

## THE KNIGHT COMMANDER CASE

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Although but one of several instances of the same sort, involving the question of the legality of the destruction of a neutral ship by a belligerent, the sinking of the *Knight Commander* excited so much adverse comment in England at the time and has given rise to so much discussion since, as to make it a test case, one upon which it is convenient to base an inquiry.

The essential facts concerning ship, cargo and voyage are as follows: She was an English merchant steamer; she carried a mixed cargo which included flour and railway material; her route was from New York to Manila, to Shanghai, finally to Yokohama; she was visited by the Vladivostok squadron off the Japanese coast; the Russian officers declared the cargo to be contraband but owing to the ship's lack of coal she could not be taken before the Vladivostok prize court for trial; the crew was accordingly taken off and the ship sunk. The ship's papers were lodged with the prize court sitting at Vladivostok, a trial was held and the destruction of the ship justified. An appeal was entered by the British owner and damages asked for on account of the cargo as well; the case tried before the Russian Council of Admiralty, but the decision of the lower court affirmed by decree of November 19, 1905.\*

In examining the legality of this destruction, the first step is to emphasize the distinction between a neutral and an enemy ship as subjects of such casualty. In our Civil War, Semmes in the *Alabama*, having neither prize crews to spare, nor ports open to him, burned a majority of his prizes and has been generally justified in so doing. This is not a similar case. It is lawful to seize enemy's property at sea, merely because of its ownership. Self interest will dictate the making beneficial use of such

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\*Decided: 1. To maintain the decision of the Vladivostok Prize Court and to leave the appeal made by Attorney Bojenoff in behalf of the owner of the steamer *Knight Commander* without consideration.

2. To leave the petitions of the Attorneys Sheftel and Berline in behalf of the cargo owners of goods non-contraband of war, and for compensation for losses, with examination.

property if it can be carried *infra praesidia*; if not it may be destroyed. But it is not lawful to seize the property of neutrals unless it is engaged in a forbidden trade. As there was no claim that either the *Knight Commander* or its cargo were Japanese property, the reason above given to justify destruction, viz.: that it was enemy's property, is inapplicable.

Of all forms of forbidden trade, perhaps the carrying of contraband is the most common. The rule governing this traffic is very clear. The *onus* of prevention rests upon the belligerent injured by it, the neutral state merely warning its own subjects of the risk of confiscation involved. To make goods contraband, they must be shown to be directly available for carrying on war and also to have a hostile destination. For instance, gunpowder bound for the German colony of Kiao Chau would not have this character. The ship is not involved in the penalty, nor the non-contraband portion of the cargo, unless under exceptional circumstances which prove complicity, such as identity of ownership or such a preponderance of contraband in the cargo as to argue the voyage to have been undertaken for its sake, to argue complicity. But ordinarily the ship is not confiscated with the guilty portion of the cargo. It is important to bear this in mind. Now this statement of the rule, making it essential to know the character of the goods, the ownership of the entire cargo, the ownership and final destination of the ship, shows the need of a searching investigation and one of a truly judicial nature before condemnation can take place, lest injustice be done. And so the final condition of the infliction of penalty for carrying contraband is that sentence must be passed upon it by a prize court.

We are now ready for our real inquiry which is twofold: may neutral contraband be lawfully destroyed at sea without judicial condemnation under any circumstances; may it be so destroyed subject to compensation, the *Knight Commander* being taken as a case in point.

These are the considerations involved:

- (1) The injustice of penalizing a ship not shown to be guilty.
- (2) The insufficiency of an *ex parte* examination of cargo at sea.
- (3) Validity of excuses for destruction.
- (4) The doctrine of conditional contraband; its application to this cargo.
- (5) Is destruction ever permissible?
- (6) Is destruction lawful subject to compensation?

Let us examine these questions seriatim; certain being capa-

ble of determination by the light of reason solely, while others rest upon precedent and the opinions of jurists.

So far as I am aware the injustice of destruction attaching as a penalty to the neutral ship, even granting that it is carrying contraband, has not been sufficiently emphasized in the *Knight Commander* case.

