georgia awaiting advent of whaling season and Admiralty ask if arrangements can be made for both vessels to be seized as prizes by Customs Officer or by Police Constable or other official in South Georgia.

Thereafter affidavit of seizure, one for each ship and headed with name of ship (the name to be inserted being German name and not any later British name), should be sworn before Magistrate, South Georgia and forwarded by first opportunity to me for communication to H.M. Procurator General.

When vessels seized please telegraph for the information of Procurator General date of seizure, together with full name and official title of individuals effecting seizure.

Affidavit should be in following form (begins).

In the S.S. "Unitas" IV (the S.S. "Unitas" V) I,(full name) ..... holding rank of ..... in South Georgia make oath and say as follows:-

On ..... day of ..... August 1947 in the Port (or Harbour) of ..... South Georgia I acting on instructions of Lord Commissioner of the Admiralty seized as prize on behalf of Crown the above named vessel.

Sworn by A ..... B ..... at ..... South Georgia this ..... day of ..... 1947 (signed) A..... B ..... before me ..... Magistrate. (Ends).

2. Please proceed accordingly.

Reply at 5

COLONIAL SECRETARY.

G.T.C.

LJH.

By 2918

DECODE.

No. R76.

TELEGRAM RECEIVED.

From SECRETARY OF STATE *to* GOVERNOR.

Despatched: 16. 8. 47 *Time:* 18.40 *Received:* 17. 8. 47 *Time:* 09.00.

No. 290. My telegram No. 278. Unitas IV Unitas V.

Please also telegraph who can be nominated for appointment by London Marshal as his substitute in South Georgia. See prize court rules of 1939 Order number XXXIX.

Msg 34 at 21 in S/S 2/3 PCT

See 9

SECRETARY OF STATE.

G.T.C.

Reply at 10

LJH.

5

DECODE.

No. 150.

TELEGRAM.

From The Magistrate South Georgia.

To The Colonial Secretary.

Despatched: August 16th *19* 47 *Time:* 22.30.

Received: August 17th *19* 47 *Time:* 10.00.

3 No. 126. Your telegram No. 114. Both vessels seized August 16th at Leith Harbour by Barry Gordon Goss, Constable, South Georgia.

2. Affidavit will be forwarded to you by first opportunity.

See 19

See 7, 8

MAGISTRATE.

G.T.C.

HE 5 furnishes information sought at x 7 1.

2. 4 / vice sent to S.G.

LJH.

6

with text of Prize Court Rule XXXIX referred to [illegible] in S/32/39 below.

A.B. 18.5

(see fol. 97)

In mail?

Me.

Extracted to 70/43 Renewal of the Mail Agreement with F.I.C.

(I assume that the coming trip to S.G. will not be regarded by F.I.C. as a scheduled trip in terms of the contract?).

[illegible]

DECODE.

7

TELEGRAM.

From The Colonial Secretary.

To The Magistrate South Georgia.

Despatched: August 19th *19* 47 *Time:* 17.00.

Received: ..... *19* .. *Time:* .....

5 No. 117. Your telegram No. 126. Please telegraph who can be nominated for appointment by London Marshal as his substitute in South Georgia. Prize Court Rules of 1939 Order number XXXIX reads begins:-

page 34 of Red 21 in S/20/39 Pt 1

MARSHAL.

1. For the performance of any of his duties the marshal may appoint or employ competent persons as his substitutes.

2. The marshal shall execute all instruments issued from the Court which are addressed to him, and shall make returns thereof.

3. Whenever in respect of any place within the jurisdiction at which a ship or aircraft taken as prize may be there is no person appointed or employed to act as substitute of the marshal then for the purposes of the execution and service of warrants and other instruments the custody of prize and for such other purposes as the President may direct,

(a) in a cause relating to a ship the principal officer of Customs at such place, and

(b) in a cause relating to an aircraft, such person as the President shall appoint,

shall be deemed to be the substitute of the marshal and for such purposes shall be an officer of the Court.

5. Persons may be appointed or employed to act as substitutes of the marshal for the purposes mentioned in Rule 3 in the ports of any ally in war of His Majesty, or for the purpose of the service of any process out of the jurisdiction. Ends.

Reply at 9

COLONIAL SECRETARY.

G.T.C.

LJH. (In view of no mail to S.G. for some months: if possible enquiry from Magistrate if fact that 7 could be dispensing to send, this could be extensive)

DECODE.

TELEGRAM SENT.

From GOVERNOR *to* SECRETARY OF STATE.

Despatched : 20. 8. 47 *Time :* 15.00 *Received :* ..... *Time :* .....

No. 459. Your telegram No. 278. Prize Court seizures.

Both vessels seized August 16th at Leith Harbour by Barry Gordon Goss, Constable, South Georgia.

2. Affidavit will be forwarded to you by first opportunity.

See 19

See 5

GOVERNOR.

G.T.C.

LJH.

Done

UP 21/8/47.

DECODE.

№6. 191.

TELEGRAM.

From The Magistrate South Georgia.

To The Colonial Secretary.

Despatched: August 20th *19* 47 *Time:* 22.30.

Received: August 21st *19* 47 *Time:* 16.00.

No. 129. Your telegram No. 117. It appears that only person who could be nominated is myself as Deputy Collector of Customs.

2. Unless there are objections to my appointment I shall be glad to carry out duties.

Reply at 10

MAGISTRATE.

G.T.C.

LJH.

DECODE.

10

TELEGRAM SENT.

From GOVERNOR to SECRETARY OF STATE.

Despatched: 23. 8. 47 Time: 11.20 Received: ....Time: ....

Addressed to Secretary of State for the Colonies No. 462 repeated to Magistrate South Georgia No. 119. Your telegram No. 290 Unitas IV and V.

Nominate Arthur Isadore Fleuret M.B.E., J.P. Magistrate South Georgia for appointment by London Marshal as substitute.

Reply at 11

See 9

GOVERNOR.

P/L.

LJH.

Repeat to M. S. G. pl.

Repeated to S.G. as above

23.8

0393

11

DECODE.

No. SS18. **TELEGRAM RECEIVED.**

From SECRETARY OF STATE *to* GOVERNOR.

Despatched: 2. 9. 47 *Time:* 12.10 *Received:* 3. 9. 47. *Time:* 09.00.

10 No. 311. Your telegram No. 462. Unitas (iv) and (v). Fleuret has been appointed. Instrument of appointment follows.

1/26

See 13, 17

SECRETARY OF STATE.

G.T.C.

LJH.

H.E.

11 with 10. I will inform Mag. S.G.

ABL 3.9

Refer to Mag. S.G. see 12

MC 3/IX

ref. to (10)

12

GOVERNMENT TELEGRAPH SERVICE.

FALKLAND ISLANDS AND DEPENDENCIES

SENT.

Number	Office of Origin	Words	Handed in at	Date
				4. 9. 47.

To

MAGISTRATE SOUTH GEORGIA.

No. 124 My telegram No. 119 (10) stop Following telegram (11) received from Secretary of State begins colon dash Unitas bracket iv close bracket and bracket v close bracket stop Fleuret has been appointed stop Instrument of Appointment follows stop Ends.

COLONIAL SECRETARY.

Time

LJH.

13

DECODE.

No. 38.

TELEGRAM RECEIVED.

From SECRETARY OF STATE *to* GOVERNOR.

IMPORTANT.

Despatched: 4. 9. 47 *Time:* 10.20 *Received:* 5. 9. 47 *Time:* 09.00

11 No. 314. My telegram No. 311. Unitas IV and V.

Please telegraph earliest whether Procurator General may be assured both ships are now held at disposal of Fleuret in his capacity as Marshal's substitute.

Ministry of Transport are seeking requisition of both ships and application to London Prize Court are about to be made. After requisitioning Orders have been obtained it is probable substitute will be asked to give delivery to local Manager Salvesen and Company as representative requisitioning authority.

Reply at 15 SECRETARY OF STATE.

G.T.C.

LJH.

Repeated to Mag. Sly at 14

14

T E L E G R A M S E N T.

From: The Colonial Secretary.

To: The Magistrate South Georgia.

Despatched: September 5th 1947 Time: 10.25.

Received: ..... 1947 Time: .....

13 No. 126. Following telegram received from Secretary of State begins:-

11 No. 314. My telegram No. 311. Unitas IV and V.

Please telegraph earliest whether Procurator General may be assured both ships are now held at disposal of Fleuret in his capacity as Marshal's substitute.

Ministry of Transport are seeking requisition of both ships and application to London Prize Court are about to be made. After requisitioning Orders have been obtained it is probable substitute will be asked to give delivery to local Manager Salvesen and Company as representative requisitioning authority. Ends.

2. Please enable His Excellency to reply.

COLONIAL SECRETARY.

G.T.C.

Reply at 15

Bx. 8/9 ABK 5.9

LH

15

DECODE.

No. 64.

TELEGRAM.

From Magistrate South Georgia.

To The Colonial Secretary.

Despatched: September 5th *19* 47 *Time:* 22.15.

Received: September 6th *19* 47 *Time:* 10.00.

14 No. 134. Your telegram No. 126. Procurator General can be assured both vessels are now held at the disposal of substitute.

See 16

MAGISTRATE

G.T.C.

LJH.

DECODE.

16

TELEGRAM SENT.

From **GOVERNOR** *to* **SECRETARY OF STATE.**

Despatched : 6. 9. 47 *Time :* 10.30 *Received :* ..... *Time :* .....

13 No. 499. Your telegram No. 314. Unitas IV and V.

Procurator General may be assured both vessels are now held at disposal of Fleuret in his capacity as Marshal's substitute.

GOVERNOR.

P/L.

LJH.

BW 8/X ABL 8/X

17

DECODE.

No. 68.

TELEGRAM RECEIVED.

From SECRETARY OF STATE *to* GOVERNOR.

IMPORTANT.

Despatched: 6. 9. 47 *Time:* 13.25 *Received:* 7. 9. 47 *Time:* 09.00.

11 No. 318. My telegram No. 311. Following from Admiralty Marshal for his substitute begins.

Requisition order in respect of "Unitas IV" and "Unitas V" obtained September 6th. Please give delivery of both vessels to local Manager Chr. Salvesen and Company acting on behalf of Ministry of Transport. Obtain receipt and forward to me by first opportunity. Ends.

Sec 27

SECRETARY OF STATE.

Repeated to Mag S S at 18

G.T.C.

LJH.

18

T E L E G R A M S E N T.

From: The Colonial Secretary.

To: The Magistrate South Georgia.

Despatched: September 8th 1947 Time: 10.10.

