No. 2 of 1949.

In the Privy Council.

ON APPEAL

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

BETWEEN

LEVER BROTHERS & UNILEVER N.V., "MARGA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN and "SAPONIA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN - - - - *Appellants.*

AND

THE ATTORNEY GENERAL - *Respondent.*

S.S. "UNITAS" and CARGO.

Case for the Respondent.

RECORD.

1. This is an appeal by the Claimants against a decree by The Right Honourable 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 and condemned the same as good and lawful prize. The learned President admitted an appeal subject to the provision of security for costs of the appeal and directed that the decree should be suspended pending the appeal. P. 107, L. 22.

2. The s.s. "Unitas", hereinafter called "the ship", is a whale factory ship of 21,000 odd gross registered tonnage and from the date of her construction in 1937 until the date of her capture was registered in the Port of Bremen, Germany, and was of German Nationality. At all material times the ship was owned by a German Limited Liability Company known prior to June 1939 as Jurgens-Van den Bergh Margarine Verkaufs Union G.m.b.H. and thereafter as Margarine Verkaufs Union G.m.b.H. The said Company is referred to in the evidence, and hereafter, as "Verkaufs". The ship was registered in the name of Verkaufs. Pp. 8, 9. P. 13. P. 17, L. 36. Pp. 40-41. P. 17, L. 41.

3. At the time of the unconditional surrender of Germany the ship was lying in the port of Wilhelmshaven in Germany and following such surrender became subject to the directions of the British naval authorities. On the 1st July 1945 the ship arrived at Methil Roads, Methil in the County of Fife pursuant to an order of His Majesty's Royal Naval Flag
Pp. 3, 4. Officer at Hamburg, and thereupon possession was taken of the ship and of her cargo by one David Edward Purdie a Preventive Officer of Customs
P. 5. and Excise on behalf of His Majesty. The ship's papers which were
P. 8. delivered up at the time of capture included the German "Mess Brief" or document of registered measurements which contained full particulars of the registration, nationality and measurements of the ship.

Pp. 1, 2. 4. The Writ herein was issued on the 17th July 1945 and duly
P. 14. served the following day. 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 in the evidence and hereafter
P. 18. as "N.V.") as parties interested in the ship. On the 18th June 1946 appearance was entered for the second Appellants "Marga" Maatschappij tot Beheer van Aandeelen in Industrieele Ondernemingen N.V. of Rotterdam (referred to in the proceedings and hereafter as "Marga"), and the third Appellants "Saponia" Maatschappij tot Beheer van Aandeelen in Industrieele Ondernemingen N.V. of Rotterdam (referred
P. 14. to in the proceedings and hereafter as "Saponia" as parties interested in and as beneficial owners of the ship.

5. On the 7th January 1947 a claim was filed on behalf of all the
P. 15. said Appellants as parties interested in or as sole beneficial owners of the ship, her tackle, apparel and furniture, and for all losses, costs, demurrage and expenses which had arisen or might arise by reason of her seizure and detention as prize.

6. The grounds of the said claim as shown by the indorsement included the following :—

P. 15, L. 26. (A) That N.V. a Dutch Company through its wholly-owned subsidiary Dutch Companies, including two such companies referred to in the proceedings as "A.J.V.F." and "Hovema", and the Appellants Marga and Saponia who are their successors in title, at all material times managed and controlled from Holland and was solely interested in the operations and assets of the above-named German Company "Verkaufs" which was the registered owner of the ship.

P. 15, L. 37. (B) That the construction of the ship in Germany and her subsequent registration and operation under the German flag were not voluntarily undertaken by N.V., A.J.V.F. or Hovema, or by Marga, or Saponia.

Ibid., L. 40. (C) That N.V. or its subsidiaries were compelled to build the ship or to cause the ship to be built in Germany and to be registered and operated under the German flag by the duress of the German Government.

Ibid., L. 44. (D) That at the time of the seizure the whole beneficial interest in the ship was owned by and vested in N.V. or alternatively by and in Marga and Saponia.

(E) That there was at the time of seizure no enemy beneficial interest in the ship. P. 16, L. 5.

(F) That the interest of the Appellants and the absence of any enemy interest were well known to the Crown prior to the seizure by reason of two letters dated the 26th October 1943 and the 20th June 1945. *Ibid.*, L. 7.