The argument is this: To condemn a ship carrying contraband it must be shown that it belonged to the owner of the contraband or that the contraband formed so large a portion of the cargo as to prove complicity. This is an intricate business of a highly judicial nature, demanding the production of papers and examination of witnesses. It will be later shown what grave doubt existed as to the really contraband character of the cargo in question. But laying this aside, the case in point shows us a penalty, namely, the loss of the ship, which according to the accepted rules governing contraband would not have been inflicted by any well-regulated prize court, unless the owner of the ship was shown to be the owner of the cargo as well, as to which there is no proof that the searching officer made inquiry. Thus we find this case to involve an enlargement of the accepted penalties for carrying contraband.

2. The vast difference between the cursory *ex parte* judgment upon all the facts in a ship's case, and a judicial examination of the same is also to be noted as a sound reason against the practice we are considering. In port, the cargo can be landed, its character ascertained, its ownership inquired into, the ship likewise investigated, its destination learned and witnesses summoned in proof of all, beside that evidence which the ship's papers give. This trial, before a court trained to judge the credibility of evidence, if properly conducted, creates so strong a presumption of guilt or innocence that few governments will venture to challenge its verdict. It must be admitted that the prize court of first instance sitting at Vladivostok seems to have been scarcely a judicial body; it seems to have existed for condemnation only. This apparent blemish upon the Russian judicial system may lower the Vladivostok court in our eyes but it will not thereby raise the navy officer into a satisfactory judicial position. He cannot unload the cargo; he at best can only guess the uses of the cargo; its ownership and that of the ship are shown to him by the ship's papers, not by outside evidence; he assumes judicial functions without being in possession of the facts or having a judicial mind. It is as if the sheriff were to judge the guilt of a

supposed criminal whom he had arrested, and not only impose sentence but execute it on the spot even to the death penalty. This evident misplacing of the judicial function is a strong argument against the legality of the act under review. This was keenly felt in England by the government. The Marquis of Lansdowne said, in the House of Lords, July 28, 1904, "Upon no hypothesis of International Law can we conceive that a neutral ship, even if it be ascertained that her cargo included contraband of war, could be destroyed in this manner upon the mere *fiat* of the commanding officer of the capturing squadron and without reference to a properly constituted prize court." (London Times, July 29, 1904.)

And the same day in the Commons, Balfour characterized the practice as follows: "Evidently if it is left to the captain of a cruiser to decide on his own initiative and authority as to whether the particular articles carried by the ship do or do not belong to the category of contraband of war, what is not merely the practice of nations but what is a necessary foundation of equitable relations between belligerents and neutrals, would be cut down to the root." He was speaking generally, but went on to say specifically of the *Knight Commander* case, "In our view that is entirely contrary to the accepted practice of civilized nations in the case of war."

3. What were the excuses for a failure to carry the alleged prize before a court for trial?

The justification seems to have been founded upon certain clauses in the Russian prize regulations issued March 25, 1895. These stipulated that "in extraordinary cases where the saving of a seized vessel is rendered impossible by its bad condition, its low value, the danger of its being retaken by the enemy, the fact of its being at a considerable distance from Russian ports, or the ports being in a state of blockade and dangers threatening the capturing vessel or its operations, the naval commander may on his own responsibility burn or sink the vessel seized after having landed the persons on board and as far as possible the cargo, as well as having taken other measures for the preservation of papers and other articles on board likely to be required" at an investigation before a prize court. A statement by the naval commander responsible for the act was also provided for. Now according to a dispatch in the *London Times* of August 3, 1904, Vice-Admiral Skrydloff telegraphed his Czar that the *Knight Commander* could not be sent to port to be tried owing to her lack of coal.

Here there are three things to be remarked: first, that the ship being sunk, her sufficiency of coal to carry her several day's sail beyond her destination could neither be proved nor disproved.

Again, although these regulations might justify the Russian Admiral, they could not excuse the Russian government unless they can be shown to be in conformity with usage.