Received: ..... 1947 Time: .....

IMPORTANT.

17 No. 128. Following telegram has been received from Secretary of State for the Colonies.

" No. 318. My telegram No. 311. Following from Admiralty Marshal for his substitute begins.

Requisition order in respect of "Unitas IV" and"Unitas V" obtained September 6th. Please give delivery of both vessels to local Manager Chr. Salvesen and Company acting on behalf of Ministry of Transport. Obtain receipt and forward to me by first opportunity. Ends.

Sec 20/1/6

COLONIAL SECRETARY.

G.T.C.

12/x

1945

H.

19

FALKLAND ISLANDS.
SOUTH GEORGIA.

C.S. No.

MEMO.

Departmental Number.

S.G. D/12/47.

Date 23rd August, 1947.

From The Magistrate, South Georgia.

To The Colonial Secretary, Stanley.

IN PRIZE, THE S.S. "UNITAS IV" AND THE S.S. "UNITAS V".

Reference Numbers. 3. Col. Secretary's Telegram, No. 114 of 13/8/47.
5. Magistrate's Telegram, No. 126 of 16/8/47.

5

20
21

I have the honour to refer to my telegram, No. 126 of the 16th of August, 1947, and to transmit herewith, in duplicate, sworn affidavits relating to the seizure in Prize of the German s.s. "Unitas IV" and s.s. "Unitas V" at Leith Harbour on the 16th of August, 1947, by one Barry Gordon Goss, Constable, South Georgia.

C. I. Stewart
Magistrate.

IN THE S.S. "UNITAS IV".

I, BARRY GORDON GOSS, holding the rank of Constable in South Georgia, make oath and say as follows :-

On the sixteenth day of August, 1947, in the Harbour of Leith, South Georgia, I acting on the instructions of the Lords Commissioners of the Admiralty seized as Prize on behalf of the Crown the above-named vessel.

Sworn by Barry Gordon Goss at King Edward Cove, South Georgia, this sixteenth day of August, 1947.

Signed B. G. Goss

Before me -

A. J. Secord

Magistrate.

IN THE S.S. "UNITAS V".

I, BARRY GORDON GOSS, holding the rank of Constable in South Georgia, make oath and say as follows :-

On the sixteenth day of August, 1947, in the Harbour of Leith, South Georgia, I acting on the instructions of the Lords Commissioners of the Admiralty seised as Prize on behalf of the Crown the above-named vessel.

Sworn by Barry Gordon Goss at King Edward Cove, South Georgia, this sixteenth day of August, 1947.

Signed B.G.Goss

Before me -

C.I.Stewart.

Magistrate.

22

MEMO.

S.G. No. D/12/47. C.S. No.

11th September, 1947.

From :-

THE MAGISTRATE,

South Georgia.

To :-

The Honourable,

THE COLONIAL SECRETARY,

Stanley.

IN PRIZE. THE S.S. "UNITAS IV" AND S.S. "UNITAS V".

18

11/9/47.

With reference to previous correspondence terminating with your telegram, No. 128 of the 8th of September, 1947, I have the honour to forward herewith, for favour of onward transmission, a letter addressed to the Admiralty Marshal, London Prize Court, by his Substitute at South Georgia, on the subject of the delivery of the above-named vessels to the Local Manager of Messrs Chr. Salvesen and Company at Leith Harbour.

C. I. Jewell

Magistrate.

See 28

King Edward Cove,
South Georgia,
9th September, 1947.

I, ARTHUR ISADORE FLEURET, M.B.E., E.D., J.P., Substitute for the Admiralty Marshal, London Prize Court, HEREBY CERTIFY that I have this day delivered the s.s. "Unitas IV" and the s.s. "Unitas V" to SIGURD LARSEN BJELLAND, Local Manager at Leith Harbour, South Georgia, of Messrs Chr. Salvesen & Company, acting on behalf of the Ministry of Transport.

C. I. Fleuret

Substitute for Admiralty Marshal,
London Prize Court.

Leith Harbour,
South Georgia,
9th September, 1947.

I, SIGURD LARSEN BJELLAND, Local Manager at Leith Harbour, South Georgia, of Messrs Chr. Salvesen and Company, acting on behalf of the Ministry of Transport, HEREBY CERTIFY that I have this day taken delivery of the s.s. "Unitas IV" and the s.s. "Unitas V" from ARTHUR ISADORE FLEURET, M.B.E., E.D., J.P., Substitute for the Admiralty Marshal, London Prize Court.

S. Larsen Bjelland

Local Manager,
Chr. Salvesen & Company,
acting on behalf of the
Ministry of Transport.

F.I. Ref: 0393.

24

The Governor of the Falkland Islands and its Dependencies presents his compliments to the Right Honourable the Secretary of State for the Colonies and as requested in the latter's telegram No. 278 of 11th August 1947, and telegram No. 318 of 6th September 1947, has the honour to forward two Affidavits of Seizure and a letter from the Magistrate, South Georgia, as Substitute for the Admiralty Marshal, addressed to the Admiralty Marshal, London Prize Court.

1 — 17

20-21+22.

GOVERNMENT HOUSE,

STANLEY.

25th September, 1947.

PA Able 30/9

ERM.

Saving. 8005/546/47. 0393 25

From the Secretary of State for the Colonies.

To the Officer Administering the Government of FALKLAND ISLANDS.

Date 8" 3rd September, 1947.

No. 24 Saving.

"Unitas IV and Unitas V".

11 My telegram No. 311.

A document dated the 29th August, 1937, appointing Mr. Fleuret to be the Substitute in South Georgia of the Admiralty Marshal, is attached.

26

SECER.

26

C O P Y.

IN THE HIGH COURT OF JUSTICE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(ADMIRALTY) (PRIZE)

I, Charles Stanley Roscoe, Marshal of the Prize Court, hereby appoint Arthur Isadore Fleuret, M.B.E., J.P., Magistrate, South Georgia, or his successors to be my Substitute in SOUTH GEORGIA under the powers conferred on me by Order XXXIX, Rule 1 of the Prize Court Rules, 1939, or any other powers me hereunto enabling.

(Sgd) C. S. ROSCOE,

MARSHAL

29th August, 1947.

Original sent to Mag. S.G. under (corp) slip

ADMIRALTY MARSHAL'S OFFICE,

Royal Courts of Justice,

Strand,

LONDON, W.C.2.

8005/546/47. 0393 27

Saving.

From the Secretary of State for the Colonies.

To the Officer Administering the Government of FALKLAND ISLANDS.

Date 15th September, 1947.

No. 78 Saving.

17 My telegram No.318 "Unitas IV" and "Unitas V".

Should any expenditure have been incurred by the Marshal's Substitute in South Georgia, this will be recoverable from the London Marshal.

Grateful if I can be enabled to inform the London Marshal whether there has been any expenditure which must be deemed to be for his account.

Reply at 30 SECER.

Ask Mag. S.G. by telegram pl.

17.

(This has been done in a draft put up to me for signature)

GOVERNMENT TELEGRAPH SERVICE.

28

FALKLAND ISLANDS AND DEPENDENCIES.

SENT.

Number	Office of Origin	Words	Handed in at	Date
				~~20. 10. 47.~~

To H.O. R/c.

MAGISTRATE, SOUTH GEORGIA

22 No. 151. Your Minute D twelve of forty-seven of 11th September, 1947. Unitas Four and Five. Secretary of State enquiring whether any expenditure incurred stop paragraph two grateful you telegraph full particulars

Reply to 29

COLONIAL SECRETARY.

Time

VP.

29

GOVERNMENT TELEGRAPH SERVICE.

FALKLAND ISLANDS AND DEPENDENCIES.

RECEIVED.

Number	Office of Origin	Words	Handed in at	Date
407	Zouth Georgia Etat	45	22.00	27.10.47

To

Secretary Stanley

28

No 164 your telegram No 151 only expenditure incurred in connection with Unitas four and five sum of twenty pounds for transport Constable and self Grytviken Leith Harbour Grytviken stop 2 Please advise whether amount should be charged as Advances against Admiralty.

Magistrate.

Reply re 31

Time

DECODE.

TELEGRAM SENT.

From GOVERNOR *to* SECRETARY OF STATE.

Despatched: 29. 10. 47 *Time:* 09.50 *Received:*.....*Time:*.....

27 No. 632. Your telegram No. 78 Saving of 15th September "Unitas IV" and "Unitas V".

Twenty pounds expenditure transport Constable and Admiralty Marshal's Substitute Grytviken to Leith Harbour.

GOVERNOR.

G.T.C.

LJH.

GOVERNMENT TELEGRAPH SERVICE.

FALKLAND ISLANDS AND DEPENDENCIES.

31

S E N T.

Number	Office of Origin	Words	Handed in at	Date
				~~29. 10. 47.~~

To

~~MAGISTRATE SOUTH GEORGIA.~~

Number 158 Your telegram No. 164 paragraph 2 Yes. 29

COLONIAL SECRETARY.

Time

LJH.

33

No. **1.**

Circular Note

MALTA AND ISLANDS

0393

Transmitted with the compliments of the Secretary of State for the Colonies, for information and distribution, with reference to his circular

of the (2) } 41 in S/32/39 II "Prize Court"

Colonial Office,

Church House, S.W.1.

[7262] Wt. 26373/5031 5m 10/47 C.N.Ld. 748.

No. 1925.

In the High Court of Justice.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

(IN PRIZE).

Royal Courts of Justice.

Friday, 20th February, 1948.

Before:

THE RT. HON. THE PRESIDENT
(LORD MERRIMAN).

SS. "UNITAS" and CARGO.

CLAIM OF:—

LEVER BROTHERS & UNILEVER N.V., "MARGA" Maatschappij tot Beheer van Andeelen in Industrieele Ondernemingen of Rotterdam, Holland, N.V., and "SAPONIA" Maatschappij tot Beheer van Andeelen in Industrieele Ondernemingen of Rotterdam, Holland, N.V.

(From the Shorthand Notes of JAMES TOWELL & SONS, 12, New Court, Lincoln's Inn, London, W.C.2. Tel.: HOLborn 6205).

SIR WILLIAM MCNAIR, K.C., and MR. E. W. ROSKILL (instructed by Messrs. Simpson, North, Harley & Co., 18-20, York Buildings, Adelphi, London, W.C.2, and 1, Water Street, Liverpool, 2) appeared on behalf of the Claimants.

MR. C. T. LE QUESNE, K.C., and THE HON. QUINTON M. HOGG (instructed by The Treasury Solicitor, Storey's Gate, London S.W.1) appeared on behalf of His Majesty's Procurator General).