(G) That the fact that the ship was flying the German flag at the time of seizure and was registered at the Port of Bremen did not conclusively determine her liability to seizure or condemnation in Prize. *Ibid.*, L. 14.

7. The only evidence at the trial consisted in the formal Affidavits of seizure and ship's papers filed on behalf of the Respondent and the Affidavits, exhibits, and other written evidence filed on behalf of the Appellants together with certain further information furnished at the request of the learned President. P. 93, L. 88.

8. The Appellants N.V. are a company incorporated under the law of the Kingdom of the Netherlands, carrying on a large international business *inter alia* in margarine products. In 1937 N.V. entered into an Equalization Agreement with the well-known English Public Company Lever Brothers and Unilever Limited which provided for the pooling of profits and the payment of similar dividends on the ordinary stock of both Companies. The relations of each of these two associate companies and their subsidiary companies is shown by a diagram which formed part of the Appellants' evidence in the proceedings. P. 17. P. 19, L. 20. P. 81, L. 20. P. 109.

9. The two Appellants Marga and Saponia which are wholly owned Dutch subsidiaries of the Appellants N.V. own between them the entire share capital of the limited liability company registered under the laws of Germany known as Margarine Union Vereingte Oel-und Fettwerke A.G. (referred to in the proceedings as " Margarine Union A.G.") an amalgamation formed in 1942 of various smaller German subsidiaries of N.V. Margarine Union A.G. or its predecessors in title in turn own the entire capital of the German Company " Verkaufs " which as before set out at all material times owned the ship. P. 17, L. 30.

10. At all material times the Appellants N.V., Marga and Saponia or the predecessors in title of Marga and Saponia carried on their entire margarine business in Germany through Margarine Union A.G. or Verkaufs or their predecessors in title. The Appellants N.V. controlled the policies of their German subsidiaries from Rotterdam by means of an organisation in Berlin referred to as the Præsidium, and, although German boards of directors existed, these boards appear to have met solely for the purpose of giving effect to these decisions of policy. P. 18, L. 19. P. 19, Ll. 30–36.

11. On the 1st August 1931 the German subsidiaries of N.V. were indebted to N.V. or its subsidiaries in Holland in a sum of marks equivalent to £7,500,000 sterling. At about this date the German Government of the day began to introduce restrictions and financial legislation which resulted in the conversion of these substantial credit balances into what P. 20, Ll. 29, ff. P. 20, L. 30.

were known as " blocked marks ". This meant that N.V. and their Dutch subsidiaries were no longer in a position freely to obtain repayment from Germany of the loans, which they had advanced to these German subsidiaries for the provision of working capital, or to obtain payment of moneys due from the same subsidiaries for the supply to them of raw materials. Further the amount of Reichsmarks representing the trading profits of the subsidiary companies of N.V. in Germany ceased to be freely transferable by way of dividend to N.V. or N.V.'s subsidiary companies in Holland. Only a small fraction could be so transferred. These Reichsmarks, which did not represent foreign claims on Germany, were classified as " inland marks " and could be used within certain limits for making investments in Germany. Fresh financial restrictions were imposed with the advent of the National Socialist Government of 1933, and by 1936 the accumulated cash and cash investments held by N.V.'s subsidiary companies in Germany had risen to a figure of about 61,000,000 Reichsmarks. This increase took place notwithstanding the deliberate policy pursued by N.V. of directing their German subsidiaries to spend as much as possible of their trading profits in the acquisition of new businesses in Germany.

P. 20, Ll. 48–49.

P. 21, L. 30.

P. 21, L. 26.

12. The existence of these large and accumulating amounts of blocked marks and also of cash and cash investments in Germany led the Appellants to seek ways and means of extracting these blocked marks from Germany. This they were prepared to do at a considerable financial sacrifice, and the means they adopted with the full consent of the German authorities was to order the construction inside Germany at the order of N.V. or one of its associated companies of ships, which were exported and sold to foreign purchasers. The terms imposed upon N.V. and their associated companies by 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 for that purpose into Germany. This involved the expenditure of considerable sums in currencies other than German, which amounted at first to 20 per cent. and later to about 45 per cent. of the building price, but the net result of these transactions was to enable N.V. and its associated companies to extract from Germany a proportion of the blocked mark balances and to convert them into foreign currency.

