

The Karadeniz

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Judge : Norman Macleod, Kt., C.J.

Appeal No. : Case No. 3 of 1915

Appellant : The Karadeniz

Judgement :

Norman Macleod, C.J.

1. On the 11th March 1915, I delivered a preliminary judgment in the matter of the SS. Karadeniz. I was then of opinion that I was bound by an Order in Council of the 20th August 1914 to consider the Declaration of London as governing this case, that under Art. 67 of the Declaration the neutral or enemy character of a vessel is determined by the flag she is entitled to fly, and that before the capture the Persian Government had recognised this vessel's right to fly the Persian Flag. That therefore the vessel could not be condemned as lawful prize unless I was satisfied that in spite of the apparent validity of the transfer of the vessel to the claimant, the control of the vessel remained in the hand of the Turkish vendors. On the evidence there was considerable justification for my holding that there was an arrangement between the claimant and the vendors that the latter should retain the control of the vessel and use the transfer as a means of getting her to the

nearest Turkish port under the Persian Flag, but the claimant asked to be allowed to produce further evidence regarding the bona fides of the transfer, so I directed the cause to stand over' for further proof. Some further evidence has now been taken in England on Commission but owing to the continuance of hostilities the claimant has been unable to procure the evidence he wanted from Constantinople. However, owing to a recent decision of the Privy Council the Government have asked me to set down the cause for further argument and I have heard the arguments of counsel on the question whether the vessel should not be condemned as lawful prize on the ground that the commercial domicile of the claimant at the time of the capture was Turkish. Their Lordships of the Privy Council held in *The Zamora* (1916) 2 A.C. 27 that while the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be.

2. Then, in *The Proton* (1918) A.G. 578. the question arose whether Art. 57 of the Declaration of London which it was declared by the Declaration of London Order in Council No. 2 of 1914 should be adopted and put in force, prescribed the law to be administered by a Court of Prize- or directed that the rights of the Crown were to be mitigated in favour of a neutral or of the enemy. The judgment says:

In their Lordships' opinion the former is the effect of the article. It declares that a Court of Prize shall determine the character of a vessel alleged to be of enemy character by one single circumstance, the character of the flag which she is entitled to fly, and not by the entire body of relevant circumstances, which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence....The terms of this article are little adapted to a waiver of His Majesty's rights in favour of others : they clearly purport to prescribe the law on a topic which has been the subject of many decisions.

3. In my previous judgment I said :

But for the change effected by Article 57 there would have been no difficulty in deciding this case. According to the authorities the claimant at the outbreak of

hostilities for the purposes of Prize Law would be considered a Turkish subject by reason of his mercantile domicile unless within a reasonable time he transferred himself and his property to another country: See *The Ariel* (1867) 2 EPC 600. But this he had no intention of doing. It was by mere chance that he was at Piraeus when the war broke out and in his evidence he said that he intended to go back as soon as the Dardanelles were open to look after his business. It was immaterial to him whether war was going on or not.

4. I have now been asked by counsel for the claimant to reconsider the opinion I then expressed regarding the commercial domicile of the claimant, when the question was one of mere academic interest, while counsel for Government contend that on the authority of *The Proton* it is clear that the vessel must be condemned unless I can come to a different conclusion. I am not prepared to say now that the question is so free from difficulty as I thought it was when I delivered my first judgment.

5. However it has been argued for the claimant that I definitely decided that I was bound by the Order in Council and that it is not open to me to reconsider the case in the light of the judgment of the Privy Council in *The Proton*. I think I am entitled, before final judgment is given, either condemning or releasing the vessel, to reconsider any opinion I have previously expressed.

6. The Hague Convention does not apply to this case as it was not ratified by Turkey. If then I can find that the *Karadeniz* bore an enemy character she must be condemned. I shall now consider the authorities on that point.

If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character and a subject of the enemy's country, in regard to his commercial transaction, connected with that establishment Kent's *International Law*, p.217.

7. In *The Indian Chief* (1801) 3 Rob. 12, 20 it was laid down by Sir William Scott that for all commercial purposes the domicile of the party without reference to the place of birth becomes the test of national character. The character that is gained by residence ceases by non-residence and is an adventitious one, no longer

adhering to the subject of it from the moment he puts himself in motion to quit the country sine animo revertendi.