Judgment.

THE PRESIDENT: In this case the Crown seeks condemnation of the whaling factory ship "Unitas." The vessel was captured in Wilhelmshaven when that port was taken by Allied invading forces in June, 1945. She was transferred to Methil under British naval control, and was there formally seized in Prize on the 1st July, 1945.

The Writ was issued on the 17th July and was served on the 18th July, 1945. Appearances were entered by two Dutch Companies, Lever Brothers and Unilever N.V. (referred to throughout as "N.V.") and two subsidiary Dutch Companies referred to as "Marga" and "Saponia," engaged respectively, as their names imply, in the production of margarine, soap and kindred products. Save in so far as the characters of "Marga" and "Saponia" indicate the normal activities of their subsidiary companies in Germany, to which more detailed reference must later be made, they require no separate consideration. The real Claimants are N.V. All the Claimants, as parties interested in or as sole beneficial owners of the vessel, claim not only for the said ship but for all losses, costs, charges, damages, demurrage and expenses which have arisen or may arise by reason of her seizure and detention.

The order for the construction of the vessel was placed in May, 1936, as the result of arrangements between N.V. and the German Government by a subsidiary company of the claimants incorporated in Germany, whose name has been conveniently abbreviated to "Verkaufs." The vessel was completed by September, 1937, delivered to "Verkaufs" on the 3rd of that month, on or about which date she was chartered to another German company named "Unitas" which had been formed, in circumstances which I shall describe more particularly later, to operate the vessel as the principal unit in a whaling fleet, the whale catchers of which were constructed and delivered in pursuance of the same arrangement, about the middle of October, 1937. The "Unitas" was registered, on completion, at the port of Bremen, as a German ship, the property of German owners. As appears from the ship's papers found on board, no change had been made in her registration at the time of her capture at Wilhelmshaven.

It appears to be necessary at the outset to refer to two elementary principles of Prize Law. The first is laid down in the "*Baron Stjernblad*" (1918 Appeal Cases, p. 173 at p. 175). The Privy Council, in an appeal directed solely to this issue, restated the principles upon which a claimant who has succeeded in obtaining an order for the release of the subject-matter is also entitled to damages and costs, in the following terms: "The law on the subject is reasonably certain. It is clearly stated in the letter of Sir William Scott and Sir John Nicholl, printed on pages 1-11 of Pratt's edition of Mr. Justice Story's Notes on the Principles and Practice of Prize Courts, and in the case of the 'Ostsee.' If there were no circumstances of suspicion, or, as it is sometimes put, 'no probable cause' justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure."

Applying these principles, it is, in my opinion, clear that whatever view may be taken about the claim for release, the facts already stated as to the ownership and flag of this vessel alone provide "probable cause" justifying the seizure. In my opinion, the claim for damages and costs, which was seriously maintained at the very end of the argument, is untenable, and I propose to say no more about it.

The second principle is that once probable cause for seizure is established by the captors, the burden of proof lies upon the Claimants. In support of this principle it is only necessary to cite the most recent restatement of it by the Privy Council in the "*Sidi Ifni*" (Lloyds Reports of Prize Cases, Second Series, Vol. 1, p. 200, at page 204). After referring to the "*Monte Contes*" (1944 Appeal Cases, p. 6), Lord Roche, delivering the opinion of the Privy Council, says: "As their Lordships point out in that case, it is sufficient in Prize Law for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned. The claimants whose property has been seized must show to the satisfaction of the Court by affirmative evidence amounting to positive proof that the reasonable suspicion is unfounded (see also '*Hakan*' 1918 Appeal Cases, p. 148, and 5 Lloyds Reports of Prize Cases, p. 186)."

This case was tried on the affidavits filed by the Claimants and the exhibits thereto, supplemented by certain further information provided at my own request. In so far as the affidavits deal with events and figures their accuracy has not been challenged by the Crown, but the Crown does not, of course, admit the inferences which it is sought to draw therefrom. More than once, in the course of the argument for the Claimants, it seemed to be assumed that they were entitled to the benefit of any doubtful inferences. I have therefore thought it necessary to restate this elementary principle at the outset.

Apart from the formal evidence in proof of the capture, seizure, the particulars of the ship's papers and the service of the Writ, no evidence was filed on behalf of the Crown. The evidence on behalf of the Claimants is contained in two affidavits and the documents exhibited thereto. The whole is conveniently set out in an agreed bundle, supplemented by the further documents put in at the hearing, the statements in which, so far as they go, though not supported by affidavit, are not challenged by the Crown.

In summarising the facts, I propose so far as possible to follow the chronological order rather than the order in which events are dealt with in the affidavits. It would be well in the first place, however, to refer to the diagram of the Unilever organisation set out on page 40. From this it appears that at all material times, so far as the German structure is concerned, N.V. through its Dutch subsidiaries " Marga " and " Saponia " were the sole shareholders of the German company " Margarine Union," which in turn held all the shares in " Verkaufs." The diagram also records the existence between the N.V. group and the British company Lever Brothers and Unilever Limited and its subsidiaries of an agreement for the equalisation of profits, more particularly described on page 23, paragraph 12. The details of the structure of N.V. in relation to Germany are set out in paragraphs 2-9 of the affidavit of Paul Rykens (Documents, pages 19-22). From paragraph 9 it appears that the " Margarine Union " did not in fact come into existence until 1942, when it replaced former subsidiary companies in Germany, but this detail is immaterial. Before the war the control of the German businesses was exercised from Rotterdam, if necessary after full consultation with the British Company, who were interested by reason of the equalisation agreement, and although the German subsidiary companies had German Boards of Directors it appears that these Boards met solely for the purpose of giving effect to decisions on policy or management matters taken in Rotterdam, and had no independent authority (page 23, paragraph 12). There was in Berlin a body known as the Praesidium, the members of which were appointed by N.V., and which controlled the German business on their behalf, so as to ensure that the policies decided upon in Rotterdam were effectively carried out (page 24, paragraph 13).

On the 1st August, 1931 (page 25, paragraph 14), N.V.'s subsidiary companies in Germany were indebted in respect of the purchase of raw materials, and for other reasons, including the granting of considerable loans, to N.V. and to N.V.'s subsidiary companies in Holland, in sums in Dutch florins, sterling or Reichsmarks amounting in all, at the then official rates of exchange, to the equivalent of £7,500,000 sterling. On that date a decree was issued by the German Government affecting remittances from Germany, the effect of which was that these debts were frozen, and the amounts involved became " blocked marks " (pages 25-26, paragraphs 14-15). At the same time fresh trading profits were accumulating inside Germany, which are stated by the end of 1933 to have amounted to Reichsmarks 40,000,000, and by the end of 1936 to have amounted to Reichsmarks 61,000,000. These Reichsmarks were classified as " inland marks " (page 27, paragraph 16).

These increases in " inland marks " had occurred notwithstanding the decision of N.V. to direct their German subsidiaries to spend large sums thereout on the acquisition of yet further businesses in Germany.

Meanwhile there remained the serious problem of getting out of Germany the very considerable sum of " blocked marks." An arrangement was made with the German Goverment designed to effect this purpose, which I will call the " extraction process." I have not been informed whether any similar arrangements were made with other holders of " blocked marks," or whether this was a special privilege accorded to N.V. Suffice it to say that not only in its inception, but more particularly as events have turned out, it was manifestly to N.V.'s advantage. The arrangement is set out on pages 27-30., paragraphs 17-21 of Mr. Rykens' affidavit, and may be summarised as follows:— With the consent of the German Government N.V., whose business had not hitherto included shipbuilding, began to place contracts in German shipyards for the building of ships for export. At first these ships appear to have been built for the British company and its subsidiaries, but when their requirements had been satisfied, were built for independent purchasers of Dutch and other nationalities. They were built in the name of N.V. or one of its associated companies outside Germany, and provided for the payment to the shipyards in Reichsmarks in Germany. I have not seen the details of these contracts, but it is stated that the German Government usually imposed the condition that a portion of the building price should be paid out of the proceeds of sale of certain commodities which N.V. were specifically required to import into Germany for this purpose, which meant in effect that part of the purchase price was found in foreign currency, and that the German Government effected a corresponding saving in foreign exchange (page 28, paragraph18). The proportion of the building costs thus provided is stated (*ibid*) to have risen from 20 per cent. at first, though I am not informed when or by what stages, to as high as 45 per cent. or 48 per cent., at which rate the loss on the Reichsmarks provided by N.V. became so heavy that the transactions were uneconomic and the policy was discontinued.

When the ship was delivered by the shipyards, N.V. was allowed to export her from Germany for delivery to the eventual buyer against payment outside Germany in guilders or sterling as the case might be. An example is given (page 29, paragraph 19) showing that on a ship sold for £160,000, in respect of which the proportion paid in imported commodities was 30 per cent., the net proceeds in sterling were £97,000.

Having regard to a certain vagueness in the details of the " extraction process " as described in Mr. Rykens' affidavit, and more particularly having regard to the distinction drawn between this shipbuilding programme and the building of the " Unitas " (page 36, paragraph 29), a distinction even more emphatically insisted upon in the argument of the Claimants' case, I asked, as I have already said, for further information. Although no detailed analysis of the stages of the " extraction process " was given, a point to which I shall be obliged to refer later, I was provided with a list of the contracts for the building of ships for export. From this (although it is stated in paragraph 17 of the affidavit that the programme began at some unspecified date in 1935) I now know that in fact the first contract was placed on the 15th November, 1934, and that by the end of 1934 contracts had been placed for two tankers of 14,500 tons each, as well as for five cargo ships of 8,000 tons each and for two trawlers of 475 tons each. I also know that the last contract was placed nearly two years later, on the 31st October, 1936. I was also informed by the Claimants that taking the rates of exchange prevalent in 1931, the equivalent of £7,500,000 in " blocked marks " was Reichsmarks

120,000,000, and, taking the same rate of exchange throughout, that there remained to be extracted as at the 31st December, 1938, only 5,000,000 " blocked marks," which a further statement showed had been reduced by the 31st December, 1939, to 3,000,000 marks. *Prima facie,* therefore, it would seem that at the date of the placing of the last contract at the end of October, 1936, the " extraction process " had not yet become wholly uneconomic, as it is said (page 30, paragraph 20) eventually to have become. In view of the great importance which, for obvious reasons, the Claimants attach to the absence of any connection between the " extraction process " and the circumstances in which the " Unitas " herself was built, one would have expected that they would provide the Court with a detailed statement showing, month by month and contract by contract, the state of progess of the " extraction process." It would have been valuable as showing, periodically, what in terms of sterling or guilders yet remained to be extracted, and, consequently, what inducement there was to avoid any untimely interruption of the benefits of the " extraction process." In the absence of any such detailed analysis it is possible only to draw inferences in general terms.

