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Uninvited and Unwelcome: The SS Appam *and the US Law of Neutrality*

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Abstract

On 15 January 1916, the British steamer Appam *was captured near the Madeiras by the German raider* Moëwe. *British mystification regarding her disappearance was more than matched by American officials' consternation when the vessel, flying German naval colours, unexpectedly appeared at the entrance to Hampton Roads, Virginia, on 1 February 1916. These officials were further discomfited to discover she was under the command of a German prize crew whose commander, LT Hans Berg, was demanding that the USA permit* Appam, *under German control, to remain indefinitely in a US port. This demand was the first salvo in a bitter diplomatic row between the USA, Britain and Germany regarding the rights and obligations of a neutral respecting a prize brought by a belligerent into its territory. The nature of this dispute was irrevocably altered when the vessel's British representatives filed suit in the USA for the return of the vessel and her cargo. This article tells the story of* Appam, *focusing on the diplomatic and legal sparring that characterized her tenure in US waters. In so doing, it traces the development of the law of maritime neutrality with respect to prizes in the USA during World War I.*

1 Introduction

Enemy merchant vessels may be captured whenever they are located beyond neutral territory.[1] Under long-standing international practice, an enemy merchant vessel captured at sea is placed under the command of a prize crew and taken to a port of the

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[1] *Department of Defense Law of War Manual*, June 2015, s. 13.5.1. A neutral vessel may also be seized by a belligerent if it engages in an activity that compromises its neutral status, such as carrying contraband destined for an opposing belligerent, breaching or attempting to breach blockade, carrying personnel in the military or public service of the enemy or communicating information in the interest of the enemy. *Commander's Handbook on the Law of Naval Operations*, Doc. NWP 1-14M (July 2007), s. 7.10.

seizing state or that of an ally, where a prize court convened by the seizing nation adjudicates the vessel's status and, if warranted, condemns the vessel, her cargo or both as a prize of war. Title to the seized vessel and, as warranted, her cargo, does not vest in her captors until the prize court issues this judicial decree of condemnation.[2] In the USA federal district courts, which exercise admiralty and maritime jurisdiction, serve as US prize courts.[3]

In January 1916, the British steamship *Appam* was seized on the high seas by the German surface raider *Möwe*. Instead of being dispatched to a German port or that of an ally, she was conveyed to Hampton Roads, Virginia, a port of the USA, where she arrived, unannounced and uninvited, on 1 February 1916. There, her prize crew commander presented to US authorities a note written by *Möwe*'s commanding officer announcing his intention that *Appam* be 'laid up' – in effect, interned – in a US port for an indefinite period, presumably the duration of the war. The German embassy quickly got involved, contending that such a practice was permitted, in fact required, by the terms of Article 19 of the Prusso-American Treaty of 10 September 1785 (1785 Treaty).[4] Not to be outdone, the British diplomatic corps strenuously objected to any American accommodation of the prize and her crew, arguing vociferously that under Articles 21 and 22 of the 1907 Hague Convention (XIII) on Neutral Powers in Naval War (Hague Convention XIII) a prize could only be brought into a neutral port on account of unseaworthiness, stress of weather or want of fuel or provisions, and as none of those conditions existed aboard the vessel, the USA was under an obligation to release the vessel with her officers and crew and to intern the prize crew.[5]

US diplomatic officials, caught unprepared and facing a factually unique and difficult situation, struggled to find a solution that would not unnecessarily aggrieve one of these two powerful contenders. Before these officials could act, the matter was effectively wrested from their control and placed in the hands of the judiciary when *Appam*'s owners and her captain filed suit in US court, seeking restitution of the vessel and her cargo respectively. The case ultimately made its way to the Supreme Court of the United States, whose ruling, which was consonant with pronouncements issued by the secretary of state, served to set US policy with respect to prizes and neutrality in World War I and II and into the contemporary era.

This article recounts the circumstances surrounding *Appam*'s capture and conveyance to the USA. It then traces the diplomatic spat that erupted from the moment she arrived in America, involving as it did two powerful belligerents engaged in a titanic global struggle and a powerful and influential neutral. Finally, the article follows the judicial developments in the case, culminating with decisions by both the

[2] *Oakes v. United States*, 174 US 778, at 786–787 (1899). Prize procedures are not used for captured enemy warships because their ownership vests immediately in the captor's government by the fact of capture. *Department of Defense Law of War Manual*, *supra* note 1, s. 13.4.3.