8. Therefore Kent says that the most important test is the animus manendi.

9. In *The Gerasimo* (1857) 11 Moor. P.C. 88, it was laid down that:

The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country.

10. The property of a person not resident in enemy territory may acquire a hostile character.

11. In *The Jonge Klassina* (1804) 5 Rob. 297 a claim was made by a Mr. Ravie describing himself as Ravie of Birmingham to certain goods coming to be imported from Holland¹ under the authority of a licence. Ravie had been to Amsterdam in connection with the export of the goods and the Court ordered their confiscation on the ground that it appeared from the evidence that Ravie had been as substantially employed in the trade of Amsterdam as any other mercantile firm of that place.

12. In *The Ann* (1813) 1 Dod. 221 the ship under American colours was seized in the river Thames on the 1st August 1812. A claim was made by the master who was also sole owner of the ship describing himself to be a British subject and as such entitled to the benefit of an Order in Council of November 1812 directing the restitution of British ships under the American Flag. The claimant said he was born in Falkirk in Scotland, that during the last seven years he had been chiefly at sea but when at home he had lived and still lived at Bathgate in the Shire of Linlithgow, where his wife and family were, that he was a British subject but that about sixteen years ago he had been admitted a citizen of the United States of America for the purpose of commerce only. The Court said: 'Why, this transaction is for the purpose of commerce: According to his own account, then, he ceased to be a British subject for commercial purposes.' Nor did the mere circumstance of leaving

his wife and family in Scotland avail him for the purpose of retaining the benefit of his national character.

13. In the leading American case of *The Venus*, *Rae Master* (1814) 8 Cranch 253 the decisions of the English Courts on the subject of national character acquired by residence and on the consequences of such acquired character were recognised as being founded on sound principles of public law.

As a consequence of the doctrine of domicil, the Court decided (by a majority) that if a citizen of the United States should establish his commercial domicil in a foreign country, and hostilities should afterwards break out between that country and the United States, his property, shipped before knowledge of the war, and while that domicil continued, would be liable to capture, on the ground, that his permanent residence had stamped him with the national character of that country_The doctrine of enemy's property, arising from a domicil in an enemy's country, is taken strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty Kent's International Law, p. 223.

14. In *The Eumaus* (1915) 1 Br. & Col. P.C. 605; 32 T.L.R. 125 decided in November 1915, Sir Samuel Evans said that Professor Dicey's definition of commercial domicil' as such residence in a country for the purpose of trading as makes a person's trade or business contribute to or form part of the resources of such country and renders it therefore reasonable that the hostile, friendly or neutral character should be determined by reference to the character of such country was sufficiently clear and accurate for practical purposes.

15. It must be noted however that, a person who has an interest in a house of trade in one country although not resident there is sometimes said to have a commercial domicil in that country and a personal domicil in the country in which he resides. See *The Anglo-Mexican* (1918) A.C. 422, :

Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He

acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character.

16. From the opinion of the majority in *The Venus*, Marshall O. J. dissented, contending that a commercial domicile wholly acquired in time of peace ceases at the commencement of hostilities, that the presumption of an intention to return to the native country at the first opportunity is to be entertained and that this presumption ought to shield the property from condemnation until delay or circumstances destroy that presumption. If then property of a neutral with a commercial domicile in belligerent territory is liable to capture although shipped before the outbreak of war it would follow that a ship belonging to such a neutral if captured at sea or in port on the outbreak of war would be liable to be treated as an enemy ship although the owner may have had no opportunity of absolutely relinquishing his commercial domicile.

17. I have searched through some hundreds of decisions of the Prize Courts of the Allies during this war in the hopes of finding a case the facts of which were in any way approximate to the facts in this case, but without success. *The Venus*, *Rae Master* (1814) 8 Cra 253 was referred to by Sir Samuel Evans in the case of *The Manningtry* (1916) P. 329 decided in October 1915. Certain goods had been shipped before the outbreak of war by a partnership of four members, three of whom were in the position of British subjects and the fourth was a German subject. The place of business was in Germany. The President said:

The question to be determined would be what the position was in the circumstances of this case with regard to the right of capture or seizure of the goods at sea, after the commencement of hostilities. If a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of war, and resided there, he would, according to international law, have a commercial domicile there, and his goods would be subject to capture at sea after hostilities, although shipped before the war....(*The Venus*, 8 Cranch 253). Apart from a commercial domicile by residence, the property of a person may acquire a hostile character, independently

of his national character or his personal residence. 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 : Pratt's Edn. of Story, p. 60; and the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize : Wheaton, Inter. Law, 4th Edn. (1904), Section 334. The rule is succinctly stated by Story J. in 'The Friendschaft', 4 Wheaton at p. 107. ' It has been long since decided in the Courts of Admiralty, that the property of a house of trade established in the enemy's country, is condemnable, as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company '. But it seems also to be settled that in such cases confiscation will not take place at the commencement of war, if the trade has been carried on during peace, unless the person affected continues his connection with the trade after the war: Pratt's Ed. of Story, p. 61....The Vigilantia, 1 C. Rob. 515. It is not easy to see why, in the case of a partner in a hostile house of trade, time should be given to sever connection after war before confiscation by capture at sea is permitted, when no such opportunity is given to a person having a commercial domicil 'by residence in hostile territory. But I accept the law as it stands.

18. In his dissenting judgment in *The Venus*, Rae Master Marshall C. J. discussed how a commercial domicil might be terminated. He said :-

If a British subject, residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country,

and again,

An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicil.

19. In *The Manningtry* (1916) P. 329 the President decided that the British partners had not taken immediate steps, as their duty was, at the outbreak of war

to divert the goods from reaching Germany and condemned their shares. If they had been neutral the case would have been different.

The question turns upon the stage at which in the case of a pre-war shipment a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation...One test would be whether the neutral partner has done anything actively after the commencement of hostilities to further or facilitate the delivery of the goods to the enemy house...If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary course. I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State *The Anglo-Mexican* (1916) P. 112.

20. It would also seem that in the President's opinion a British subject carrying on a business in Germany but not resident there would be allowed an opportunity to sever his connection as he cites with approval a passage from Calvo, Vol. IV, Section 1937, p. 70 :

According to these principles, if a merchant domiciled in a neutral country does not take at the commencement of the war immediate measures for withdrawing his goods from a commerce which has no longer a neutral character and to which he could legitimately attend in time of peace in the country of a belligerent, he cannot guarantee his goods from capture and from hostile confiscation by alleging that personally he resides in a neutral country.

21. In these days there would no doubt be difficulties placed in the way of withdrawing property, but I presume from this passage that if a British or a neutral subject engaged in trade in Germany at the outbreak of the war in August 1914, but not resident there, had goods at sea belonging to that trade, they would not be liable to capture and confiscation, provided the owner had taken such immediate steps as were open to him to divert the goods from that trade.

22. These questions were discussed by Judge Cator in the case of *The Lutzow* (No. 4)(1916) 2 Br. & Col. P.C. 122, 129, 134 before the Egyptian Prize Court in March 1916.

23. The *Lutzow* was a German ship which was captured and condemned as prize. A claim was made to certain goods on board her by the American Trading Company which had a branch in Hamburg. The goods had been bought by the Hamburg branch and had been shipped for transmission to another branch at Kobe. It was held that at the time of the capture the ownership was in the Hamburg branch and the goods were therefore to be treated as prima facie belonging to an enemy. The learned Judge criticised adversely the law as laid down by the majority of the Court in *The Venus, Rae Master*. He referred to *The Ocean* (1804) 5 C. Rob, 90 in which a British subject settled as a partner in a house of trade in Holland had made arrangements for dissolution but was only prevented from removing personally by the violent detention of all British subjects who happened to be within enemy territories at the breaking out of war. Sir William Scott said :-

It would, I think, under these circumstances, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in France, so, as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal.

24. Judge Cator remarks: 'This...was the case of a partnership, but Sir William Scott makes no point of that fact'. Again *The Venus* 'declares that the supposed right of election on the outbreak of war does not exist'. 'This doctrine', it says, 'is believed to be as unfounded in reason and justice as it is in law'. But the learned Judge declined to consider the decision in *The Venus* good law. He concludes:

No one can wish to inflict needless hardship on British subjects or on neutrals, and if on the outbreak of war a non-enemy, be he neutral or British, resident or non-resident, promptly closes his business and merely takes the steps necessary to remove his own-property from the enemy country, I think he is entitled to do so.