This brings me to the building of the " Unitas." The circumstances are described in the concluding paragraphs of Mr. Rykens' affidavit (page 23, paragraph 24 *et seq.*). It appears that about April or May, 1935, Dr. Schacht, at all material times Reichsminister of Economy (page 31, paragraph 23), spoke to Mr. Rykens and Mr. Hendriks, both Dutch nationals, respectively the Chairman of N.V. and the principal Dutch member of the Praesidium, with a proposal that N.V. should build a whaling fleet in Germany for operation under the German flag. Mr. Rykens states expressly (page 33, paragraph 24) that he was opposed to this because it was a proposition which could not result in N.V. being able to remit money or money's worth from Germany. In other words, it was not part of the " extraction process." The Chairman succeeded in staving off this proposal for the time being. He was able to use the argument (page 34, paragraph 25) that the successful operation of such a whaling fleet involved the recruitment of a substantial number of Norwegian officers and seamen, experienced in such work, and that the Norwegian Government were unwilling to allow Norwegian officers and seamen to sail under the German flag.

I pause here to observe that it is manifestly impossible for Mr. Rykens to speak with certainty about the considerations which were passing in the mind of Dr. Schacht or any other member of the German Government; but I find it difficult to draw the inference which I was pressed to draw, that the proposal that N.V. should spend part of their accumulation of " inland marks " from trading profits in Germany on the building of a whaling fleet in Germany was wholly disconnected in the minds of Dr. Schacht and others with the fact that the German Government had permitted N.V. to undertake the business, hitherto foreign to their trading activities, of building ships for export for the purpose of the " extraction process." However that may be, it appears (page 34, paragraph 26) that at the beginning of 1936 Mr. Rykens and Mr. Hendriks learned that Dr. Schacht, meanwhile, had made a similar proposal to certain German concerns interested in the margarine or soap business, and therefore presumably rivals of N.V., that these two concerns, namely, Rau and Henkel, had agreed to build whaling fleets, and that the Norwegian Government's opposition to the recruitment of Norwegian officers and seamen had been overcome. Dr. Schacht then made a fresh approach to N.V. It is not suggested that Dr. Schacht actually used any threats in this connection, but it is stated that in connection with another proposal made in 1935 (page 31, paragraph 23), by Dr. Schacht that N.V. should supply raw materials to

the German Government on credit terms instead of for cash as theretofore, certain high officials of the Ministry of Food had openly threatened that unless N.V. agreed to the proposal the production quotas of their subsidiary companies in Germany would be cut. Dr. Schacht and Herr von Ribbentrop had disclaimed all knowledge of such threats, although Mr. Rykens states that he did not accept the truth of these disclaimers. Be that as it may, N.V. had resisted the pressure brought to bear on that occasion and refused " to make any raw materials available to the German Government, on terms which would lead to any increase in Dutch or British investment in Germany " (page 33, paragraph 23).

Reverting to the proposal about the whaling fleet, Mr. Rykens says (page 34, paragraph 26) that it became apparent, though, as I have said, no overt suggestion was made to this effect, that unless N.V. was prepared to participate in the construction of the whaling fleet, consequences such as those indicated might, and probably would, be extremely serious. To quote his own words, he says: " I have no doubt whatsoever that, had N.V. not complied with Dr. Schacht's demands, the production quotas would have been cut still further and other steps adverse to the interests of N.V. taken."

Let me say at once that, in examining, as I shall do later, the extent to which economic pressure was responsible for the decision to participate in the building of the " Unitas " and the rest of the whaling fleet, I do not doubt at all that the German Government were in a position to bring economic pressure to bear on foreign concerns trading in the country through German subsidiaries, nor that they would hesitate to bring to bear any such pressure as they thought would serve their purpose. But it is not unimportant to consider, in light of the information available, what, apart from the virtual confiscation of N.V.'s German businesses, may be implied in the phrase " other steps adverse to the interests of N.V."

The schedule giving the list of contracts for the building of ships for the purposes of the " extraction process " shows that by the end of 1935 20 contracts had been placed for the construction of 47 ships of a total tonnage of 249,710 tons. From the beginning of 1936 to the 31st October of that year, when the last contract was placed, 13 more contracts were placed for the building of 21 ships, no less than 13 of which were tankers of 14,500 tons or more. The total tonnage covered by these last 13 contracts was 213,757 tons. I shall return to this matter later. For the moment, I say no more than that it appears to me to be a reasonable inference that the interruption of the " extraction process " at this point would have been a " step adverse to the interests of N.V."

Before the proposal was accepted in principle, Mr Rykens was made aware of two other points on which the German Government insisted: (1) That the whaling fleet, when built, should be chartered to a new company to be formed, in which N.V. would have no more than a 50 per cent. interest; and (2) That the fleet should not be transferred from the German flag without the consent of the German Government. Dr. Schacht had refused to agree to N.V.'s proposal that the whaling fleet should be registered under the Dutch flag. Mr. Rykens was also aware that the German Government was prepared to grant a subsidy towards its construction. Again, to quote his own words, Mr. Rykens says (page 35, paragraph 26): " This subsidy it was decided to accept because otherwise the cost of construction in Germany would have been wholly uneconomical." This appears to imply that with the subsidy, the amount of which is given (page 84) as Reichsmarks 2,295,570 as against the gross total of Reichsmarks 9,767,921, both figures being in " inland marks " (page 47, paragraph 7), the pro-

posal was not " wholly uneconomical," but here again no detailed information is vouchsafed, and, as will be seen, the gross figure included a sum of about £7,000 which N.V. were enabled to recoup themselves in sterling.

The proposal having been accepted in principle, the formal contracts were dealt with by Mr. Thomas, a Dutch national, one of the principal Dutch members of the Praesidium, who was in Germany at all material times until he was compelled to leave in 1940. The formal documents relating to the " Unitas " herself appear in the exhibits to his affidavit (pages 50-64 inclusive) beginning with a letter of the 8th May written by Mr. Thomas and another Director on behalf of " Verkaufs," the building owners, and ending with a letter of confirmation dated the 27th May, 1936. The formal contract (pages 77-88)was not signed until the 26th January, 1939. Again I observe in passing that at the beginning of May, 1936, there were still unplaced seven contracts involving 12 ships, to be built for the purpose of the " extraction process," of a tonnage of 137,816 tons.

It is unnecessary to go through these documents in detail, but there are certain salient features to which I must refer.

The " Unitas " was to be of 29,000 tons dead weight, and was to be built by shipbuilders at Bremen, with the expectation that the fleet was to be ready for the 1937-38 whaling season (page 51). The subsidy was to be for the same amount as had already been granted to the German rival concerns. The letter of the 7th May (page 52) contains two proposals to which I attach considerable importance. The first was that one of the foreign Unilever companies (page 58, paragraph 9) was prepared to advance amounts of foreign currency which might be required as part of the actual building costs for items supplied from abroad, upon condition that " Verkaufs " were allowed to replace such advances, plus a fair rate of interest, by deliveries of whale oil from the first whaling season at the world market price. In fact, it was admitted that no foreign currency at all was thus required for the actual construction of the vessel, and that the amount required for equipment purchased abroad was accurately estimated (page 60, paragraph 4) not to exceed £7,000. It is, of course, admitted that this sum would be amply covered by the proceeds of the first season's whaling. It follows this programme was undertaken without any risk of losing sterling or guilders, and at a time, as has already been pointed out, when the " extraction process " was still in operation.

Next (page 52) " Verkaufs " undertook that their foreign companies were prepared to advance such costs of running the whaling expeditions as had to be paid in foreign currency, which likewise might be recouped by deliveries of whale oil from each year's catch at the world market price. It was also stipulated (page 53) that in general " Verkaufs " should in no way be treated less favourably than their rivals already referred to.

In accordance with the arrangement that the whaling fleet should be chartered to a new company, in which " Verkaufs " had not a controlling interest, the " Unitas ' 'company was formed on the 24th September, 1937, to carry on whaling, to undertake all business connected with whaling, and to process and utilise all products obtained from whaling (page 87, Article 2). The capital was Reichsmarks 1,000,000 subscribed as to Reichsmarks 486,000 by " Verkaufs "" and as to the balance by German interests (page 88, Article 3). Mr. Thomas was one of the Directors appointed by " Verkaufs " (page 90). The Chairman, J. H. Mohr, was a Hamburg merchant.

The charterparty (pages 94-105) is actually dated the 24th February, 1938, but shows that in fact the " Unitas " was handed over to the " Unitas " Company immediately she was delivered to " Verkaufs "

on the 23rd September, 1937, and that the other vessels of the fleet were similarly handed over on the 10th October, 1937 (page 95, Article 1 (2)). In this sense, as Mr. Thomas says (page 49, paragraph 10), N.V., through "Verkaufs," parted with the actual possession and control of the fleet, on completion, about two years before war broke out.

The charter was for ordinary whaling operations in Antarctic waters, with permission to the charterers to use the fleet temporarily for the transport of soft oils and for storage of soft oils, or to allow a similar use by third parties. They were not, however, permitted to allow the fleet to be used by third parties for whaling purposes.

Article 9 (page 100) provided that the vessels should not be used except for legally permitted voyages, that no voyage should be undertaken that exposed the vessels to danger of confiscation, seizure or capture. By Article 10 areas endangered by war were to be avoided at all costs, and "Verkaufs" were entitled to demand that the vessels be used in a way that precluded any war risk affecting them, and the provisions of Article 9 were made particularly applicable to perilous areas and war risk. The charter for the entire fleet was to end on the 20th September, 1940 (page 95, Article 1, paragraph 2).

In the two concluding paragraphs of his affidavit Mr. Rykens contends (pages 35-36, paragraphs 28-29) that the building of the whaling fleet was undertaken involuntarily. He says that although his conferences with Dr. Schacht and Herr von Ribbentrop were conducted in a courteous manner, he was never left in any doubt as to the reality of the threats lying behind their proposals, and that he has no doubt at all that if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag, steps would have been taken to confiscate or render valueless N.V.'s assets in Germany, and to restrict to the minimum any further carrying on of business by N.V. in Germany. He submits that N.V. was forced by the German Government into a position in which they had no alternative but to comply with the German Government's demands. He draws attention to the difference between the circumstances in which the "Unitas" and the whale catchers came to be constructed in Germany, and those in which the ships for export were constructed under the "extraction process." The latter, he admits, were built voluntarily by N.V. as part of a consistent policy of restricting and reducing N.V.'s interests in Germany, but says that the whaling fleet was built "*only* as the result of the direct pressure by the German Government."