[3] Title 10, US Code § 7652(a).

[4] Treaty of Amity and Commerce between the Kingdom of Prussia and the United States of America (1785 Treaty), 10 September 1785.

[5] Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907.

US Department of State and the US Supreme Court that collectively clarified and established US policy as to neutrals and prizes. The article concludes by examining the continuing legacy of this case to the US law of neutrality.

2 *Appam* Departs on a Routine Voyage

Appam was a commercial steamship of 4,761 tons net register (7,781 tons burden), owned by the British and African Steamship Navigation Company and operated by Elder Dempster Lines.[6] Built in 1913, she was involved in the carriage of general cargo to and from Britain's African colonies.[7] She carried no mounted weapons, only small arms.[8] She departed on her fateful voyage from Dakar at 2:40 p.m. on 11 January 1916, bound for Plymouth direct, under the command of Captain H.G. Harrison.[9] Her cargo on this voyage consisted of cocoa beans, palm oil, kernels, tin, maize, 16 boxes of specie and some other articles.[10] In addition to her crew, she carried as passengers Sir Edward Mereweather, recently retired governor of Sierra Leone, several members of the British armed forces and numerous British customs officials.[11] She also carried 13 enemy civilian prisoners and seven German prisoners of war who had been captured fighting in the German African colonies. The plan was to dispose of the German military prisoners upon arrival in Plymouth and to turn over the civilian prisoners and their wives to the representatives of the Home Office in Liverpool.[12]

3 *Möwe* and Her Activities

Möwe was a two-masted, single-screw steamer of 4,500 tons, which was 385 feet long and capable of a maximum speed of 14 knots.[13] Originally named *Pungo*, she was designed and launched in May 1914 at Geestemunde to carry bananas from the German African colonies to Hamburg.[14] Upon the outbreak of war, she was converted into a

6 Letter from N. Hamilton (Collector of Customs, Hampton Roads) to A. Peters (Secretary of the Treasury), 1 February 1916, Enclosures to Joint State-Navy Neutrality Board Memorandum, 7 February 1916, The SS *APPAM*: Construction of Article 19 of the Treaty of 1799 with Prussia, 4, Records of the Department of State Relating to World War I and Its Termination, 1914–1929 (Department of State World War I Records), Microfilm no. 367, Roll 178, files 763.721 (Political Relations), 763.72111 (Neutrality) and 763.72111Ap4/1/180, National Archives and Records Administration (NARA), College Park, MD.

7 E. Keble Chatterton, *The Sea Raiders* (1936).

8 Letter from N. Hamilton to A. Peters, *supra* note 6, at 5.

9 Letter from Mr. Bayley, New York, No. 216, attaching text of Captain's report, which was surreptitiously obtained by the Elder Dempster agent, 3 February 1916, ADM 137/2755, The National Archives (TNA), London, United Kingdom.

10 *The Steamship Appam*, 243 US 124, 143 (1917).

11 Letter from N. Hamilton to A. Peters, *supra* note 6, at 2, forwarded to Secretary of State R. Lansing by A. Peters via a letter on 2 February 1916, Department of State World War I Records, NARA.

12 Secret Telegram no. 1347/16 from the Governor of the Gold Coast to the Secretary of State for the Colonies, 7 January 1916, ADM 137/2755, TNA.

13 Chatterton, *supra* note 7.

14 *Ibid.*

commerce raider, armed with two 4.1 inch guns mounted under her forecastle, two of the same calibre mounted abaft the break of her forecastle, one 22 pounder mounted on the poop disguised as hand-steering gear and two above-water torpedo tubes.[15] She was also fitted to carry approximately 200 mines and was configured to deploy them.[16] She was under the command of Korvetten-Kapitän Graf Nicolaus zu Dohna-Schlodien. Her voyage up until her capture of *Appam* had been extraordinarily eventful. After setting out from Germany on 29 December 1915, she first laid mines on New Year's Day in 1916 off the east coast of Scotland, in what was known as the Whiten Head Bank minefield.[17] This effort bore spectacular fruit on 6 January when HMS *Edward VII*, a battleship, on her way to Belfast from Scapa Flow, struck a mine and sank.[18]

Following this auspicious start, she laid a second minefield off La Rochelle on 9 January and then moved into the shipping lanes used by British merchant vessels voyaging to and from the Canary Islands as well as by vessels utilizing the major trade routes from South America and the west coast of Africa to Britain.[19] She was immediately rewarded with a rich haul of British and Allied vessels, capturing and sinking no less than six steamers carrying goods and supplies, which were vital to the Allied war effort, between 9–15 January. The crews of these hapless vessels were taken aboard *Möwe*, which began to bulge at the seams with so many unexpected guests.