And thirdly, there is nothing in these regulations so far as noted, to show whether they were really intended to apply to neutral vessels, it being usual for states to prescribe rules as to the treatment of enemy vessels, destruction amongst them.

That the eminent Russian publicist Professor de Martens, twenty years before had excused the destruction of prizes is recalled by Professor Holland, he alleging the distance of Russian ports from the scene of possible naval operations, so that what other states will resort to only in extremity, will become for Russia the rule, though frankly admitting that such a practice would raise against his country universal dislike—yet even here there is no certainty that destruction of neutral prizes is included in this claim.

4. Hitherto we have gone on the assumption that the *Knight Commander* contained some contraband. It is now in order to examine this question. Her cargo, by the *London Times* report, was said to be "rails, rice and flour." Admiral Skrydloff wired that railway material made up a considerable part of the *Knight Commander's* cargo. Assuming that she carried railway iron and breadstuffs, bound for an enemy's port, namely, Yokohama, could these by the accepted usage be held to be contraband? This brings up the doctrine of conditional contraband. Very briefly this means that articles capable of use in peace as well as war, must have their intended military availability and purpose shown to render them guilty. Thus according to this doctrine the railway plant carried by the *Knight Commander* would be contraband only if it could be shown to be intended for military use in Korea or Manchuria. As its destination was Yokohama this would be difficult. So likewise the foodstuffs on board unless intended specifically for army use, must be held innocent. Without going at length into this doctrine it is enough to say that it was originated by Lord Stowell in the *Jonge Margaretha* (1. C. Rob. 189); followed by our own Courts in the *Commercen* (1 Wheat. 382); and since upheld by most writers of these two countries and by a certain number of continental publicists. For a fuller discussion I refer to Professor Hershey's note, in his

recent and valuable work on the International Law of the Russo-Japanese war, p. 161, or Scott's Cases. The regulations governing the British, Japanese and United States navies recognize the doctrine.

But the Russian government at the outset of the war dodged the question by the simple expedient of declaring *all* foodstuffs, *all* fuels, *all* railway material to be contraband "if they are transported on the account of or are destined for the enemy" ignoring the factor of their military use. The continental writers do not, however, support the Russian contention but the contrary, for they incline to hold that these articles, *ancipitis usus*, can never be held contraband not that they are always so. Thus whatever one may think of the doctrine of conditional contraband, the *Knight Commander* case illustrates a novel and arbitrary enlargement of the list of contraband and one without precedent, save that attempt of France to make rice contraband in her affair with China in 1885, an attempt which was not put to the test. And Russia herself later in the recent war seems to have held provisions to be conditionally, not absolutely contraband.

5 and 6. Quite apart from the questions above discussed, we now ask whether the destruction of a neutral ship is ever justifiable or is justifiable subject to the payment of compensation. The two questions are not easily separable and are therefore considered together.

To the first question Phillimore and Hall reply, no. Hall declares that the destruction of a neutral ship is a "punishable wrong; if it cannot be brought in for adjudication it can and ought to be released." Sec. 277. Taylor, Sec. 691, says the same. Lawrence, Sec. 215, is of the opinion that neutral owners "have a right to insist that an adjudication upon their claim shall precede any further dealings with it." Snow in his manual for the U. S. Navy, p. 164, is even more explicit. "Neutral property can only be transferred and condemned by proper courts and trial so it is not proper to destroy it. If a neutral vessel cannot be brought into port for adjudication, it should be released." And the latest British writer, Oppenheim (II. p. 470), is to the same effect. "The rule is that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought to a port of a Prize Court." Various cases adjudicated are to the same purport. I quote a single one. The *Felicity* (2 Dodson 380) in which Sir W. Scott thus expresses himself: "If a neutral ship or protected ship is destroyed by a captor either wantonly or under an alleged necessity in which she herself was not directly

involved, the captor or his government is answerable for the spoliation." He mentions compensation it is true but as a penalty for a wrong not as legalizing the act of destruction. This great Admiralty judge goes on to say "If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises and the safe and proper course is to dismiss. Where it is neutral the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value."

