

Privy Council Appeal No. 76 of 1919.

In the matter of the Barque "Svithiod."

Rederiaktiebolaget Navigator - - - - - *Appellants*

v.

Edmund L. Newcombe, K.C., C.M.G., the Proper Officer of the
Crown - - - - - *Respondent*

FROM

THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY
DISTRICT (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1920.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

THE LORD JUSTICE CLERK.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

Their Lordships are much indebted to Counsel on both sides for the unusually complete and exhaustive survey of all possible authorities bearing on a most important question; but, for reasons which their Lordships will briefly state, they do not think it necessary to deal with this case in such a manner as would require that time should be taken for its further consideration.

The case is one in which there is no appeal by the captain against the confiscation of the rubber which was his property. The learned Local Judge in Admiralty, Mr. Justice Drysdale, has expressly said that for carrying the contraband rubber alone he would not have confiscated the ship, and that, although the captain of the "Svithiod" lied in certain particulars, that alone would not cost his owners their ship; and accordingly the case, although it has involved some discussion as to both the prevarication and falsehood of the captain, and his conduct in having

on board some contraband, really resolves itself, and always has resolved itself, into the question whether the captors made out, or laid the foundation for making out, a case of unneutral service.

Upon that the evidence briefly stands as follows. There was a German stowaway on board the vessel found at Halifax. Their Lordships will assume that, as the learned Trial Judge found, this stowaway was taken on board in collusion with the captain of the vessel, although it may be pointed out that this is rather a matter of indirect inference from the probabilities of the case than dependent upon any fact positively deposed to. This person was the third mate of the "Blucher," which had taken refuge in Pernambuco at the beginning of the War to avoid the risks of capture at sea, and had remained there for the best part of three years. Hellman came on board and purported to be a stowaway, and purported to discover himself when the ship was a sufficient length of time out of Pernambuco, and was then treated by the captain of the "Svithiod" with some consideration, and so the vessel reached Halifax. The vessel was a Swedish vessel, bound with a full cargo of maize from Buenos Ayres to a port of discharge in Denmark. The learned Trial Judge found that he was satisfied that the captain took the third officer intending to smuggle him to Germany. In their Lordships' opinion, that, however plausible as a matter of speculation, on this evidence is a matter of speculation only; because all that can be said is, on the one hand, that he was a German, and apparently that his relations were still alive in Germany, while, on the other hand, there is no evidence of any express intention on his part, or of anything done by him to throw any light on his further proceedings after arriving in Denmark; and for what it may be worth there is the fact that he had left Pernambuco under such circumstances of dispute with the other officers on board his ship, the "Blucher," that the immediate cause of his discovery was in fact the sending of a letter by the first mate, which he must have known would fall into the hands of the British officials, betraying Hellman's presence on board, because he had gone away in debt to him and others. Therefore, it would be quite impossible, in their Lordships' opinion, to say that it has been proved that he was even going to Germany. What this man was, except that he was a mariner and a qualified third officer, the evidence does not show; and even assuming, as probably one may assume, because our eyes cannot be closed to circumstances of public notoriety connected with the War, that, if he reached Germany, some service in connection with the War would promptly have been found for him, the fact remains that he was at the time a seaman in an entirely private capacity seeking the opportunity of a voyage, by which he would at least escape from a further stay at Pernambuco, and proceeding at his own expense, or at the expense of the owners of this Swedish barque, it does not appear which, but without their cognisance at any rate. His case, therefore cannot be placed in the same category at all as the cases where the officers of a belligerent

State have engaged a vessel to perform a particular service, or have paid for the carriage of particular passengers, or where persons, already embodied in the service of the belligerent country, are being transported upon some purpose of State.

Their Lordships are impressed with the fact that the circumstances of this case appear to lie outside the scope of any authority to which their attention has been drawn. It is true that when he reached Halifax the captain of the "Svithiod" endeavoured to conceal the presence of the man on board by means of very transparent devices, because, as he knew almost as soon as he was interrogated, the officials were already aware of the man's presence, and anything he might say or do could hardly do more than save appearances for himself, and enable him to say that he had not given the man up. The conduct of the captain of the "Svithiod" does not appear to their Lordships particularly aggravated. At any rate, if there is no sufficient evidence of an act which would constitute an unneutral service or a cause of condemnation under that or any analogous title, the mere deceptions of the captain of the "Svithiod" in themselves would not, either in justice or according to authority, be a ground for confiscating the vessel.

Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavour to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject.

Their Lordships will, therefore, humbly advise His Majesty that the appeal succeeds: that the decree of confiscation ought to be set aside, and that the confiscated vessel ought to be restored to her owners. The respondent will pay the costs of the appeal.

In the Privy Council.

In the matter of the Barge "Seihod."

REDERIAKATIEBOLAGET NAVIGATOR

v.

EDMUND L. NEWCOMBE, K.C., C.M.G.,
THE PROPER OFFICER OF THE CROWN.

DELIVERED BY LORD SUMNER,