4 The Capture of *Appam* and Subsequent Events

The morning of 15 January 1916 dawned fine and clear as *Appam* steamed northward, east of Madeira, on a course to pass 100 miles west of Cape Finisterre.[20] Her most recent port of call had been the Canary Islands.[21] During the course of the morning, she passed two southbound vessels.[22] At approximately 1:40 p.m., Captain Harrison went up to the bridge and had his attention drawn to a southbound vessel, approximately seven to eight miles off the starboard bow, which was assumed to be a cargo steamship on a southwesterly course.[23] As she drew nearer, the mystery vessel was observed to be flying British colours. When she drew within a mile of *Appam*'s port bow, the vessel (which was, of course, *Möwe*) hauled down the British colours,[24]

15 *Ibid.*, at 198.

16 *Ibid.*

17 *Ibid.*, at 199–200.

18 *Ibid.*

19 *Ibid.*, at 201.

20 Letter from Bayley, *supra* note 9.

21 Phone call from N. Hamilton to A. Peters, 1 February 1916, Department of State World War I Records, NARA.

22 Official Statement of Captain Harrison, ADM 137/2755, TNA.

23 *Ibid.*

24 The use of false colours (enemy or neutral) by a warship is a practice sanctioned under customary law, though the warship must hoist its true colours prior to exercising any belligerent rights. Such a practice was frequently resorted to during both World Wars. Robert W. Tucker, 'The Law of War and Neutrality at Sea', 50 *International Law Studies* (1955) 139. British officials acknowledged in internal documents that the flying of British colours in this case was a legitimate *ruse de guerre*. Confidential document circulated within the Cabinet, 5 February 1916, CAB 37/142/8, TNA.

replaced them with the German naval ensign and also hauled up two signal flags: 'stop immediately' and 'wireless operator'.[25] These demands were reinforced by a shot fired across *Appam*'s bow. As *Appam* drifted to a stop, *Möwe* continued down her port side, rounded her stern and hove to a quarter mile off her starboard beam, firing a shot across *Appam*'s stern as she did so.

Shortly thereafter, with several heavy guns trained on *Appam* to ensure compliance, *Möwe* dispatched a small boat containing a boarding party. Although the boarding officer politely apologized to Captain Harrison for taking his ship, the martial nature of the interaction was vividly illustrated by several bombs the boarding party placed aboard *Appam*. The boarding officer gathered the ship's papers and information about her cargo, speed, passengers and the like and signalled this information back to the raider. Captain Harrison, the majority of *Appam*'s crew and the naval drafts from the west coast of Africa were conveyed to the raider, which was done in several trips aboard *Appam*'s boat; there, they joined the crews of the other vessels previously captured and destroyed by *Möwe*. *Appam*'s second officer, engineers, firemen and stewards, together with all of the passengers, were left aboard *Appam* and confined below. Bullion worth £36,000 was also transferred to *Möwe* at this time.

The two vessels steamed in company with each other until 17 January, at which time the crews of the previously captured vessels, totalling 138 persons (none of them Americans), were transferred to *Appam*; three British military officers, some naval ratings and marines and the African naval recruits were retained aboard *Möwe*.[26] A prize crew of 22 Germans under the command of Lieutenant Hans Berg was also placed aboard *Appam*; they were augmented by the seven liberated former German prisoners of war.[27] Korvetten-Kapitän zu Dohna-Schlodien informed those transferred to *Appam* that she would land them at a safe port and warned them that she was rigged with bombs and that he had instructed the prize crew to sink her before allowing her to be retaken.[28] She continued in company with *Möwe* until 19 January, at which time the two vessels parted – *Appam* setting on a westward course towards America, and *Möwe* heading for fresh hunting grounds off South America.

5 British Authorities Mystified; US Authorities Flummoxed

On 24 January 1916, concerned officials of the British steamship company Elder Dempster contacted the Admiralty to inquire if there was any news of *Appam*, then several days overdue.[29] On 26 January, after several other British and French vessels

[25] Letter from Bayley, *supra* note 9.