25. The learned Judge further expressed the opinion that Sir Samuel Evans in *The Manningtry* had not approved of the decision in *The Venus*, but from the passage which I have underlined above, it would appear that the President felt himself bound to accept the decision although he thought that there was a good deal to be said in favour of the dissenting judgment.

26. In May 1915 the Prize Court at Malta had to deal with the claim of one S. Hovaghimain to certain goods forming part of the cargo of the SS. *Erymanthos*, a German steamer, which was captured and condemned as prize. The claimant was an Egyptian subject and a sleeping partner in a firm at Alexandria, but he was domiciled and carried on business in Constantinople. On the outbreak of war he left Constantinople and came to reside in a neutral country. The Court expressed the opinion that he was not to be treated as an enemy subject. The facts of the case are not very fully set out on the record, but if, as it seems, the goods were consigned to the claimant at Alexandria, the Court may have considered that they did not belong to the trade carried on in enemy territory.

27. The decision of Judge Cator was reversed on appeal by the Privy Council (*The Lutzow* (1918) A.C. 435) on the ground that the goods had been ordered by and belonged to the Japanese branch. Their Lordships said at p. 441:

On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her Allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if for the purpose of doing so they removed from Germany by sea any property they then had in Germany it would during its transit for that purpose be free from seizure and condemnation as enemy property.

28. In *The Anglo-Mexican* (1918) A.C. 422 a claim was made by a naturalised American who had a one-fifth share in a German partnership. Their Lordships said at p. 425:

An acquired domicile may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicile in the country of the enemy, the goods will prima facie be treated

as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicile. This point was discussed in *The Venus*. In that case the majority of the Judges of the Supreme Court of the United States decided against allowing any interval for election....The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany.

29. Their Lordships also said :

If (a neutral not resident), having such a commercial domicile in a country which by the outbreak of war becomes an enemy country, desires to avoid the consequences entailed by such domicile, he may avail himself of the interval allowed by law to discontinue or dissociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation taking place after the capture, or will even adjourn proceedings in the Prize Court to give an opportunity for such discontinuance or dissociation.

30. There are therefore four classes of neutrals who may be engaged in trade in enemy territory on the outbreak of war.

31. 1. Resident; 2. Non-resident; 3. Resident and partners with enemy subjects; and 4. Non-resident and partners with enemy subjects.

32. The property of class 1 would be liable to capture at sea and confiscation on the outbreak of war if the decision in *The Venus* must be followed, but the decision of the Privy Council in *The Gerasimo* seems to lay down the opposite view and allow such a neutral a right of election. The property of class 2 would not be liable provided the claimant took immediate steps on the outbreak of war to prevent it reaching enemy territory.

33. In classes 3 and 4 there seems to be a distinction according as the claimant is a subject of the other belligerent country or of a neutral country.
34. In the case of the former a British subject at any rate is bound to take immediate steps to divert the goods from reaching enemy territory.
35. In the case of the latter, if in class 4, he is only bound to refrain from taking any active steps to enable the goods to reach enemy territory. If in class 3 I presume his duty would be the same though I have not found any decision on the point.
36. Now the present claimant as regards the Karadeniz which was his own private property clearly comes within class 1 unless the fact that he was by accident temporarily residing in Greece at the outbreak of war can bring him within class 2. Such a question as far as my researches have gone has not been discussed before. It seems to me just possible that a Court of Prize guided by principles of equity might decide in favour of such a claimant, even if it held that he came within class 1, provided he took immediate steps to announce his intention of abandoning his enemy domicil and to prevent the goods from reaching enemy territory.
37. It cannot be disputed that on the outbreak of war with Turkey the claimant's commercial domicil was Turkish. He was born in Constantinople, he had always resided and carried on business there. About 1912 he became a Persian subject in order to free his children from the obligation to serve in the Turkish army, but that made no difference to the way in which his business was conducted. He left Constantinople on the 21st October for Piraeus because he had heard that one of his ships had been damaged there in a collision, but up to the 5th November he had disclosed no intention of giving up his business in Constantinople. When war broke out he sent a man to Constantinople to remove his wife and family as he was afraid for their safety because they were Greeks, and they arrived at Piraeus about the 13th or 14th November, but that by itself would not constitute a step towards getting rid of his commercial domicil in Turkey. See The Ann.
38. He said in examination-in-chief that he did not intend to go back to Constantinople as long as the present Government was in power. In cruse-