The rival arguments may be summarised shortly as follows: For the Crown it is argued, in the first place, that in the case of a ship the enemy flag is *prima facie* decisive of her enemy character, and that if there be special exceptions to this rule, there is nothing in the facts of this case to warrant the making of an exception. Secondly, that the ship is condemnable as enemy property.

The Claimants, while admitting that the flag under which she sailed is an important consideration, argue that the "Unitas" was placed under the German flag involuntarily and under duress. Secondly, they seek to apply in their favour the principle of *Daimler Company* v. *Continental Tyre & Rubber Company* (1916) (2) Appeal Cases, page 307) and assert that "the whole and sole ownership" in the ship "in every real and business sense" was in N.V.; (*The "St. Tudno,"* 2 British and Colonial Prize Cases, at page 278).

To this second contention the Crown replies, first, that the allegation of duress is inconsistent with the allegation of "whole and sole ownership in every real and business sense," But, apart from this inconsistency, submits as a matter of principle that the decision in the *Daimler* case is applicable in Prize only in favour of the Crown and not of the Claimants, and that the argument of the Claimants would mean allowing the nationality of shareholders in the Company owning

the vessel (and in this case shareholders twice, thrice, or even, as regards N.V., four times removed) to determine her character and ownership. Further, that if the decision in the *Daimler* case is applicable, as the Claimants contend, the result would be that " Verkaufs " was a house of trade of N.V. in Germany, that the " Unitas " was a concern of that house of trade, and that N.V. on the outbreak of war did nothing whatever to dissociate themselves from that house of trade, or its concerns.

I will deal first with the question of the flag. In Pratt's edition of Story the proposition is thus stated on page 61: " Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character." But on page 62 the learned author adds: " When, however, it is said that the flag and pass are conclusive on the character of the ship, the meaning is this; that the party who takes the benefit of them, is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations; but they do not bind other parties as against him; other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel."

The " Vigilantia " (1 Christopher Robinson, at page 13) is cited in support of both propositions, and the later passage is taken from the *" Fortuna "* (1 Dodson, at page 87). In the *" Vrow Elizabeth "* (5 Christopher Robinson, page 2) Lord Stowell said at page 4: " I hold the claim to be also against the established rules of law; by which it has been decided that a vessel, sailing under the colours and pass of a nation, is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them." In laying down the rule, Lord Stowell said that there may be cases of such particular circumstances as to raise a reasonable distinction. He instances the case where, because the Governments of France and Holland had refused, in breach of the Treaty of Amiens, to allow British property to be withdrawn from certain islands otherwise than in ships of France and Holland, and on destination to those countries, the British Government had permitted British ships to put themselves under the Dutch flag for this particular purpose; and adds that in such cases the particular situation of affairs arising out of this refusal to execute the Treaty may have entitled such parties to a relaxation of the general rule (Ibid, page 7, and Note (a) thereto). The same principles were applied by Sir Samuel Evans in the first World War (see the *" Tommi,"* 2 British and Colonial Prize Cases, p. 16, and the *" Hamborn,"* 3 British and Colonial Prize Cases, p. 80, at p. 83). In the latter case Sir Samuel Evans stated the rule thus (at page 83): " It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied to questions of the ownership of vessels, means that the Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt, but captors as against them are not so bound." He then cites the passage from Story already referred to. The criticism of this passage on appeal (Ibid at p. 381), when Sir Samuel Evans' Judgment was affirmed by the Privy Council, does not affect the validity of the principle, but only its applicability to the facts of the particular case.

The only two exceptions to which my attention has been drawn are the cases of the "*Palme*" and the "*Taxiarchis*," both referred to in Wheaton, 7th Edition, at pages 152 and 153. These were both cases of vessels whose country had no maritime flag, a particular circumstance which bears no resemblance to the present case. With regard to such cases, however, the learned Editor of Wheaton, Professor Keith, says that it is not at all clear that even in such a case as this English law would have deviated from its rule that the flag is decisive against the owners, and the learned Editor of the 6th Edition of Oppenheim's International Law (Vol. II, p. 223) says that the circumstance that the vessel was compelled to fly the flag of a maritime state would make no difference to the general rule.

Admittedly the case of alleged duress has never arisen as a "particular circumstance to raise a reasonable distinction." It is manifestly unnecessary to consider whether the handing over of a ship to be sailed under an enemy flag by reason of duress to the person of the true owner would be a particular circumstance, because nothing of the sort is alleged to have occurred. What is asserted is that the building of the "Unitas" as a German ship was brought about by duress of goods under the threat, unexpressed but by no means imaginary, of the confiscation of N.V.'s German property. In support of this contention, the decision of the Court of Appeal in *Maskell* v. *Horner* (1915) (3) King's Bench Division, p. 106) was relied on; per Lord Reading, Lord Chief Justice, at p. 118, citing *Atlee* v. *Backhouse* (3 Meeson and Welsby, p. 633); and it was argued that the same principle should be applied in Prize. But that was a case of payment of money under duress of goods; this is a case of making a series of contracts; and it is well settled in English law that duress of goods, as distinct from duress of person, does not avail to avoid a contract (see Bullen and Leake, 3rd Edition (1868), p. 49).

In *Oates v. Hudson* (6 Exchequer, p. 346) at p. 348 Baron Parke says: "In *Atlee* v. *Backhouse* (3 Meeson and Welsby, p. 633) it is correctly laid down that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that where a sum of money is paid simply to obtain possession of goods which are wrongfully detained, that may be recovered back, for it is not a voluntary payment."

Even assuming, however, that duress of goods would suffice in Prize Law as distinct from municipal law, I will examine first the arrangements for the construction of the "Unitas" by themselves. It is said that there was nothing to be gained by N.V., but I would observe that it was their deliberate policy, with a view to restricting the accumulation of "inland marks," to invest them through their subsidiaries in the purchase of German businesses (page 27, paragraph 16; and as to the control of policy, p. 23, paragraph 12). Regarded solely as an investment of "inland marks" in a German business, I have been given no reason to suppose that the building of a whaling fleet was not a sound business proposition. One fact which admittedly had some influence with N.V. was that their trade rivals, presumably because it was to their advantage to do so, had undertaken to build whaling fleets. Moreover, save for the equipment to be paid for in sterling, for which, as has already been stated, they could very easily recoup themselves in sterling, only "inland marks" were to be employed in the construction.

I have not been informed whether the fleet was in fact completed in time for the 1937-38 season, a point upon which the German Government laid great stress and for which they offered every facility; and therefore whether there were two seasons, or only one, with, perhaps, part of another, before the outbreak of war made whaling in the Antarctic impossible. Nor have I had any evidence whatever to sug-

gest that the whaling operations were anything but satisfactory and profitable.

Seeing that almost the whole of the cost of building the " Unitas " was provided out of " inland marks," that the German Government contributed a subsidy of 30 per cent. and (page 53) that it was stipulated that in general " Verkaufs " were not to be treated any less favourably than the whaling companies founded by their rivals, either as regards the carrying out of operations or the utilisation of the profits obtained, and there is no evidence that these conditions were not faithfully observed in peace-time, it does not seem to me that there was anything inherently unreasonable in the German Government requiring that the ship should be a German ship, that she should be chartered to a German company in which German nationals held a controlling interest, and that the whaling fleet should not be sold or chartered outside Germany (page 60) without the Ministry's consent. Even if the project is to be considered on its own merits, I am far from convinced that it bore signs of being concluded under duress.

But I am unable to accept the submission that it is to be treated in isolation, or that, as Mr. Rykens asserts on page 36, paragraph 29, the fleet was built " only as the result of direct pressure by the German Government." On the contrary, it seems to me that the decision to accept the proposal of the German Government must have had a close connection with the " extraction process." In one sense, of course, they were essentially different projects, in that the one did, while the other could not, result in the extraction of " blocked marks " from Germany (page 36, paragraph 29). But, as I have already shown, at the beginning of 1936, when the project of building a whaling fleet became the subject of serious consideration, the building of ships under the " extraction process " was very far from complete.

Having regard to the proportion of tonnage for which contracts were yet to be placed, namely, 213,757 tons, out of a total tonnage of 463,467 tons, it seems to me to be a reasonably plain inference that a large part of the £7,500,000 yet remained to be extracted, and the fact that it is admitted that 2,000,000 " blocked marks " were extracted between the 31st December, 1938, and the 31st December, 1939, which presumably must have occurred during the eight months before the outbreak of war, appears to show that the " extraction process " never wholly ceased to be effective. It was argued that I had no right to draw any such inference because other methods of extracting the " blocked marks " might be in operation. I offered the Claimants the opportunity of proving that any other effective method was in operation, but the offer was declined.

I do not hesitate, therefore, to draw the inference that early in 1936 the advantage of continuing the " extraction process " without interruption must have been in the mind of those directing the policy of N.V., and that the risk of this benefit being withdrawn cannot fail to have been a potent inducement to accept the proposal of building the whaling fleet. Putting it at its very lowest, the Claimants have provided no evidence which satisfies me that this was not the case. In my view, there is no particular circumstance which takes this case out of the general rule that the enemy character of the ship is determined by her flag.

Mr. Rykens complains (page 26, paragraph 15) that from the first introduction in 1931 of restrictive financial legislation the freedom of N.V. to exercise unfettered control over its businesses in Germany was seriously jeopardised. But traders, whether in foreign countries or in their own, are subject to the restrictive financial legislation of the country in which they trade; nor is there anything novel in the idea of some measure of discrimination in favour of native as against foreign

traders, or in the attempt to overcome such difficulties by setting up an organisation in accordance with the municipal law of the country concerned. I do not doubt that with the coming of a totalitarian regime in Germany, trading conditions became more precarious for foreigners carrying on business there, nor, as I have already said, that the German Government would hesitate to bring any such pressure to bear as they thought would serve their purpose. But when it is insisted that this is a case of extreme hardship, I feel obliged to say that I am not concerned with that, but with the strict administration of the law of Prize.