[26] Chatterton, *supra* note 7, at 208. All told, counting *Appam*'s own complement of 155 crew, 117 passengers, 20 German subjects and her 22-man prize crew, she carried 452 persons aboard when she arrived in the USA. Letter from Mr. Bayley, New York, No. 213 (coded), 1 February 1916, ADM 137/2755, TNA.

[27] Berg, age 39, was a naval reservist from Schleswig-Holstein who was commissioned as a lieutenant on 10 August 1915. In civilian life, he was a merchant captain, with much familiarity with US ports. Letter from N. Hamilton to A. Peters, *supra* note 6.

[28] Bombs were slung over her bow and stern; one large bomb, said to contain about 200 pounds of explosive, was placed on the bridge; and several smaller ones were placed in the chart room. There they remained until the ship arrived at the Virginia Capes, when they were removed. *Appam*, *supra* note 10, at 145.

[29] Telegram from Admiralty to 'Shipping Devonport', 24 January 1916, ADM 137/2755, TNA.

bound for Europe from points south were also reported overdue, the Admiralty sent an urgent telegram to various naval commands asking: 'Have you any information or intercepted [wireless telegraph] calls.'[30] Information, sparse as it was, arrived, not from naval units but, rather, from Lloyds of London, which reported that the steamer *Tregantle*, which arrived at Hull on 26 January, reported having passed a lifeboat with 'Appam of Liverpool' painted on the stern 120 miles east-northeast of Madeira.[31] The weather in the vicinity was very fine and clear, there was no wreckage in the vicinity and the lifeboat, while its bow had been damaged, was still seaworthy.[32] There was no sign that any passengers had been aboard.[33] *Tregantle*'s master believed *Appam* had been sunk by a submarine or a mine.[34] Other than this report, the only other information related as to the missing *Appam* was a report by the outbound steamer *Palma*, whose master related that she had passed *Appam* at 2 p.m. on 15 January, 40 miles north of Teneriffe.[35]

British mystification regarding *Appam*'s disappearance was more than matched by American officials' consternation when the vessel, flying German naval colours, unexpectedly appeared at the entrance to Hampton Roads on 1 February 1916, ultimately dropping anchor off Fortress Monroe in Hampton, Virginia, at 8 a.m. that same date. This prompted a flurry of calls and cables between officials on-site, particularly Norman Hamilton, the collector of customs,[36] and their superiors in Washington, DC, regarding the appropriate response to this startling situation. These officials were further mystified, and significantly discomfited, to discover she was under the command of a German prize crew whose commander, Lieutenant Hans Berg, presented them with a commission provided to him by zu Dohna-Schlodien, which read as follows:

> Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer 'Appam,' and has orders to bring this ship into the nearest American harbor, and there to lay up. Count Zu Dohna, Cruiser Captain and Commander.[37]

Were she to be laid up as intended, she would join two German auxiliary cruisers already interned in Hampton Roads for violating US neutrality laws by remaining in US waters after being ordered to leave: *Prinz Eitel Friedrich* and *Kronprinz Wilhelm*. Immediately upon his arrival, Berg, in the presence of Vice Consul L.M. von Schilling,

30 Urgent telegram, from Director Trade Division (DTD) and Director of the Intelligence Division (Admiralty), No. 201, 26 January 1916, ADM 137/2755, TNA.

31 Letter from Lloyds of London to Admiralty, 28 January 1916, ADM 137/2755, TNA.

32 Telegram from N.C. Hull to Admiralty, 29 January 1916, ADM 137/2755, TNA.

33 *Ibid.*

34 *Ibid.*

35 Letter from the Director Trade Division to Rear Admiral Commanding, 9th Cruiser Squadron, 30 January 1916, ADM 137/2755, TNA.

36 By executive order, N. Hamilton was in charge of the preservation of the neutrality of the USA, and as such, at least initially, to him fell the onus of all on-scene interactions and liaisons directly related to the vessel. Letter from R. Lansing to A. Peters, 29 February 1916, Department of State World War I Records, NARA.