P. 21, Ll. 10–15 and L. 40.

P. 21, Ll. 40–41.

P. 22, Ll. 1–14.

P. 94, L. 21.

13. The whole process thus described is referred to in the judgment of the learned President as " the extraction process ". The progress of it from the 15th November 1934, when the first shipbuilding contract was placed, to the 15th June 1939 when the last ship was delivered was to some extent set out and analysed in documents submitted by the Claimants during the course of the hearing in response to requests by the Court for further information than that supplied in the original Affidavits. It is submitted that it is clear from the whole description of the process that it was to the advantage of the German Reich as well as of the Appellants that the extraction process should continue, since the terms imposed by the German Government involved in effect the payment by the Appellants of part of the purchase price in foreign currency, whilst on the other hand the Appellants used the " inland marks " mentioned in paragraph 11 above to pay the balance of the purchase price and then by selling the vessels abroad obtained guilders or sterling.

P. 94, L. 21.

Pp. 87, 88 and 89.

P. 22, Ll. 2, ff.
P. 23, L. 10.
P. 22, Ll. 36–39.

14. Prior to the construction of the ship only one allegation of an attempt at duress on the part of the German authorities was made by the Appellants. From the imposition of the original financial restrictions in 1931 N.V. and its Dutch subsidiaries had supplied raw materials for margarine to N.V.'s German subsidiaries for cash only, and not on credit, as had previously been the case, and subsequently, when the German Government became the sole buyer of such materials, they were supplied to the German Government on the same terms. During the course of the year 1935 conversations took place between Mr. Paul Rykens and Mr. Hendriks on behalf of the Appellants and Dr. Hjalmar Schacht, the Minister at all material times responsible for the economic policy of the Reich under the National Socialist regime, at which, as Mr. Rykens deposed, Dr. Schacht " attempted to force " the Appellants to supply raw materials to the German Government on credit terms, and when Mr. Rykens refused to agree, hinted at " adverse consequences ". It is suggested by Mr. Rykens that this hint had reference to a restriction in the quota of raw materials allowed to the German subsidiaries of the Appellants, whose existing quota is described by him as being already below that to which they would have been entitled on the basis on which the allocations to other producers had been calculated. Mr. Rykens further deposed that following the conversation in 1935 a threat was made by the German Food Ministry to impose a further cut in the quota. It is not clear, however, that this threat was ever carried out, and it was in fact resisted. Neither Mr. Rykens nor Mr. Hendriks were persons ordinarily resident within the Reich or in any way subject or subjected to personal duress.

P. 23, Ll. 39, ff. P. 23, Ll. 22–40. P. 23, Ll. 38, ff. P 23 L. 45. P. 24. P. 24, L. 10.

15. In April or May 1935 Dr. Schacht first approached Mr. Hendriks and Mr. Rykens on behalf of the Appellants with a view to persuading them to build a whaling fleet in Germany for operation under the German flag, and Mr. Hendriks reported that Dr. Schacht had informed him that the German Government was " relying upon " N.V. building such a fleet. Both Mr. Rykens and Mr. Hendriks had a number of interviews with Dr. Schacht in Berlin, but the proposal came to nothing at that time. One reason for this was that Norwegian seamen experienced in whaling operations were needed for the successful prosecution of the whaling enterprise and were not then available, as the Norwegian Government were unwilling to allow them to sail under the German flag. At the beginning of 1936 this obstacle had been overcome. At that time Mr. Rykens and Mr. Hendriks learned that similar proposals for the building of whaling fleets had been made by Dr. Schacht to two trade rivals of N.V. in Germany, one named Rau and the other named Henkel, and that they had agreed to build whaling fleets. Dr. Schacht again approached Mr. Hendriks and Mr. Rykens refers to this new approach as follows, viz. : " It became apparent to Mr. Hendriks and myself that, unless N.V. was prepared to participate in the construction of such a whaling fleet on Dr. Schacht's terms, the consequences, such as those I have already indicated, might and probably would be extremely serious. 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." The terms now proposed by Dr. Schacht included the requirements that the fleet could not be transferred from the German flag without the consent of the German Government and that the vessels

P. 24, Ll. 32–48. P. 24, Ll. 39–40. P. 24, Ll. 39–40. P. 25, Ll. 6–12. P. 26, Ll. 18–40. P. 24, L. 48 to P. 25, L. 5. P. 25, Ll. 31, ff.

would 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 from the Reich towards the construction of the
P. 36, L. 13. fleet. This subsidy proved to be 30 per cent. of the costs of construction
P. 39, L. 3. up to a maximum of RM.3,500,000. After consideration, the Appellants decided to accept in principle, and the appropriate representatives of the
P. 25, Ll. 42, ff. Appellants were instructed to make the necessary arrangements with the German Government for a contract.