Amongst foreign publicists are also found those who fully adopt this rule, that destruction of the neutral ship and cargo are unlawful. Thus Kleen (II. 530): "Or, ce qui est absolument contraire au droit international, c'est de détruire sans jugement régulier des prises neutres." "La destruction d'une propriété neutre n'est jamais une nécessité de la guerre, car le belligérant ne se défend pas par cela contre son ennemi." Both British and and Japanese Admiralty regulations likewise forbid destruction of the neutral.

To the contrary may be cited Art. 50, of the U. S. Naval War Code, which allows destruction in case of controlling reasons, "if there should be no doubt that the vessel was a proper prize," but without applying this rule specifically to neutral ships, and without a trial and condemnation can neutral ships, be *proper prize* without doubt.

"France allows her captors to destroy prizes—apparently neutral as well as enemy prizes—where the destruction is necessary for the safety of the captor or for the success of his operations." (Oppenheim, II. p. 471.)

The Institute of International Law in 1882 adopted a code which regulated maritime capture. Art. 50, reads: "It shall be permitted a captor to sink or burn his prize after taking on board her crew and as much of her cargo as possible and preserving her papers for the judicial inquiry and for the owners' claims;" in five cases of necessity, viz.: the unseaworthiness of the prize; storm; danger of recapture; lack of men; distance from home port. But this again is not in so many words made applicable to neutrals.

In 1887 the Institute enlarged and repeated this code. The same want of explicitness runs through the opinions of continental writers, who are commonly cited on the affirmative of this

question. They allow the destruction of prizes but fail to specify that they mean both neutral and enemy ships. And even so they are lukewarm advocates. Calvo brings their opinions together (V. 277). Thus Bluntschli declares that the captured ship as a rule must be sent before the captor's prize court. One is never authorized to destroy a prize under the pretext that the captor's ports are blockaded. Such a difficulty does not enlarge the rights of the captor. The destruction of the captured ship is only justifiable in case of absolute necessity.

Boeck argues that one may destroy ships as one may destroy property in land warfare, on the basis of military necessity but with the reservation that every prize must be judged.

Perels says that destruction of a prize is only justifiable if said prize could not be sent in without serious risk. After its destruction a judicial decision must confirm the validity of the capture. This if found to be illegal must be indemnified.

His own views Calvo does not clearly give but by way of illustrating them cites the case of two German ships sunk by a French cruiser in 1870. They were enemy ships but with neutral goods on board which also perished. A claim for damages was made against France because, under the Declaration of Paris, such goods in an enemy's ship were exempt. This claim Calvo repudiates, as the French prize court did, on the ground that the destruction of the ships was justified by the necessity of "preserving the safety of the captor's operations," and granting the legality of this act, neutral goods, however exempt from capture, cannot be held exempt from incidental destruction.

In support of the legality of destroying neutral prizes under special conditions, Oppenheim cites Fiore, Geffeken, Martens and Dupuis. It may be doubted, however, if they preserve the distinction between neutral and enemy prizes sharply, and one must remember that the continental publicists have in the main advocated leniency rather than harshness in the rules of prize, opposing the doctrines of the English Admiralty Courts.

It is at least permissible to say that there is no consensus of clear unequivocal opinion amongst continental writers in favor of the Russian contention, but only here and there an expression capable of being so construed, while British opinion is nearly a unit in forbidding destruction under any and all circumstances. One English publicist of authority, however, fails to share in the extreme view. In a paper read before the British Academy in April, 1905, and printed in the "Fortnightly Review" of May, 1905, Professor Holland, discussing the neutral duty of acquies-