37 *Appam*, *supra* note 10, 146.

gave his word of honour as a German naval officer that he would not undertake to leave the USA, or permit any of his men to leave the USA, until authorized to do so by the US government.[38]

Berg's demand to be allowed to 'lay up' was the first salvo in a bitter diplomatic row between the USA, Britain and Germany regarding the law of maritime neutrality – particularly, the duties and obligations of a neutral respecting a prize brought by a belligerent into its territory. Berg's note was swiftly followed by letters sent on 2 February and 8 February from the German ambassador to the USA, Count J.H. von Bernstorff, to the US secretary of state, Robert Lansing. In these letters, Bernstorff provided official notification to the USA of *Appam*'s arrival and further stated that 'the commanding officer intends, in accordance with Article 19 of the Prusso-American treaty of September 10, 1785, to stay in an American port until further notice'.[39] Bernstorff also contended that *Appam* had not been used for warlike purposes while she was a prize and, thus, had not been converted into an auxiliary warship.[40] He concluded by requesting that the USA intern the 'locked-up military party of the enemy' and also the crew of *Appam*, who supposedly offered resistance to capture in a manner, so he contended, that converted them likewise into combatants.[41]

Bernstorff's missives raised a host of vexatious issues, all of which the USA had to eventually resolve in the course of fully and finally deciding how to deal with the *Appam*'s presence in her waters. The most urgent matter was that of the disposition of the British subjects aboard the vessel. The closest precedent US authorities had to go by was the case of the *Sitka*, a Russian warship captured by the British in 1855 during the Crimean War and brought unescorted by a prize crew to San Francisco.[42] A writ of *habeas corpus* was served on behalf of two of the Russian crew members who were detained aboard as prisoners of war.[43] The US Attorney General ultimately opined that the *Sitka* was properly considered a public ship of war exempt from US jurisdiction, and, thus, the Russian prisoners could not be released by any order of the US government.[44]

Such a conclusion, if followed in the *Appam* case, would vindicate Count Bernstorff's argument and result in certain of the British subjects being detained indefinitely aboard *Appam* during her tenure in US waters, however long it may be. The British, through a series of conversations between her ambassador to the USA, Sir Cecil Arthur Spring-Rice, and Secretary of State Lansing, took the precisely opposite position from the one they had taken in 1855, with Spring-Rice urging that 'it was most

[38] Letter from N. Hamilton to A. Peters, *supra* note 6.

[39] Letter from J.H. Bernstorff to R. Lansing, 2 February 1916, 723–724, file A 785, reprinted in Department of State, *Foreign Relations of the United States: 1916 Supplement, The World War* (*Foreign Relations*) (1929).

[40] *Ibid*.

[41] *Ibid*.

[42] Letter from C.A. Spring-Rice to Foreign Secretary Grey, No. 112, 4 February 1916, MT 9/1089, TNA.

[43] Secret Foreign Secretary supplementary memorandum entitled 'Appam' (Foreign Secretary Memorandum), February 1916, CAB/37/143/35, TNA.

[44] *The Sitka*, 7 Op. Atty. Gen. 123 (1855).

undesirable that whatever the precedents in the past, British subjects should be held as prisoners in American territory by foreigners claiming the right of hospitality under a treaty over a hundred years old'. Spring-Rice had already formally protested the USA allegedly allowing German officials to visit the vessel, while denying that same right to British officials.[45] By such discrimination, he claimed, the USA would 'lay itself open to a charge of breach of neutrality'.[46]

The USA, in contrast with its practice with respect to the other important issues raised in this case, resolved the issue of the British subjects aboard the vessel with promptitude. On 3 February, Hamilton met aboard *Appam* with Lieutenant Berg and Prince Hatzfeldt, councillor of the German embassy, and at the direction of the secretary of state, made an oral demand for the immediate release from *Appam* of all who desired to leave, except the prize officer, the prize crew and all those who had acted as members of the prize crew in the navigation of the ship.[47] Prince Hatzfeldt, upon being assured by Hamilton that this was the decision of the secretary of state, directed Berg to comply with the order.[48] Thus, it came to be that on 4 February, all British subjects, even the members of her armed forces, were permitted to depart *Appam*, along with all of their personal baggage.[49] Six days later, on 10 February, they left for England on the SS *Baltic*.[50]

This decision by the USA, which implicitly rejected Germany's arguments that some of the British subjects should be detained aboard the vessel, was considered by the Germans to constitute a 'tactical defeat'.[51] The Germans did score a related tactical victory of their own in the matter of the 13 civilians (12 German, one Austrian) aboard the vessel. Their status was unclear and depended on whether or not they had been 'incorporated' into the prize crew during the voyage to Hampton Roads. Berg acknowledged that they had been provided arms for self-defence, but he contended that they had not stood sentry duty or otherwise materially assisted the prize crew.[52] US authorities, perhaps wishing to ease the sting of the Germans' previous tactical defeat, did not press the issue and, on 11 February, granted permission for these civilians to depart from the vessel 'at will'.[53]

45 Telegram from C.A. Spring-Rice 'en clair', No. 343, 2 February 1916, ADM 137/2755, TNA.

46 Letter from C.A. Spring-Rice, No. 341, 2 February 1916, ADM 137/2755, TNA.

47 Letter from N. Hamilton to A. Peters, 3 February 1916 (forwarded to R. Lansing on 4 February), Department of State World War I Records, NARA.

