

**In the matter of the Steamship "Hamborn."**

**Naamlooze Vennootschap Maatschappij Stoomschip "Hamborn" - *Appellants***

*v.*

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

FROM

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

---

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1919.**

---

*Present at the Hearing :*

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

LORD STERNDALE.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

---

The late President condemned the S.S. "Hamborn" upon the ground that she was "a German vessel belonging to German owners." Her owners, the appellants, contend that they are a limited liability company, incorporated in Holland according to Dutch law, and that their ship was on the Dutch register of shipping and that she flew, as well she might, the flag of the kingdom of the Netherlands. Literally all this is true. The President spoke of her as being "nominally" owned by a Dutch Company but held that she "must be regarded as belonging to German subjects" and, quoting from the "*Fortuna*" (1, Dodson's Reports, p. 81), that "it is no inconsiderable part of the ordinary occupation of a Prize Court to pull off the mask and exhibit the vessel in her true character," he laid it down that "the Court is not bound to determine the neutral or enemy character of a vessel by the flag she is flying or may be entitled to fly at the time of capture."

In fact, however, in this case there is no mask to be pulled off, if by that is meant some deception to be exposed. The appellant Company really is a Dutch Company; the ship was bought before the war and really was the Company's property. The Company is not shown to be a nominee holding in trust for other persons. There seems to have been no disguise or concealment or attempt to delude either the captors or the Court and, according to the municipal law applicable, namely that of Holland, the appellants are a Dutch incorporation, and the ship is theirs and enjoys the rights and is subject to the obligations which attach to a Dutch ship. Evidently there is some inaccuracy, no doubt inadvertent, in the language employed by the President and on this the appellants' argument is rested.

The facts are these. The appellant Company, the Naamlooze Vennootschap Maatschappij Stoomschip "Hamborn" (or the Hamborn Steamship Company) is a single-ship Company and the whole of its shares belong in equal moieties to two other Dutch Companies, the Naamlooze Vennootschap Handels en Transport Maatschappij Vulcaan of Rotterdam (or the Transport Company) and the Vulcaan Kohlen Maatschappij, also of Rotterdam (or the Coal Company). As to the Transport Company, all the shares but two, which belong to the German firm of Thyssen & Company of Mulheim on the Ruhr, are the property of a German Company, the Gewerkschaft Deutsche Kaiser of Hamborn. The shares of the Coal Company are held exclusively by three Companies, the Vulcaan Transport Company above-mentioned and two German Companies, the Gewerkschaft Rhein and the Gewerkschaft Lohberg, both of Hamborn. All the directors and shareholders of the last two Companies are Germans, resident in Germany. So are the directors of the Vulcaan Transport Company, and they have under their supervision and control as managers two Germans, who have resided in Holland since the formation of the appellant Company in 1913 and attend to the practical business details of the Vulcaan Transport Company, which in its turn holds the office of manager to the Hamborn Steamship Company. It does not appear that they have any business of their own and before the appellant Company was formed they were clerks employed by the Deutsche Kaiser Company, the one till 1907, the other till 1910.

Sufficient details are given of the ship's regular trade to make it quite clear what she was bought for. Her trade was, with unimportant exceptions, to load ore at Spanish ore ports for Rotterdam, going out with coal from South Wales to French ports to save a ballast voyage. When the war broke out, she was sent across the Atlantic and was trading on time charter there when she was captured. The Transport Company, which owns half the capital of the appellant Company, was incorporated to own and manage lighters and tugs for the carriage of cargo up the Rhine and its tributaries, on behalf among others of the Deutsche Kaiser Company, for whom it carries ore. Thyssen & Company and the Deutsche Kaiser Company own

ironworks in Germany and there was not a single person interested in any of these companies at the time of her capture, who was not an enemy subject. Their Lordships entertain no doubt that the "Hamborn" was bought and employed as a useful tender to the German iron industry on the Ruhr, that her other trading was ancillary, and that her Dutch flag, Dutch ownership, and local management at Rotterdam were adopted merely for the convenience of her German import trade. For some purposes no doubt she belonged to and was counted as part of the mercantile marine of the kingdom of the Netherlands, but in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire. The legal effect of all this, particularly on her liability to capture, is another matter.

The true question is one, in the President's phrase, of determining the neutral or enemy character of the "Hamborn." Unless either her Dutch flag or the country of incorporation of the owning Company or the place of residence of her subordinate managers or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce, which a belligerent is entitled to disable and restrain.

It may be as well to put on one side certain aspects of the effect of using a national flag, which are not now relevant and are really only false analogies. If a ship for her own purposes has assumed and used a national flag, to which she is not really entitled, she may in some circumstances be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may in some cases be said, by a figure of speech, to derive from her flag the system of municipal law, by which her contracts or her civil liabilities are governed. In the first case she cannot deny as against captors the national character, which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position, where in a question with captors it becomes necessary to consider whether the ship, though in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a neutral flag, is, in the view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user *de facto* at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those, who act for or in the name of the artificial person. It was decided in the case of *The Daimler Company, Limited, v. The Continental Tyre and Rubber Company*

(*Great Britain*), *Limited* (1916, 2 A.C. 307), that, in the case of an incorporated Company, the right and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the Company and whose orders its officers must obey, or the control of those persons, who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial *persona*, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment, which sufficiently represents the true gist of his reasoning:— "The centre and whole effective control of the business of the Hamborn Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this Court as belonging to German subjects," in a claim by captors for condemnation.

One small point remains. By Article 57 of the Declaration of London, varying the rule of international law, the neutral or enemy character of a ship is simply determined by the flag, which she is entitled to fly. Down to the 25th October, 1915, the Crown, by adopting the Declaration of London, had waived its right to rely on other criteria. On that day was published an Order in Council, by which that waiver was withdrawn. The ship was captured on the 27th October. It is said that the appellant Company was unaware of this Order, but its ignorance cannot have the effect of compelling the Crown to continue to waive rights, which in truth were in full effect, nor, if knowledge of this kind could matter, would it be the knowledge of the Company, which merely owned the ship, but that of the time charterers, who sent her to sea, as to whom nothing is proved.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

---



In the Privy Council.

---

IN THE MATTER OF THE STEAMSHIP  
"HAMBORN."

NAAML00ZE VENNOOTSCHAP MAATSCHAPPIJ  
STOOMSCHIP "HAMBORN"

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

---

---

DELIVERED BY LORD SUMNER.