Hardship is a matter for the bounty of the Crown. But, after all, it is quite clear from the evidence that after the advent of the Nazi regime N.V., so far from curtailing their trade in Germany, were expanding it by investing their accumulated profits in " inland marks " in what are described as " comparatively safer investments ' 'in Germany. Presumably they did so because they thought it was the best policy for themselves, and incidentally for their British associates who were equally interested, so to do. This policy still prevailed in 1936 (page 27, paragraphs 16-17). In that year they were, as has been seen, still engaged in the " extraction process," a scheme which, while it was of considerable advantage to N.V., was also saving the German Government foreign exchange (page 28, paragraph 18). If, therefore, the desire to continue this process provided, as I infer that it did, some part at least of the inducement to participate in the German Government's whaling schemes, which would not only provide that Government with a whaling fleet without the expenditure of foreign currency, but would necessarily result in augmenting the provision of substitutes for the butter which they were openly proclaiming to the world was, figuratively speaking, being turned into guns, it is hardly a matter for surprise that the Crown should insist on its strict rights when the fortunes of war brought about the capture of this ship in a German port. But however that may be, I am prepared to decide this case on the basis that the flag is decisive of her enemy character. In the " *Endraught* " (I Christopher Robinson, p. 19), one of the group of cases governed by the " *Vigilantia* " (*supra*), Lord Stowell said: " If the Claimant, from views of interest, chose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation." That sentence seems to me to apply to this case.

Nevertheless, out of deference to the argument upon the other points raised, I will express my opinion about them.

As regards the principle of the *Daimler* case, it was argued that this must be applicable in favour of the Claimants because otherwise the " Unitas " could have been condemned in a German Prize Court after the German conquest of Holland, on the ground that in every real and business sense the whole and sole ownership of the vessel was Dutch (*The " St. Tudno," supra*), while at the same time the Crown seeks to obtain condemnation in a British Prize Court.

To this curious argument there seem to me to be two answers: first, that the German Government, having taken every precaution to ensure that the " Unitas " was owned, registered and managed in Germany, and that no change should be made in this respect without their express consent, could have no object in bringing her before a German Prize Court, nor is there the slightest suggestion that they did so. On the contrary, the evidence is that she was treated during the war as a German ship (see the supplementary Agreement dated the 21st October, 1941, and the letter relating thereto, pages 111-120). It is true that on the 5th July, 1941, a Reich Commissioner for the management and control of N.V. was appointed, but this does not affect the point. Secondly, if the " Unitas " had duly been condemned by a

German Prize Court, her status would thereby have been determined in face of the world. Therefore, if she subsequently came before a British Prize Court her case would fall to be dealt with not in spite of, but in light of, the fact that she had already been condemned to the German Government by a Court of competent jurisdiction.

In my opinion, there is no authority for applying the principle of the *Daimler* case in favour of Claimants in Prize, though it is clearly applicable in favour of the Crown (*The "Glenroy,"* 1945 Appeal Cases, at p. 137). Moreover, it seems to me that it would be contrary to settled principle to do so. The allegation that the "whole and sole ownership" of the "Unitas" resides in N.V. depends upon the fact that N.V. indirectly hold all the shares in "Verkaufs." In my opinion this claim is untenable.

In the "*Primus*" (1 Spinks E. & A., p. 204) Dr. Lushington, during the Crimean War, said that not only the authority of Lord Stowell, but every argument he used go the whole length of saying that whoever embarks his property in shares of a ship is bound by the character of that ship, whatever it happen to be. If he reap the benefit accruing in peace, he must also take the consequence of war.

In the "*Pedro*" (1889, 175 United States Reports, at page 376) Chief Justice Fuller, delivering the Judgment of the majority of the Court, says: "It was argued that the '*Pedro*' was not liable to capture and condemnation because British subjects were the legal owners of some, and the equitable owners of the rest, of the stock of La Compania La Flecha, and because the vessel was insured against risks of war by British underwriters. But the '*Pedro*' was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish flag and a Spanish licence; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and be dealt with accordingly. Story on Prize Courts (Pratt's Edition), pages 60, 66 and cases cited. *The 'Friendschaft,'* 4 Wheaton, p. 105; *The 'Ariadne,'* 2 Wheaton, p. 143; *The 'Cheshire,'* 3 Wallace, p. 231. Hall on International Law, paragraph 169."

Moreover, this principle was recognised by Sir Samuel Evans in the "*Marie Glaeser*" (1 British and Colonial Prize Cases, p. 39 at p. 45). It was suggested in the course of the argument that the word "shareholders" was used in that case to describe the part-owners of the vessel. I have now seen the record and it is clear that the claim was made on behalf of shareholders in the Company owning the vessel. The confusion may have arisen from the fact that, as the share certificate of one of the Claimants shows, the limited liability company owning the ship was named after her; (see also the British Year Book of International Law, 1927, p. 164, to the same effect.

As I do not find that duress is proved, I need not deal with the argument that it is inconsistent with the allegation that the whole and sole ownership resided in N.V.

That brings me to the last point, the position of "Verkaufs" as a house of trade. The principle is stated in Story, p. 61, as follows: "So if the agency" (that is, an agent stationed in a belligerent country) "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 a neutral having such a commercial domicile in a country which becomes an enemy, is, on the outbreak of war, according to the views held by British Courts, allowed a reasonable interval during which he can discontinue or dissociate himself from the business in question.

(*The "Anglo Mexican,"* 1918 Appeal Cases, at p. 425). See also the "*Glenroy*" (1945 Appeal Cases at p. 141), where Lord Porter, delivering the opinion of the Privy Council, says: "In a sense it is a hardship, but the neutral is given a *locus poenitentiae* if he withdraws from the business carried on in the enemy country, and he may well be called on to elect not to continue to assist the trade of the enemy as the price of rescuing his goods from condemnation."

It is argued that there was nothing that N.V. could do, and that Prize Law, like English Law, does not compel the doing of the impossible. Reliance is placed on the fact that all the German directors resigned from N.V. after the outbreak of war between Germany and this country. So apparently did the British directors; at any rate, the Chairman did so (see Mr. Rykens' affidavit, p. 19, paragraph 1). Admittedly N.V. could do nothing after the invasion of Holland, but it is clear that during the time when Holland was neutral Mr. Thomas, a principal member of the Praesidium, was still in Germany (page 44, paragraph 1). But although he has sworn an affidavit in support of this claim, there is not the slightest suggestion that he, or anyone else on behalf of N.V., did anything to dissociate N.V. from the activities of their subsidiaries in Germany, even, for instance, by insisting on a strict compliance with Article 9 and 10 of the charterparty quoted above. During the war it is true that on the 26th October, 1943, the British Company wrote a letter to the Ministry of War Transport claiming that this whaling fleet, and another with which I am not concerned, were not German owned and should not be considered as available for reparations. But that does not seem to me to effect the point that at the time when N.V. were still neutral they did nothing to dissociate their organisation in Germany from the taint of enemy character, or to make plain to the British Government where they stood.

For these reasons this claim, in my opinion, fails, and the "Unitas" should be decreed to be good and lawful Prize, and I give Judgment accordingly.

SIR WILLIAM MCNAIR: Your Lordship's Judgement will obviously require very careful consideration by my clients in Holland, and, in those circumstances, there are two matters I should like to put before your Lordship. Firstly, to make a formal application for admission of an appeal as of right, under the Order.

THE PRESIDENT: There is no doubt about that; the only question is terms, of course.

SIR WILLIAM MCNAIR: Yes, my Lord.

MR. HOGG: There is, of course, an appeal as of right, but I think, in the circumstances, my friend is bound to offer security.

THE PRESIDENT: The two matters for discussion are the security and the time within which to lodge.

SIR WILLIAM MCNAIR: The record for the Privy Council would be comparatively light. It would only be the agreed bundle of correspondence, and I suggest a modest sum as security.

THE PRESIDENT: What do you mean by "a modest sum"?

SIR WILLIAM MCNAIR: I think the sum usually ordered is £250 or £300, and I suggest that that would be appropriate in this case.

THE PRESIDENT: It usually ranges between £300 and £500. There is a good deal of money at stake. I expect the costs of the preparation of the record will not be very large. Five copies have got to be obtained.

MR. HOGG: I am instructed to ask for £500. It is a very substantial matter and, of course, the record is only part of the expense.

THE PRESIDENT: I should not think we need spend much time on the question of whether Unilever can afford £500.

SIR WILLIAM MCNAIR: If your Lordship thinks £500 is right, I say no more.

THE PRESIDENT: What about the time?—three months is the usual time.

MR. HOGG: Three months is agreeable to the Crown.

SIR WILLIAM MCNAIR: Yes, I agree. Under Order 44, Rule 4, your Lordship has power to direct that the execution of this Order for condemnation be suspended pending the appeal. On that I should just menton this. This vessel, the " Unitas," has been requisitoned out of the Prize Court by the Ministry of Transport, and, whilst under that requisition, has been sold to the Union Whaling Company for the sum of £1,000,000 subject to the property not passing until a Decree of Condemnation is made. I submit, my Lord, that in those circumstances, the operation of the Decree of Condemnation should be suspended pending the appeal.

THE PRESIDENT: In the circumstances that sounds reasonable, does it not, because if one does not suspend it the property would pass, which is not what is intended?

MR. HOGG: Whether reasonable or not, I do not object, my Lord.

SIR WILLIAM MCNAIR: If your Lordship pleases.

THE PRESIDENT: Have you any application, Mr. Hogg?

MR. HOGG: No, my Lord.

THE PRESIDENT: Nothing has been said about costs.

MR. HOGG: I am not instructed to ask for costs.

THE PRESIDENT: Very well.

No. 1925.

In the High Court of Justice.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

(IN PRIZE).

Royal Courts of Justice.

Friday, 20th February, 1948.

ss. "UNITAS" and CARGO.

CLAIM OF—

LEVER BROTHERS & UNILEVER N.V., "MARGA" Maatschappij tot Beheer van Andeelen in Industrieele Ondernemingen of Rotterdam, Holland, N.V. and "SAPONIA" Maatschappij tot Beheer van Andeelen in Industrieele Ondernemingen of Rotterdam, Holland, N.V.

Judgment.

SIMPSON, NORTH, HARLEY & CO.,
18-20, York Buildings,
Adelphi, London, W.C.2,
Claimants' Solicitors.

THE TREASURY SOLICITOR,
Story's Gate, London, S.W.1,
Respondent's Solicitor.

Diprose, Bateman & Co., Sheffield Street, Kingsway, W.C.2.
L 3. Order 4770 Dd. 1 Wt. 8172 Gp. 422 4.48.

9/2/48

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Circular Note

FALKLAND ISLANDS

0366

Transmitted with the compliments of the Secretary of State for the Colonies, for information and distribution, with reference to his circular note of the 15 OCT 1948 Fin 0366.