48 *Ibid.*

49 Statement of Captain Harrison, *supra* note 22.

50 Letter from C.A. Spring-Rice, No. 372, 10 February 1916, ADM 137/2755, TNA.

51 Letter from J.H. Bernstorff, Imperial German Embassy, No. A785, 2 February 1916, Department of State World War I Records, NARA. Interestingly, the USA did not officially inform the Germans of the decision regarding certain British subjects until 2 March, when, in a letter from Lansing that had been approved by President Wilson, he informed Bernstorff that 'I have the honor to inform you that the Government has, after due consideration concluded that they should be released from detention on board the Appam, together with their personal effects'. Letter from R. Lansing to J.H. Bernstorff, Washington, DC, 2 March 1916, Department of State World War I Records, NARA.

52 Neutrality Board memorandum, 9 February 1916 (serial 127 bis 2; subject: recommended action in the case of the *Appam*), 11–12, Department of State World War I Records, NARA.

53 Letter from N. Hamilton to L.T. Berg, 11 February 1916, Department of State World War I Records, NARA. This decision had been conveyed by the Treasury Department via telephone to N. Hamilton that same day.

6 The Main Issue, the Law and Each Belligerent's Main Contention

These tactical skirmishes merely presaged, and were peripheral to, the main issue presented by *Appam* – that of her status under international law and the concomitant rights and obligations of the neutral nation, the USA, in whose waters she had arrived, unescorted and uninvited. As already mentioned, in a typical case, a prize such as *Appam* taken by a belligerent like Germany would have been sailed to a German port or that of an ally, 'where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war'.[54] This was obviously an atypical case, involving, as it did, a prize in neutral waters. The two principal bodies of law implicated in this case were the 1785 Treaty – Article 19 of which had been invoked by Bernstorff in his letters of 2 and 8 February – and general (or customary) international law, as reflected in the Hague Convention XIII. Both of these will be discussed in turn, and then the principal contentions of the two belligerent parties – Germany and Britain – will be examined.

The 1785 Treaty was the first treaty entered into between the USA and Prussia.[55] Such luminaries as Thomas Jefferson, John Adams and Benjamin Franklin were involved in the negotiation of its terms.[56] The 1785 Treaty was succeeded by the 1799 Prusso-American Treaty (1799 Treaty), and the wording of the article at issue – Article 19 – was essentially identical in the two treaties.[57] The interpretation of the relevant portions of this article (both treaties were in French) used by the Department of State in the *Appam* matter is as follows:

> The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show.[58]

[54] *Appam*, *supra* note 10, at 148. The US Supreme Court characterized this proposition as 'familiar international law'.

[55] Neutrality Board memorandum, *supra* note 6, at 1.

[56] Letter from J.H. Bernstorff to R. Lansing, No. A 4387, 30 June 1916, reprinted in *Foreign Relations*, *supra* note 39, at 737–739.

[57] Neutrality Board Memorandum, *supra* note 6, at 1. All subsequent discussion in this article will refer to the Treaty of Amity and Commerce between the Kingdom of Prussia and the United States of America (1799 Treaty), 11 July 1799. This treaty expired by its own terms on 22 June 1810, but the provisions of Arts 13–24 were revived by the Treaty of Commerce and Navigation between the Kingdom of Prussia and the United States of America, 1 May 1828.

[58] *Appam*, *supra* note 10, at 152.

The USA and Germany had already had reason to refer to the 1799 Treaty in the current war, and both nations had agreed that the treaty was still in effect between the two nations.[59]

With respect to Hague Convention XIII, the implicated substantive articles were Articles 21, 22 and 23. They read in relevant part as follows:

> Article 21 – A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.
> Article 22 – A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.
> Article 23 – A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court.

