

ADMIRALTY AND VICE-ADMIRALTY
JURISDICTION.
IN PRIZE.

*Before Sir Norman Macleod, Kt., Chief Justice.**

THE S. S. "KARADENIZ", SOCRATES ATYCHIDES, CLAIMANT.*

1919.

June 9.

Prize Court—Seizure of ship as prize—Claimant, a Persian subject—Commercial domicile of the claimant in enemy territory—Claimant failing to establish intention of removing domicile to a neutral country—Declaration of London, Article 57, effect of—Condemnation of ship as lawful prize.

On the 5th November 1914, war was declared between Great Britain and Turkey. On the 13th November 1914, the SS. *Karadeniz*, then lying in Bombay Harbour, was captured as an enemy vessel under Government Orders. On the 19th November 1914, the ship's papers were lodged in Court with the usual affidavit. On the 21st November 1914, the writ was issued against the ship and the goods laden therein for the condemnation thereof as lawful prize. On the 15th January 1915, the claimant filed his claim to the ship. His petition in support of his claim alleged that he was a Persian subject and had purchased the ship on the 15th August 1914 from a Turkish Company, at Constantinople where he resided and carried on business, that the sale had been completed the same day, that the ship on its arrival in Bombay on the 19th August 1914 was not permitted to leave the Port by the Port Officer at Bombay and that at the time of its capture or at any other times material to the matter in cause, no subject of the Turkish Government or enemy of Great Britain had any share, right, title or interest in the said ship. He prayed for the restitution of the ship and damages for her detention.

Held, that the ship must be condemned as lawful prize, inasmuch as on the outbreak of war the claimant had his commercial domicile in Turkey, and that at the time of the capture and for months after he had no intention of removing that domicile to a neutral country and preventing the ship from reaching enemy territory.

Decisions of the English and American Prize Courts referred to. Effect of Article 57 of the Declaration of London considered in view of the decisions in *The Zamora*⁽¹⁾ and *The Proton*⁽²⁾.

PRIZE Court proceedings.

The claimant Socrates Atychides was a Greek born in Constantinople where he resided and carried on

* Case No. 3 of 1914.

(1) [1916] 2 A. C. 77.

(2) [1918] A. C. 578.

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business for a number of years. In 1912, he became a naturalised subject of the Shah of Persia in order to free himself and his children from the obligation to serve in the Turkish Army, continuing, however, to conduct his business in Constantinople which was his commercial domicile.

On the 15th August 1914, the claimant purchased from Seir Safani & Co., a Turkish Steamship Company at Constantinople, the ship *Karadeniz* for £15,000. The purchase was completed the same day according to the law of the land at Constantinople and the document evidencing the sale was filed by the claimant with the Consul General for Persia who on the same day issued his certificate evidencing the said sale. Immediately after the purchase the claimant changed the name of the ship to that of "*Hamadan*."

On the day of the sale the vendors Seir Safani & Co. informed the claimant that the ship was lying at anchor at Hodeida in the Red Sea and that telegraphic instructions were being transmitted by them to the captain of the ship informing him of the sale and asking him to wait for his papers and further instructions. The Persian Consul General at Constantinople telegraphed in the same terms to the Persian Consal at Hodeida. Thereafter the claimant was making arrangements to recruit a fresh crew to be sent to Hodeida for the purpose of replacing the old crew and to proceed to Bussarah in the Persian Gulf where the ship was chartered by the Turkish Government to be loaded with grain which was to be carried to Constantinople. On the 19th August 1914, the claimant was informed by Seir Safani & Co. that they had received a telegram from their Hodeida agent that the *Karadeniz* was at the date of the sale on the high seas between Hodeida and Bombay.

The *Karadeniz* on arriving at Bombay was not permitted to leave the Port of Bombay by the Port Officer

in the months of September and October 1914. The claimant on receiving communication by wire from the captain of the ship approached the Persian Consul General at Constantinople on the subject, and the latter communicated with the British Ambassador at Constantinople and forwarded the original Bill of sale to the British Embassy proving the fact of such sale.

On the 25th September 1914, the Persian Consul at Bombay gave his certificate to the Master of the ship saying that the ship was under the Persian Flag. On the 26th September, the Port Officer wrote to the Master of the ship saying until he saw the ship's register "no change of name or nationality can occur nor be recognised." On the 6th October 1914 the Master of the ship wrote a letter to the Port Officer informing him that he would sail on the 8th October at 4 p.m. and requesting the Port Officer to send a pilot. The Port Officer refused to grant the Port Clearance and the ship thereafter remained in Bombay under compulsion.