17 JUL 1950

JUN 1950

Colonial Office,
Church House, S.W.1.

(6/48) [536B] Wt. 34540/5180 5m. 12/48 C.N.Ld. 748

Privy Council Appeal No. 2 of 1949

Lever Brothers and Unilever N.V. and others - - - *Appellants*

v.

His Majesty's Procurator General in the matter of S.S. "Unitas" and cargo - - - - - *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 8TH MAY, 1950

Present at the Hearing:

LORD PORTER
LORD SIMONDS
LORD NORMAND
LORD MACDERMOTT

[*Delivered by* LORD PORTER]

This is an appeal against a decree by the President of the Probate, Divorce and Admiralty Division of the High Court of Justice sitting in Prize who on the 20th February, 1948, pronounced that the steamship "Unitas" belonged at the time of capture and seizure to enemies of the Crown and was liable to confiscation as good and lawful prize. The learned President gave leave to appeal subject to the provision of security for costs of the appeal, and directed that the decree should be suspended pending the appeal. The "Unitas" is a whale factory ship of about 21,000 gross registered tonnage. The evidence on behalf of the Crown was confined to the formal affidavits of seizure and ship's papers from which it appeared that throughout her life from the date when she was built in 1937 until she was seized she was registered in the Port of Bremen, Germany, and was of German nationality. At all material times her immediate ownership was vested in a German limited liability company known prior to June, 1939, as Jurgens-Van den Bergh Margarine Verkaus Union G.m.b.H. and thereafter as Margarine Verkaufs Union G.m.b.H., referred to hereafter as "Verkaufs". She was registered in the name of "Verkaufs", and at the date of capture and seizure was flying the German flag. At the time of the unconditional surrender of Germany she was lying in the port of Wilhelmshaven in Germany and was there captured by H.M.S. "Alexandra". After capture she was transferred to Methil in the County of Fife and there formally seized in prize on the 1st July, 1945. The writ herein was issued on the 17th of that month, and on the 10th August, 1945, an appearance was duly entered on behalf of the first appellants, Lever Brothers and Unilever N.V. of Rotterdam, referred to hereafter as N.V., as parties interested in the ship. On the 18th June, 1946, further appearances were entered for the second appellants, "Marga" Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Marga", and the third appellants "Saponia" Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Saponia", as parties interested in and as beneficial owners of the ship. On 7th January, 1947, a claim was filed on behalf of all these appellants as parties interested in or as beneficial owners of the ship, tackle, apparel and furniture. An additional claim was filed at the same time for all losses, costs, demurrage

and expenses by reason of her seizure and detention as prize, but was abandoned before their Lordships, it being admitted that the seizure, but not the condemnation, was justified.

" N.V." is a Dutch Corporation. Its shares are publicly held mainly by British and Dutch nationals, and it owns the entire share capital of the second and third appellants, both of whom are also Dutch corporations. They in their turn jointly own the entire shares of a Company incorporated under the laws of Germany, named Margarine Union Vereinigte Oel-Und Fettewerke A.G., hereafter called " Margarine Union ", and Margarine Union owned the entire share capital of Verkaufs. It was not disputed by the respondent that the general control of the German Companies in the Organisation through which N.V., " Marga " and " Saponia " carried on business in Germany was at all times exercised by N.V. in and from Rotterdam. Though the Companies in Germany had their own boards of directors, these boards had no authority to deal independently with policy or management. N.V. appointed a body in Berlin known as the Praesidium, the principal members of which were of Dutch nationality, and this body controlled N.V.'s German businesses and ensured that the decisions taken in Rotterdam were effectively carried out. The respondent maintained that condemnation of the " Unitas " was justified on two main grounds, first, that she flew the German flag, and secondly, that the legal title to her was vested in Verkaufs. In answer to the first of these contentions the appellants submitted that the flying of an enemy flag is only a prima facie ground for condemnation, and is subject to exceptions which cover the present case. As to the second, they maintain that it is the duty of the Prize Court to look behind the legal façade and determine where the true ownership of the " Unitas " lay, and that on the principles laid down in the House of Lords in *Daimler Co.* and the *Continental Tyre & Rubber Co.*, 1916, 2 A.C. 307 as applied to prize in the *St. Tudno,* 1916, P. 291, the whole and sole ownership in the ship was, in this case as it was in that—in every real and business sense in the beneficial owners. The respondent on his part maintained that the principles laid down in the Daimler case might be effective in a case where the legal ownership was in a friend or neutral, to disclose an enemy beneficial ownership and so lead to condemnation, but would not dispose of enemy taint where the legal ownership was that of an enemy. But in any case they maintained that if it were permissible to treat Verkaufs as a mere branch of N.V., then Verkaufs was a " house of trade " of N.V. in Germany, and that, in that event, since the " Unitas " was the concern of that house of trade, it was the duty of N.V. on the outbreak of war between the United Kingdom and Germany on 3rd September, 1939, to dissociate itself from Verkaufs. This duty they did nothing to fulfil between the outbreak of war and the invasion of Holland in May, 1940, and for this further reason the " Unitas ", as a concern of the German house of trade, was condemnable in prize.

The learned President decided in favour of the respondent on the ground that the vessel's flag was decisive of her enemy character. He held that even if there were exceptions to the rule as to the enemy flag the present case did not fall within them. He agreed with the respondent's second submission that the principle of the Daimler case did not apply even if it were established that the beneficial ownership was that of a friend or neutral, and further held that N.V. had failed between September, 1939, and May, 1940, to dissociate itself from Verkaufs.

Having regard to the importance of the interests involved and in view of the likelihood of an appeal to their Lordships' Board, the learned president dealt fully with each of the three contentions put forward in order that full assistance might be afforded on appeal to their Lordships in considering each aspect of this case. But as the Board think that the flying of the enemy flag alone is in this and in most cases sufficient to dispose of the matter at issue they refrain from expressing any opinion as to the other two difficult and controversial matters.

Prima facie, of course, the flying of an enemy flag in wartime is conclusive of the nationality of a ship and subjects her to seizure and condemnation in a Court of Prize. If it is done voluntarily it is conclusive,

but, say the appellants, if under duress or indeed under pressure and against the will of the owner of the ship it is but an element to be taken into consideration and may well be inconclusive.

For this argument reliance is placed upon the expressions over and over again appearing in the cases which begin with Sir William Scott's words in *The Vrow Elizabeth* (1803) 5 Chr. Rob. 3 at p. 6.

" In that case (viz. an earlier unreported case), however, it was held that the fact of sailing under the *Dutch* flag and pass was decisive against the admission of any claim ; and it was observed that as the vessel had been enjoying the privileges of a *Dutch* character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of *Amiens* had stipulated for the liberty of withdrawing *British property* from the ceded and restored islands. But the Governments of *France* and *Holland* afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of *France* and *Holland*, and on a destination to those countries. The difficulty which has arisen in the removal of *British* property, for want of shipping, may have induced our own Government to permit *British* ships to put themselves under *Dutch* flags for this particular purpose: and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation of the general rule."

This consideration was repeated in the *Fortuna* (1811) 1 Dods. 81 in the words of the same judge at p. 87. " All that the Court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them." He adds what is germane to another aspect of this case, " But they do not bind other parties as against him."

It will at a later stage be desirable to analyse the width of the exception to which Lord Stowell refers, but at the moment the quotations set out above are examples of those relied upon by the appellants in support of the proposition that in order to be bound by the rule of the flag the shipowner must voluntarily adopt it and not be coerced into its use.

For the allegation that their act was involuntary, the appellants lay stress upon the statements endorsed in Mr. Ryken's affidavit. They may be summarised as follows.

On the 1st August, 1931, the German subsidiaries of N.V. were indebted to N.V. or its subsidiaries in Holland to the extent of about £7,500,000 sterling, and at this time the German Government introduced financial legislation under which these credit balances were converted into what were known as blocked Marks, with the result that N.V. and its Dutch subsidiaries were no longer able freely to obtain repayment from Germany of loans which they had advanced to their German subsidiaries for the provision of working capital or of monies due from them for the supply of raw material. About the same time the amount of Reichsmarks representing the trading profits of the subsidiary companies of N.V. in Germany ceased to be transferable to N.V. or its subsidiary companies in Holland. These Reichsmarks, which did not represent foreign claims on Germany, were classified as " inland marks " and could be used within limits for making investments in Germany. As a result of these and further financial restrictions later imposed the accumulated cash and cash investments held by N.V.'s subsidiary companies in Germany had risen by 1936 to a figure of about 61,000,000 Reichsmarks.

The possession of these large amounts of blocked and inland marks led the appellants to endeavour to find means of extracting the blocked marks from Germany, even at a considerable financial sacrifice. Accordingly they obtained the consent of the German authorities to order the construction inside Germany, on behalf of N.V. or one of its associated companies, of ships for exportation and sale to foreign purchasers. As a term of their consent the German authorities required (inter alia) that

part of the building price should be paid out of the proceeds of the sale of certain commodities which N.V. was to import into Germany. This obligation involved the expenditure of considerable sums in currency other than German, which amounted at first to 20 per cent. and later to 45 per cent. of the building price. Nevertheless by these means N.V. and its associated companies were able to extract from Germany a proportion of the blocked mark balances and to convert them into foreign currency.