cence in belligerent acts, touches upon the *Knight Commander* case and what it illustrates. "If, however, the ship or cargo be neutral, the matter is not so simple. The Neutral Government is not bound to acquiesce in the destruction of the possibly innocent property of its subjects, at any rate unless some overwhelming necessity can be shown for the course which has been adopted; if indeed even overwhelming necessity would be sufficient to justify it. This is of course the question raised by the sinking of the British ship *Knight Commander*, which was effected on July 23rd, 1904, in accordance with the Russian instructions and was approved of by the Vladivostok Prize Court. The attitude of the British Government has been all along adverse to the legitimacy of such a step. Before the occurrence our ambassador had intimated our disapproval of the Russian instructions on the point and he presented a strong protest against the sinking five days after its occurrence. The incident was discussed in both Houses of Parliament (July 28th, August 11th) and was spoken of by ministers as an 'outrage, 'a serious breach of International Law.' I am not sure that this language could be fully supported by a reference to the opinion and practice of nations. While it is, on principle, most undesirable that neutral property should be exposed to destruction without enquiry, cases may occasionally occur in which a belligerent could hardly be expected to permit the escape of such property, though he is unable to send it in for adjudication. The contrary opinion is, I venture to think, largely derived from a reliance upon detached paragraphs in one of Lord Stowell's judgments on the subject, judgments which, taken together, show little more than that in his view no plea of national interest will bar the claim of a neutral owner to be fully compensated for the value of his property, where it has been destroyed without judicial proof of its noxious character. 'Where doubtful whether enemy property and impossible to bring in, the safe and proper course,' says Lord Stowell, 'is to dismiss.' The Admiralty Manual of 1888 accordingly directs commanders who are unable to send in their prizes, to 'release the vessel and cargo without ransom unless there is clear proof that she belongs to the enemy.' This indulgence can hardly, however, be proclaimed as an established rule of International Law, in the face of the fact that the sinking of neutral prizes is under certain circumstances permitted by the Prize Codes, not only of Russia but also of such Powers as France, the United States and Japan (1904.)" This able and interesting exposition of the law as to

the destruction of neutral prizes, is the strongest argument for the Russian view which appeared in England from any one of competence. Yet it will be noticed how guarded and qualified its language is. Moreover, there may be two opinions as to the meaning of Lord Stowell's dictum in the "Felicity." The phrase "no such obligation arises" (see above) which Prof. Holland does not quote, to my mind marks off the status of enemy ships and the reason for their destruction from that of neutral ships and the necessity for compensation in their case if destroyed, in such fashion as to show that the Judge considered such destruction thoroughly illegal. As for the language of the Prize Codes of the United States, Japan and France, to which Prof. Holland appeals, is it not possible that he is misled by their indefiniteness of wording, by their failure to make a clear distinction between enemy and neutral prizes in this matter of destruction? It is at least significant that neither country has resorted to this usage. Moreover, fully considering this very question in the "Discussions" of the Naval War College at Newport, in 1905, our naval officers and their adviser came to the following conclusion: "If a seized neutral vessel cannot for any reason be brought into port for adjudication, it should be dismissed," a conclusion which does them honor.

In the foregoing discussion, the distinction has not been sharply observed between compensation paid for a destroyed neutral ship as implying a penalty for an unlawful act, and compensation interpreted as the price to be paid by the belligerent for destruction as a military necessity acting within his rights. Is there not a real difference between the two, and is not the second identical with the *jus angariae*, a well-known principle in war and recognized by the United States Naval War Code, Art. 6, in these words: "If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should if practicable be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters."

With this distinction clearly in mind and the *jus angariae* to justify destruction on account of the military necessity alluded to by Prof. Holland, it is contended that the only reason for exceptions to the rule disappears, and that we are justified in laying down as probably the usage of to-day,—with the sole

exception of Russia,—that neutral ships which cannot be taken before a court for trial must be released. If military necessity demands they may be appropriated or destroyed subject to full payment.

In defense of this rule are the following considerations: This is substantially the usage of to-day except in Russia. This is the opinion almost unanimous of British and American writers. Continental publicists while not unanimous, are fairly favorable to this rule. Neutral states demand it as a reasonable measure, in their interest. It is a logical rule because otherwise you are enlarging the penalty of carrying contraband, making ship liable with the goods, and conferring improper judicial authority upon a naval officer not trained for it. If this is not the rule, yet it is a reasonable rule, and as it is the fashion now-a-days to say, the next Hague Conference should make it a rule.

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