Subsequently, the Persian Consul at Bombay despatched a communication to the Master of the ship in the following terms: "This is to certify that the Port Officer of Bombay will not permit *SS. Hamadan* formerly known as *Karadeniz* to depart from the Bombay Harbour without producing his register. He will have no objection to recognising the steamer as being under the Persian Flag after I have endorsed that fact on the register. The ship is detained in Bombay because she has come here without the register and the captain is in no way to blame for the detention."

On the 5th November 1914, war broke out between Great Britain and Turkey and on the 13th November 1914 the *SS. Karadeniz* which was lying in detention in the Port of Bombay was seized and captured as a prize of war under Government Orders. The Persian Flag was removed and the Union Jack hoisted instead.

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At the time of capture there were no contraband goods on board the *Karadeniz* and no subject of the Turkish Government or enemy of Great Britain had any share, right, title, or interest in her.

The claimant submitted in his petition that there was no just ground for the capture and detention of the ship and that he had suffered damages to the extent of Rs. 1,40,500 by reason of the detention of the ship since September 1914.

The claimant accordingly prayed for a decree for restitution of the ship, and Rs. 1,40,500 by way of damages, and costs.

The Solicitor to Government in answer to the petition denied that there was any valid transfer of the ship to the claimant before the outbreak of hostilities and justified the detention and capture of the ship, relying solely upon the joint affidavit of the Port Officer at Bombay and the Officer who captured the ship. The said affidavit was made soon after the capture of the ship and ran as follows :—

“ We, St. Leger Stanley Warden of Bombay, European inhabitant, residing at Marine Lines, Bombay, Commander in His Majesty's Royal Indian Marine and Port Officer at Bombay, and Norman Underhill of Bombay, European inhabitant, Lieutenant in His Majesty's Royal Garrison Artillery, make oath and say as follows :—

I, St. Leger Stanley Warden for myself say :—

1. The above named steamship '*Karadeniz*' arrived in the Port of Bombay on the 19th day of August 1914. She was then flying the Turkish Flag.

2. On or about the 21st day of September 1914 I received a report to the effect that the name of the said steamship had been changed and that the Persian Flag had been hoisted instead of the Turkish Flag.

3. I, thereupon, addressed a letter No. 413/41, dated the 26th September 1914, to the Master of the said ship enquiring under whose authority the change of flag had been allowed and intimating that until I saw the said ship's register no change of name or nationality could occur or be recognised. Hereto annexed and marked A is a copy of the said letter.

4. Subsequently the Master of the said steamship attended upon me and gave me a letter, dated the 26th day of September 1914, from the Persian

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Consul, Bombay, intimating that under instructions from his Government he had given a certificate to the said ship the name of which had been altered to "Hamadan" and that she belonged to a Persian subject and was under the Persian Flag. In reply I wrote to the Persian Consul that as the Master of the said steamship had not produced his ship's register I could not accept any alteration in the name or nationality of the said ship. Hereto annexed and marked collectively B are copies of the said letter, dated the 26th September 1914, and of my reply No. 414/41, dated the 27th September 1914. On the 28th September the Master again attended at my office and saw me and I informed him to the effect of my letter to the Persian Consul and advised him to cable to Constantinople for the register which he agreed to do. And two days afterwards both the Consul for Persia and the Acting Consul for Turkey who called upon me were informed by me that the vessel's register must be produced.

5. Neither the register of the said ship nor any bill of sale relative to the alleged transfer of the said ship has been as yet produced to me.

And I the said Norman Underhill for myself say :—

6. On the 1st day of November 1914 it was notified in the *Gazette of India* for general information and on the 6th November 1914 it was proclaimed by His Excellency the Governor General that war had broken out between His Majesty and Turkey. The said ship being then entitled to fly only the Turkish Flag was, as being an enemy ship, on or about the 13th November instant formally taken and seized as prize by me under the Government Orders and the papers and writings hereunto annexed and mentioned in the list marked C and numbered from No. 1 to No. 3 inclusive are all the ship's papers which were delivered up to me or otherwise found by me on board the said steamship.