By the end of 1935 twenty contracts for the construction of 47 ships of approximately ¼ million tons had been placed, and between January and October of the succeeding year 13 further contracts had been placed for 21 ships totalling over £200,000. Meanwhile in April or May, 1935, Dr. Schacht approached Mr. Hendriks and Mr. Rykens with a view to persuading the appellants to build a whaling fleet in Germany for operation under the German flag. But the appellants were able to avoid complying with the proposal at that time because Norwegian seamen experienced in whaling operations were needed for the successful prosecution of the whaling enterprise and the Norwegian Government were unwilling to allow them to sail under the German flag. At the beginning of 1936, however, this obstacle had been overcome and Mr. Rykens and Mr. Hendriks knew that similar proposals for the building of whaling fleets had been made by Dr. Schacht to two of the trade rivals of N.V. in Germany and that those trade rivals had agreed to undertake the task. At this juncture Dr. Schacht again approached Mr. Hendriks. The terms then proposed contained the stipulation that the fleet could not be transferred from the German flag without the consent of the German Government and that the vessels should be chartered to and operated by a German concern in which the appellants would enjoy no more than a half share. If accepted, the plan would attract a subsidy of 30 per cent. with a maximum of RM.3,500,000 from the Reich towards the construction of the fleet. The appellants ultimately decided to accept the proposals and instructions were given so that the necessary arrangements for a contract with the German Government might be made. Ultimately an agreement was reached by the 20th May, 1936, under which certain further provisions were confirmed. The appellants were to build a whaling fleet consisting of the "Unitas" and eight catchers at a total price of approximately RM.13,000,000, and in return were to receive from the Reich Government a subsidy of 30 per cent. of the building cost with a maximum of RM.3,500,000. The appellants were to advance the foreign currency required for the purchase of items supplied from abroad, estimated at £7,000 sterling, and to be allowed to recoup themselves these advances plus a fair rate of interest by deliveries of whale oil from the first whaling season at fair market prices. They also agreed to finance such of the costs of the whaling expeditions as would have to be paid in foreign currencies on similar terms, and to operate the fleet when built through a working company at a charter price of a quantity of whale oil (estimated at 7,000 tons per annum) which they would afterwards sell to the German Government at the ruling world price converted into Reichmarks. The balance of the whale oil was also to be sold to the German Government by the working company on similar terms. The agreement was subject to the condition that the appellants should have treatment not less favourable than that accorded to their German competitors, and the Reich Air Ministry or Naval Observatory was to be permitted to set up meteorological stations on board the vessels and to arrange for experienced radio operators and short wave equipment to be carried on board.

This history of the negotiations which led up to the building of the "Unitas" does not of itself show duress or. indeed, any undue pressure by the German Government, but Mr. Rykens says categorically that the hidden threat was there. In the first place, he says that on a previous occasion in 1935 when N.V. was asked to supply guelders to the German Government on credit terms and refused to do so, open threats were uttered by high officials in the Ministry of Finance that N.V.'s previous quotas would be cut and that although Dr. Schacht and Herr von Ribbentrop alleged that they were unaware of the proposed cuts, he had

no doubt that they knew of the threats. The attitude of the German Government and the covert threats lying behind the pressure that was brought to bear are perhaps best set out in Mr. Rykens' own words at the end of his affidavit in paragraph 28:—

> "Though my conversations with Dr. Schacht and also Herr von Ribbentrop were conducted in a courteous manner I was never left in any doubt as to the reality of the threats lying behind their proposals and I have no doubt at all that if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag effective steps would have been taken to confiscate or render virtually valueless the N.V. assets in Germany and to restrict to the minimum any further carrying on of business by N.V. in Germany. As an illustration of the high-handed and lawless action of the German authorities I would mention that before the outbreak of war one of N.V.'s German subsidiaries carrying on business in East Prussia had the quota of one of its factories arbitrarily taken by the German authorities so that it was forced to cease carrying on business."

And in the succeeding paragraph he shows the method adopted by the German Government in compelling compliance with their wishes in the following words:—

> "But for the pressure brought to bear by Dr. Schacht and the sanctions which the German Government was in a position to impose had N.V. not ultimately complied with their demands, the said whaling fleet would never have been built and thereafter owned and operated under the German flag. The construction of the said whaling fleet was not voluntarily undertaken by N.V. nor was it a freely chosen investment which N.V. decided to make of their own volition. N.V. was in my respectful submission forced by the German Government into a position in which they had no alternative but to comply with the German Government's demands."

Their Lordships are prepared to accept for the purpose of their decision Mr. Rykens' statements but they are nevertheless of opinion that they are insufficient to constitute a ground for rejecting the conclusiveness of the fact of flying the German flag.

In the course of his judgment the learned President said: "I do not doubt at all that the German Government were in a position to bring economic pressure on foreign concerns trading in the country through German subsidiaries, nor would they hesitate to bring to bear any such pressure as they thought would serve their purpose."

Indeed he envisages the possible confiscation of N.V.'s German business as one of the steps which might be taken and in their Lordships' view the threat is none the less serious though one of the adverse actions which the German Government contemplated was the cancellation of the orders for ships to be built in Germany and sold abroad. In any case it was a threat of the most serious character and their Lordships are in no sense minded to minimise its importance.

But the question remains whether a threat to the economic interests or even existence of the N.V.'s German subsidiaries is enough to render a ship flying the German flag immune from the sanction of seizure and condemnation.

It does not in their Lordships' view assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth it was not involuntary in the sense of being unintentional: it was a deliberate choice taken between two distasteful alternatives. It is only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that that election was made two years before war broke out and, though no accounts have been furnished and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage at any rate in 1938 and may well have earned considerable emoluments for her owners. The fact that she was built

as a result of German pressure and German threats because a worse fate might have befallen the claimants if they did not give way seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.

The strictness with which the rule is followed is accentuated again and again in the prize law of many countries and in the text books dealing with the topic.

Wheaton, Hall and Oppenheimer all state the principle in unqualified terms. It is enough to quote the first named (8th edition) at p. 588. "According to the rules observed in the British Prize Courts the flag of the enemy is conclusive against the ship flying it, but our Courts can go behind a neutral flag and ascertain who is the real owner and enemy shares in a ship flying a neutral flag can be condemned."

The cases to the like effect are well known and numerous. The two earliest reported the *Vigilantia* (1798) 1 Chr. Rob. 1 and the *Vrow Elizabeth* (1803) 5 Chr. Rob. 3 contain unequivocal statements to the like effect and indeed it is not disputed that this is the general rule. But it is said that the principle does not apply except in cases where the owners voluntarily chose to accept the benefit of the enemy flag for their own advantage.

To support this argument reliance is placed upon the type of expression to be found in the *Fortuna* (1811) 1 Dods 81 where the wording is: "All that the Court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them, but they do not bind other parties as against him"; or perhaps more clearly in the *Primus* (1854) 1 Spink P.C. 48 where the words used are: "If he reap the benefit accruing during peace he must also take the consequence of war".

Similar expressions are to be found in many of the cases, but in their Lordships' opinion a conclusion that a shipowner who built his ship unwillingly it may be, but still with the object of avoiding a position less favourable to himself, and sailed her under an enemy flag would avoid seizure and condemnation in prize in the event of war is altogether unjustified.

The statement that the shipowner has taken the benefit and must endure the consequences is not in essence a limitation of the doctrine, but an explanation of its origin.

It is true that as pointed out above Sir William Scott, as he then was, says in the *Vrow Elizabeth* (supra): "I do not say that there may not be cases of such particular circumstances as to raise a reasonable distinction", and instances a case where after the peace of Amiens the French failed to fulfil an undertaking to provide shipping to repatriate British subjects and ships flying an enemy flag were thereupon used for that purpose, and after outbreak of war held free of condemnation.

So too in the *Tommi* (1914) P. 251 it was said: "The law with regard to the effect of carrying the flag is perfectly clear, namely, that if a ship does sail under a particular flag, *unless there are very special exceptions*, she has elected to enjoy the protection of the state whose flag she flies and she is regarded as a ship belonging to that state".

Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in prize, but such circumstances must be very exceptional. The few in which a ship flying the enemy flag has escaped condemnation are all of that character. In addition to the cases mentioned in the *Vrow Elizabeth* (supra) their Lordships' attention has only been called to three and they are not aware of any others. Those three are the *Palme*, mentioned in Wheaton, p. 153, and reported in Balloz Jurisprudence General (1872) III, p. 94, the *Taxiarchis* also referred to in Wheaton and the *Pontoporos* 1 Brit. & Col. Prize cases 372.

The Palme was a German vessel purchased by the Swiss Red Cross from German owners. The Swiss Government would not allow their flag to be flown, the French Government forbade the use of its flag and

in default of any other the German flag was retained and a German agent appointed. The circumstances were peculiar and exceptional and a French Prize Court decreed her release.

The Taxiarchis was a case exhibiting some features of the same kind: she was British owned and registered in Cyprus which at that time was nominally under Turkish rule but actually administered by Britain. There was no national flag of Cyprus and therefore she flew the Turkish flag. In each of these cases, the absence of a national flag coupled with the neutral or friendly nationality of the owners was the deciding factor.

The Pontoporos was a Greek ship captured by the Emden and used as a coaling auxiliary, but her master never consented to her use as such and was kept a prisoner. The case is a true example of involuntary submission to enemy duress. Indeed the Prize Court which tried her case contrasted it with that of the *Carolina* 4 Chr. Rob. 256 where the master had, though unwillingly, accepted service under an enemy belligerent and the basis of the decision is explained at p. 379: "The act of force", it was said, "referred to by the learned Judge would seem to be the laying of an embargo on the ship and fitting her up as a transport against the will of the master and during his absence, but the facts show that when he returned he acquiesced." And in the Carolina itself Lord Stowell says, "A man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force exercised by one belligerent upon a neutral ship or person is to be deemed a sufficient justification for an act done by him contrary to the known duties of the neutral character there would be an end to any prohibition of the law of nations to carry contraband or engage in any other hostile act"

The circumstances in the last-mentioned case in substance resemble those now under consideration whereas those in the three cases relied upon by the Appellants are in a different category. It is, as a general rule, where captors are concerned, the use of the enemy flag which entitles them to seize. Neutral ownership of itself does not protect the ship. The *Ocean Bride* (1854) 1 Spink P.C. 66, was British owned and flew the British flag but was nominally transferred to Russian ownership in order to protect her from seizure in case of war between this country and Russia. On these facts being established she was released. As showing the importance of the flag it was said in the course of the judgment: "If this vessel had been sailing under the colours of an enemy I should say this was a claim which could not be sustainable, but here she remains navigated under British colours; and that prevents a difficulty which would have been insuperable—for, if the vessel had been under Russian colours, that would have been conclusive against all the world, for reasons I need not refer to, as it is a well-known principle".

Their Lordships have thought it desirable to deal with the grounds upon which the appellants support their case at some length as the claim is a large one and the principle at stake important. From the authorities which have been referred to, it is clear that the flag under which a ship sails constitutes one of the most if not the most important element which a Court of Prize has to consider in determining whether she is rightly seized and condemned as prize. But it is not necessary for them to set exact bounds to the limitations to be placed upon the dicta that the flying of an enemy flag is conclusive or to pronounce on the correctness or otherwise of every decision relied upon or the accuracy of every individual expression of opinion contained therein. Whatever view may be taken on the matter the present case is in their Lordships' opinion far removed from those exceptional cases in which that rule may be discarded.

In the view of the Board the "Unitas" was rightly seized and condemned and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

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In the Privy Council

LEVER BROTHERS AND UNILEVER N.V. AND OTHERS

v.

HIS MAJESTY'S PROCURATOR GENERAL
in the matter of S.S. "Unitas" and cargo

DELIVERED BY LORD PORTER

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