examination he said: 'I object to the Young Turks' Government. I shall go back as soon as the Dardanelles are opened. It is immaterial to me whether war is going on or not. I want to go to' look after my business.' It was suggested that as the evidence was given on the 23rd February, two or three days after the Allied Naval Forces had commenced an attack on the Dardanelles, that the claimant was referring to the possibility of the forcing of the Straits and the capture of Constantinople by the Allies, but I do not think the claimant can be considered as meaning anything more than that he wanted to get back to Constantinople as soon as he could. Then in re-examination he said : ' If I got to Constantinople I would try and get my ships to Piraeus. I have some immoveable property and some cash there (Constantinople). I don't want to trade there while war continues.'

39. The claimant had a partner called Bachrato, a Turkish subject, in Constantinople, who was looking after the agency business with reference to the other steamers in which the claimant had an interest, and if the Karadeniz had not been seized in Bombay there is no certainty that the claimant would not have returned to Constantinople, or, if he had elected to remain at Piraeus, that he would not have continued to direct the business at Constantinople from there.

40. The difficulty of the case lies in the fact that it may be said that he came within class 2 above, and that he had no opportunity after the declaration of war, when he happened to be in Greece, of making his election to retain or renounce his commercial domicil. It may well be that finding himself outside Turkey, and recognising the impossibility of removing his property from Turkish jurisdiction, he might have decided on carrying on such business as he could with the ships under his control outside Turkish limits, and it might therefore be conceded that thus he would have done everything in his power which the Law of Nations required, to give up his commercial domicil in Turkey so as to render immune from capture property connected with a business carried on without the limits of Turkish territory. What importance is to be attached to his answers in re-examination His objection to the Turkish Government must have been one of very recent growth as he had made no attempt to remove himself from subjection to it before November 1914. In an unguarded moment he said in cross-examination he wanted to go back to look after his business, not to remove it, it did not matter to him whether a

war was going on or not. Then he saw his mistake and said that if he got to Constantinople he would try and get his ships to Piraeus. Against that there was the undeniable anxiety of the claimant as soon as he had bought the ship to get her out of Bombay to Busrah, a Turkish Port. On the 16th and 19th November he got telegrams dispatched from Piraeus inquiring whether the ship had left for Busrah Is that consistent with an intention after the outbreak of war to remove his property as far as possible from Turkish Territory? Does it not rather point to the fact that his after-expressed intention was influenced by the ship not having been able to proceed to Busrah and having been captured in Bombay Is there anything to lead me to suppose that if the ship had got to Buerah the claimant would have done anything to get rid of his commercial domicil in Turkey Can it be said that the claimant was *sine animo revertendi* On the best consideration that I can give to these questions I have come to the conclusion that on the outbreak of war the claimant had his commercial domicil in Turkey, and that at the time of the capture and for many months after he had no intention of removing that domicil to a neutral country. Nothing is said in the claimant's petition of the 15th January 1915 regarding any such intention. The only evidence now is the claimant's statement made before me at a time when it was clearly influenced by the events which had happened and made in contradiction to his evidence already given. Therefore even if the claimant can be considered as belonging to class 2 he has not proved what it was necessary for him to prove in order to save the ship.

41. If *The Venus* is not to be followed, and no distinction can be drawn between classes 1 and 2, both having a right to elect, the result will be the same.

42. If the claimant on the outbreak of war had directed that the ship should remain in Bombay and had announced that he dissociated himself entirely from his business in Turkey, leaving the question of his being able to remove his property from Turkish territory to depend on the attitude of the Turkish Government, I do not think it would have been according to the law administered by Prize Courts to condemn the ship. But the claimant did absolutely nothing towards abandoning or denouncing his Turkish domicil. He does not come within the scope of the judgment of Marshall C. J. in *The Venus* when he said 'there must be an immediate discontinuance of trade and arrangements for removing followed by

actual removal within a reasonable time'.

43. Therefore, in my opinion, on the best consideration I can give to this very difficult case the ship must be condemned as lawful Prize. This decision whether reversed or upheld on appeal still leaves open the question whether the transfer to the claimant was made in good faith.

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