7. The said papers and writings are brought in and delivered as they were received and taken, without fraud, addition, subduction, or embezzlement and in the same condition (save the numbering thereof) as the same were delivered up or found on board the said steamship."

The following issues were raised at the hearing :—

(1) Whether the claimant was a Persian subject at the date of the transfer and capture ?

(2) Whether there was a valid transfer ?

(3) Whether the capture was not lawful ?

(4) Whether the ship was detained in Bombay by Government prior to her capture ?

(5) Whether such detention was not lawful ?

(6) Whether the claimant is entitled to claim damages in respect of such detention and if so, what ?

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(7) Whether the claimant is entitled to any and if so what damages since the capture of the ship ?

(8) Whether Government are not entitled to expenses since capture ?

Both sides agreed that the issues relating to damages should stand over until the Court decided whether the capture was lawful or not.

Stratymann (Advocate-General) with *Nicholson*, for the Government.

Mirza, with him *Inverarity*, for the claimant.

MACLEOD, C. J.:—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 Article 57 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*⁽¹⁾ 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.

Then, in *The Proton*⁽²⁾ the question arose whether Article 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."

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

(1) [1916] 2 A. C. 77.

(2) [1918] A. C. 578 at p. 581.

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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*⁽¹⁾. But this he had no intention of doing. It was by mere chance that he was at Piræus 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."

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 academical interest, while counsel for Government contend that on the authority of *The Proton*⁽²⁾ 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.

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*⁽²⁾. I think I am entitled, before final judgment is given, either condemning or releasing the vessel, to reconsider any opinion I have previously expressed.

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 transactions connected with that establishment⁽³⁾."

(1) (1857) 2 English Prize Cases 600, at p. 606.

(2) [1918] A. C. 578.

(3) Kent's International Law, p. 217.

In *The Indian Chief*⁽¹⁾ 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*.

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

In *The Gerasimo*⁽²⁾ 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."

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

In *The Jonge Klassina*⁽³⁾ a claim was made by a Mr. Ravie describing himself as Ravie of Birmingham to certain goods coming to be imported from Holland 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.

In *The Ann*⁽⁴⁾ 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

(1) (1801) 3 Rob. 12 at p. 20.

(3) (1804) 5 Rob. 297.

(2) (1857) 11 Moo. P. C. 88 at p. 96.

(4) (1813) 1 Dod. 221 at p. 223.

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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.

In the leading American case of *The Venus: Rae Master*⁽¹⁾ 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 domicile, the Court decided (by a majority) that if a citizen of the United States should establish his commercial domicile 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 domicile 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 domicile 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⁽²⁾."

In "*The Eumæus*"⁽³⁾ decided in November 1915, Sir Samuel Evans said that Professor Dicey's definition of

(1) (1814) 8 Cranch 253.

(2) Kent's International Law, p. 223.

(3) (1915) 1 Br. & Col. P. G. 605; 32 T. L. R. 125.

"commercial domicile" 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.

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 domicile in that country and a personal domicile in the country, in which he resides: see *The Anglo-Mexican*⁽¹⁾:

"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."

From the opinion of the majority in *The Venus*⁽²⁾, Marshall C. 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

(1) [1918] A. C. 422 at p. 425.

(2) (1814) 8 Cranch 253, at pp. 314, 315.

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be liable to be treated as an enemy ship although the owner may have had no opportunity of absolutely relinquishing his commercial domicile.

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*⁽¹⁾ was referred to by Sir Samuel Evans in the case of *The Manningtry*⁽²⁾ 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 Edition 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 Edition (1904), section 334. The rule is succinctly stated by Story J. in *The Freundschaft*, 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 domicile 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 domicile 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

(1) (1814) 8 Cranch 253.

(2) [1916] P. 329 at pp. 339, 340

been carried on during peace, unless the person affected continues his connection with the trade after the war: Pratt's Edition of Story, p. 61...*The Vigilantia*, 1 C. Rob. 1,15. 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 domicile by residence in hostile territory. But I accept the law as it stands."

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In his dissenting judgment in *The Venus: Rae Master*⁽¹⁾ Marshall C. J. discussed how a commercial domicile 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 domicile."

In *The Manningtry*⁽²⁾ 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⁽³⁾."

⁽¹⁾ (1814) 8 Cranch 253 at pp. 314, 315. ⁽²⁾ [1916] P. 329 at pp. 339, 340.