P. 31, L. 14. 16. On the 7th May 1936 the final discussions took place in Berlin between Mr. Hendriks and one Abraham Everardus Jacob Simon Thomas a Dutch national on behalf of the Appellants and Dr. Wohltat on behalf of the Reich Ministry of Economy. The agreement between these parties
Pp. 33–39 inclusive. was then embodied in an exchange of letters dated respectively the 8th May, 19th May and 20th May 1936. These arrangements contained, amongst others, the following provisions :—

P. 33, L. 35. (1) The Appellants should cause to be built a whaling fleet consisting of a floating factory (the ship " Unitas ") of 29,000 tons
P. 59, L. 12 and P. 42, L. 14. deadweight, and eight catchers (subsequently one scoutcatcher and seven whalecatchers known as the Unitas (1), (2), (3), (4), (5), (6), (7) and (8) respectively) at a total price of approximately R.M.13,000,000. The factory should be built for the Appellants' German subsidiary Verkaufs by the Deutsche Schiff und Maschinenbau A.G. of Bremen, and the catchers by the Bremer Vulkan Schiffbau und Maschinenfabrik.

P. 36, L. 12. (2) The building was to attract from the Reich Government a subsidy of 30 per cent. of the building cost with a maximum of R.M.3,500,000 calculated on the same principles as those employed in calculating the subsidy given to Herr Rau in his similar project.

P. 34, L. 8. (3) The Appellants were to advance the foreign currency
P. 36, L. 22. required for the purchase of items supplied from abroad, estimated at £7,000 sterling, on condition that they were allowed to recoup
P. 34, L. 14. themselves these advances plus a fair rate of interest by deliveries of whale oil from the first whaling season at fair market prices. The Appellants also expressed their willingness on similar terms and out of their own resources to finance such of the costs of the whaling expeditions as would have to be paid in foreign currencies.

P. 34, L. 23. (4) The Appellants further expressed their willingness to enter into an agreement for the operation of the fleet when built with a working company at a charter price of a quantity of whale oil (estimated at 7,000 tons per annum) which would subsequently be sold to the German Government at the ruling world price converted into Reichsmarks. The balance of the whale oil to be extracted was equally to be sold to the German Government by the working company on similar terms.

P. 34, L. 47. (5) The agreement was subject to the condition that the Appellants should have treatment not less favourable than that

accorded to Messrs. Henkel and Rau and that the German Government would permit the signing of the necessary Norwegian crews.

(6) 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. P. 39, L. 45.

17. Such was the agreement which was contended by the Respondents to have been entered into under duress. It is submitted that this agreement not only averted disadvantages and losses to which the Appellants might otherwise have been subjected but also in fact provided substantial advantages for the Appellants. In the course of his judgment the learned President said: "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 . . . 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 was admittedly of 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." The President held that the project to build the whaling fleet could not be considered in isolation, and that the decision to accept the proposals of the German Government must have been closely connected with the Appellants' desire to continue the "extraction process". He held it to be a reasonable inference that the interruption of the extraction process early in 1936 would have been a step adverse to the interests of N.V., and later in his judgment he said: "I do not hesitate, therefore, to draw the inference that early in 1936 the advantage of continuing the 'extraction process' without interuption 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." P. 101, Ll. 42, ff. P. 102, L. 32. P. 103, L. 4. P. 97–Ll. 8–18. P. 103, Ll. 1–5.

18. It had been provided by the agreement between the Appellants and the German Government that the orders for ships should be placed without delay so that the fleet could proceed to the Antarctic for the whaling season in the Autumn of 1937, and in fact on the 27th May 1936 written orders were placed by Verkaufs with the Deutsche Schiff und Maschinenbau Aktien Gesellschaft and with Bremer Wulkan Schiffbau und Mashinenfabrik for the construction of the ship "Unitas" and of seven whalecatchers respectively "Unitas 2–8". A scoutcatcher, named "Unitas 1", was ordered on the 17th November 1936. A further whalecatcher was purchased in the Autumn of 1938 and named "Unitas 9", and in 1939 a further whalecatcher was ordered and named "Unitas 10". P. 39, Ll. 37–40. P. 40. Pp. 42–49. P. 59, L. 12. P. 69, Ll. 9–11. P. 31, L. 46. P. 50.