⁽³⁾ *The Anglo-Mexican* [1916] P. 112 at pp. 115, 116.

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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, s. 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."

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.

These questions were discussed by Judge Cator in the case of *The Lutzow* (No. 4)⁽¹⁾ before the Egyptian Prize Court in March 1916.

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

(1) (1916) 2 Br. & Col. P. C. 122 at pp. 129, 134.

down by the majority of the Court in *The Venus Rae Master*⁽¹⁾. He referred to *The Ocean*⁽²⁾ 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 :—

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“ 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.”

Judge Cator remarks : “ This.....was the case of a partnership, but Sir William Scott makes no point of that fact.” Again *The Venus*⁽¹⁾ “ 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*⁽¹⁾ 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.”

The learned Judge further expressed the opinion that Sir Samuel Evans in *The Manningtry*⁽³⁾ had not approved of the decision in *The Venus*⁽¹⁾, 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.

⁽¹⁾ (1814) 8 Cranch 253.⁽²⁾ (1804) 5 Rob. 90 at p. 91.⁽³⁾ [1916], P. 329.

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The decision of Judge Cator was reversed on appeal by the Privy Council (*The Lutzow*⁽¹⁾) 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.”

In May 1915 the Prize Court at Malta had to deal with the claim of one S. Hovaghmain 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.

In *The Anglo-Mexican*⁽²⁾ 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

(1) [1918] A. C. 435.

(2) [1918] A. C. 1422 at pp. 425, 433, 434.

point was discussed in *The Venus*⁽¹⁾. 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."

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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 entitled 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."

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

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

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*⁽¹⁾ must be followed, but the decision of the Privy Council in *The Gerasimo*⁽²⁾ 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.

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.

(1) (1814) 8 Cranch. 253.

(2) (1857) 11 Moo. P. C. 88.

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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.

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.

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 domicile and to prevent the goods from reaching enemy territory.

It cannot be disputed that on the outbreak of war with Turkey the claimant's commercial domicile 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 Piræus 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 Piræus about the 13th or 14th November, but that by itself would not constitute a step towards getting rid of his commercial domicile in Turkey : see *The Ann.*^o

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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 cross-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 Piræus. I have some immoveable property and some cash there (Constantinople). I do not want to trade there while war continues."

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 Piræus, that he would not have continued to direct the business at Constantinople from there.

The difficulty of the case lies in the fact that it may be said that he came within class 2 above, and that he

^o (1813) 1 Dod. 221.

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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 domicile. 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 domicile 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 Piræus. Again 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 despatched from Piræus 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 Busrah the claimant would have

done anything to get rid of his commercial domicile in Turkey? Can it be said that the claimant was *sine animò 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 domicile in Turkey, and that at the time of the capture and for many months after he had no intention of removing that domicile 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.

If *The Venus*⁽¹⁾ 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.

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 domicile. He does not come within the scope of the judgment of Marshall C. J. in *The Venus*⁽¹⁾ where it said "there must be an immediate discontinuance of trade and arrangements for removing followed by actual removal within a reasonable time."

(1) (1814) 8 Cranch 253.

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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.

Order accordingly.

Solicitor for the plaintiff: Mr. *J. C. G. Bowen.*

Solicitors for the claimant: Messrs. *Mirza, Mirza & Mangaldas.*

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

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July 21.

PILASRAI LAXMINARAYAN (PLAINTIFF APPELLANT) v. CURSONDAS DAMODARDAS (DEFENDANT RESPONDENT).^o

Civil Procedure Code (Act V of 1908), Order IX, Rules 8 and 9—Dismissal of suit for plaintiff's non-appearance—Inherent jurisdiction of Court to restore a suit for ends of justice—Defendant protected in the matter of costs on restoration of plaintiff's suit.

On the 7th January 1919, a suit was called on for hearing when counsel for the plaintiff finding that his client was not in Court to give evidence asked for an adjournment. The defendants appeared and opposed the application which was refused and the suit was dismissed under Order IX, Rule 8. Subsequently the plaintiff applied for the restoration of the suit, stating in his affidavit that at about 11 a. m. of the day of hearing he had gone to the premises of his principal witness to bring him to the Court, that as the latter was away from the premises he waited for his return till about 12-30 noon, and that soon after he came to the Court with the witness and found that the suit was called on and dismissed. The plaintiff submitted that as the suit was fourteenth on the Board List for the day he did not