P. 54. The net cost of the ship, of the " Unitas 8 ", and of the " Unitas 10 " amounted to RM.7,472,351.35, R.M.361,365.48 and R.M.711,186.81 respectively.

P. 32, L. 21. 19. The ship was finished and delivered to Verkaufs on the
P. 32, L. 23. 23rd September 1937, and on the same day an agreement was signed
Pp. 55, ff. between Verkaufs and other German margarine interests for the formation of the proposed operating Company. That Company was called the " Unitas " Deutsche Walfang G.m.b.H. and was formed at first with a
P. 32, L. 31. capital of R.M.1,000,000, of which R.M.486,400 were subscribed by Verkaufs. Subsequently a further R.M.4,000,000 were subscribed by
P. 32, L. 35. the same interests of which the same proportion was furnished by Verkaufs.

P. 32, L. 40. 20. The ship was delivered by Verkaufs to the new company as
P. 32, L. 42. soon as Verkaufs received delivery from the builders. On the 10th October 1937 seven whalecatchers and the scoutcatcher (" Unitas 1 ") were
Pp. 59–68. delivered. On the 24th February 1938 a bare boat charter-party with retrospective effect as from the 23rd September 1937 was entered into between Verkaufs and the operating Company with regard to the ship and the whole auxiliary fleet of seven whalecatchers (" Unitas 2–8 ") and one scoutcatcher (" Unitas 1 "). A similar document relating to
P. 69. " Unitas 9 " was entered into on the 10th July 1939. " Unitas 10 " was
P. 33, L. 11. never similarly chartered because her construction was not completed until after the outbreak of war in 1939.

P. 102, L. 5. 21. There was no evidence as to whether or not the fleet actually operated in the Antarctic during the season 1937/1938, but it presumably did so during the season 1938/1939.

22. On the 3rd September 1939 a state of war was declared between Great Britain and Germany.

P. 19, L. 1. 23. On the 4th September 1939 all directors of NV. who were nationals of or resident in belligerent states resigned from the board of N.V., but there was no evidence that during the period of Dutch neutrality the board of N.V. did anything to disassociate themselves from the business of their German subsidiaries, or to make any attempt to prevent the ship or her fleet of auxiliaries from being engaged in German commerce or from being
P. 64, L. 12. used as German ships subject to the order of the German Government. Article 10 of the charterparty gave Verkaufs the right to demand that the vessels should be used in a way which precluded any war risk affecting the vessel, but there is no evidence that it was ever invoked by or on behalf
P. 18, L. 42. of any of the Appellants. In May 1940 Holland was invaded by Germany
Pp. 28, 29. and thereafter occupied by German forces until 1945 and on the 23rd June
P. 18, Ll. 40–48. 1941 and the 5th July 1941 respectively orders were made placing the business of N.V. under the control of a Reich Commissioner. It was conceded that during the period of office of the Commissioner and until the expulsion from Holland of the Germans in 1945 the board of N.V. was
Pp. 72–80. not in a position to control the business of the Company. In fact during the whole period of the war the ship and her auxiliaries appear to have
P. 104, L. 15. been treated as German vessels, and so remained until the seizure of the
Pp. 81–86, inclusive. vessels by the British authorities. By a series of letters beginning on

the 26th October 1943 the interest of Lever Brothers and Unilever Limited and of their associated Company N.V. in the ship was brought to the notice of the Ministry of War Transport but no admission or undertaking was given in reply.

24. In these circumstances the Appellants contended :—

(1) That the Prize Court will look at real, not merely nominal, ownership, and that through the mediation of subsidiary companies the Appellants were at all material times the real owners of the ship.

(2) That the criterion of the flag or registration of a ship was not conclusive of its nationality.

(3) That the construction of the ship and that the registration of the ship under the German flag was in fact undertaken as the result of duress of the German Government.

(4) That there was nothing which the Appellants could reasonably do either before or after the outbreak of war to dissociate themselves from or to discontinue the business activities of their German subsidiaries or to control the use of the ship and that Prize law does not compel the doing of the impossible.

(5) That the neutral or friendly character of the ship had been communicated to the Crown by the correspondence with the Ministry of War Transport.

25. On the other hand it was contended on behalf of the Respondent :—

(1) That the ship was registered in a German port and was entitled to fly and at all material times flew the German flag and was a ship of German nationality and that this fact was conclusive in favour of the captors.

(2) That the sole legal owners of the ship were Verkaufs a limited liability company registered in Germany under German law, that the ship was therefore liable to condemnation, and that this fact could not be displaced in a Prize Court by proof that the Appellants, being Dutch companies, held the shares in the other German companies which at different times held all the shares in Verkaufs, and further that the Appellants, not being the legal owners of the ship " Unitas ", were not entitled to claim.

(3) That, apart from questions as to the flag and the ownership of the ship, the Appellants at all material times were carrying on a business through Verkaufs in an enemy country, and that they had acquired for the purposes of Prize law an enemy commercial domicile and were to be regarded as enemies so far as regards the assets of Verkaufs which included the ship and that the Appellants had done nothing to discontinue or dissociate themselves from the said enemy house of trade whether before or after the outbreak of hostilities.

(4) That even if such evidence were relevant or admissible there was no evidence upon which the Court could find that the ship had been constructed or registered in the name of Verkaufs or chartered to the Unitas Company as a result of anything amounting in law to duress.

P. 91, ff. 26. The learned President decided all these points in favour of the Respondent. He decided :—

P. 92, L. 38. (1) That the facts related to the ownership and flag of the ship amounted to " probable cause " sufficient to disentitle the Appellants in any event to damages or costs.

P. 92, L. 43. (2) That once " probable cause " had been established the burden of proof lay upon the Appellants as Claimants.

P. 102, L. 28. P. 103, L. 5. P. 105, L. 16. (3) That the construction and registration under the German flag of the ship were not in fact undertaken by the Appellants under duress of the German Government, and that in any event duress of goods would not be a sufficient ground to entitle the Appellants to ask the Court to disregard their own act in authorising the construction for Verkaufs and the registration under the German flag of the ship.

P. 100, L. 4. P. 103, L. 48. (4) That in any event the flag was decisive of the ship's enemy character.

P. 104, Ll. 27, ff. (5) That it was not possible for the Claimants in Prize to avail themselves of the principle of the *Daimler* case, being the principle there formulated by Lord Parker with the concurrence of Viscount Mersey and Lords Kinnear and Sumner (*Daimler Company, Ltd.* v. *Continental Tyre and Rubber Company (Great Britain), Ltd.* [1916] 2 A.C. 307).

P. 105, L. 48. (6) That by carrying on business through Verkaufs and by doing nothing to dissociate themselves from Verkaufs the Appellants had acquired an enemy commercial domicile.

27. The Respondents therefore submit that this appeal be dismissed with costs for the following amongst other

REASONS

(1) BECAUSE by reason of her German flag and registration the ship is liable to condemnation.

(2) BECAUSE the legal ownership of the ship was not vested in the Appellants and they cannot succeed in a claim that the ship should be released to them.

(3) BECAUSE the enemy character of the ship and of Verkaufs, the company owning the ship, cannot be nullified or affected in a Prize Court by taking into account the national character of another company interested at second or third remove in the shares of the company owning the ship and the Appellants are not entitled to succeed by the application of the above-mentioned principle in the *Daimler* case.

(4) BECAUSE the Appellants had acquired and had in no way dispossessed themselves of an enemy commercial domicile or house of trade as regards the ship.

(5) BECAUSE, assuming that evidence of duress would be relevant, there was no evidence of duress exercised by the German Government in respect of the construction registration or employment of the ship or none that would suffice to defeat the claim of the captors.

(6) BECAUSE the Appellants have not discharged the burden of proof which lay upon them.

(7) BECAUSE the judgment of the learned President was right.

10 C. T. LE QUESNE.

QUINTIN McGAREL HOGG.

No. 2 of 1949.

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ON APPEAL

from the High Court of Justice, Probate, Divorce and Admiralty Division (in Prize).

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HIS MAJESTY'S PROCURATOR GENERAL

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