Also of relevance is Article 28, which states that '[t]he provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention'. Germany had ratified the convention, but Great Britain had not. Thus, by its literal terms, '[t]he provisions of the present Convention d[id] not apply' in the ongoing war, even to neutrals like the USA that had acceded to the convention. One of the major issues presented in the *Appam* case was the extent to which, notwithstanding Article 28, the provisions of Hague Convention XIII applied, either as a conventional obligation or as a reflection or statement of customary international law.

As with the 1799 Treaty, the USA had also applied Hague Convention XIII during the war – ironically, again related to the internment of the *Prinz Eitel Friedrich* – on the theory that most of its provisions reflected customary international law.[60] One provision of Hague Convention XIII, however, that the USA most decidedly did not consider to be reflective of customary international law was Article 23. With respect to this article, the US delegation at the Hague conference in 1907 reported to the secretary of state that:

> Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.[61]

Due to its concern with Article 23, the USA initially did not sign Hague Convention XIII. When the USA ultimately decided to ratify the convention on 3 December 1909,

[59] The USA and Germany had applied the 1799 Treaty's compensation and restitution provisions in the matter of the sinking of the US steamer *William P. Frye* in January 1915 while she was on a voyage from Seattle to England with a cargo consigned 'to order'. Ironically, the culprit was *Prinz Eitel Friedrich*, interned in Norfolk. Sandra Carruthers, 'The Work of the Joint State-Navy Neutrality Board, 1914–1918' (Master's thesis, University of Colorado, Boulder, 1963).

[60] *Ibid*.

[61] Neutrality Board Memorandum, 2 February 1916 (serial 127; subject: Visit and stay of S.S. *Appam*), 3, Department of State World War I Records, NARA.

it expressly excluded Article 23 from the act of adherence, formally declaring '[t]hat the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23'.[62]

Turning now to each side's respective contentions in this case, the Germans argued that Article 19 of the 1799 Treaty 'authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be any question of turning the prize over to [the] English'.[63] As to Hague Convention XIII, the Germans contended that the convention did not apply due to Britain's non-accession, which was in accordance with Article 28.[64] Even if the convention did apply, the rules in Articles 21 and 22, which appear to operate to Germany's disadvantage, would not apply, as the preamble to Hague Convention XIII states that the convention will not modify existing treaties.[65] Thus, the rule expressed in Article 19 of a treaty that was already acknowledged by both Germany and the USA to still be in force would remain as the controlling law, notwithstanding anything purportedly to the contrary in Hague Convention XIII.[66]

As for the British, on 3 February, the Foreign Office instructed Spring-Rice to address a note to the Department of State demanding that *Appam* be ordered to leave the USA or be restored to her owners and the German prize crew interned.[67] This he did on 4 February, along with an exposition of the controlling law from the British standpoint. As to Article 19 of the 1799 Treaty, Spring-Rice quoted the 'revival of an ancient abuse' language in the report of the American delegation to Hague Convention XIII regarding Article 23 as proof that this treaty 'was regarded as obsolete and inconsistent with modern doctrines'.[68] The USA's later reservation with respect to Article 23 demonstrated to the British that, in so far as the provisions of the 1799 Treaty conflict with the convention, they were regarded as being overridden by the later instrument.[69]

This 'later instrument' was Hague Covention XIII, specifically Article 21. Spring-Rice contended that Article 21 is a rule of 'general application',[70] and since *Appam* had not entered port for one of the acceptable reasons under Rule 21, the USA had an obligation to 'order it to leave at once; [and] should it fail to obey, … [to] employ the means at its disposal to release it with its officers and crew and to intern the prize

62 James Brown Scott, 'The Case of the Appam', 10 *American Journal of International Law* (1916) 809.

63 *Ibid.*

64 Letter from J.H. Bernstorff to R. Lansing, 8 February 1916, reprinted in *Foreign Relations*, *supra* note 39, at 726.

65 Letter from J.H. Bernstorff to R. Lansing, No. A 4387, 30 June 1916, *supra* note 56. The preamble to Hague Convention XIII, *supra* note 5, states that the 'rules [in the convention] … cannot … modify provisions laid down in existing general treaties'.

66 See note 59 above and accompanying text.

67 Cypher telegram from Foreign Office to C.A. Spring-Rice, No. 263, 3 February 1916, ADM 137/2755, TNA.

68 Memorandum from British Embassy to Department of State (Embassy Memorandum), 4 February 1916, CAB/37/143/35, TNA.

69 *Ibid.*

70 *Ibid.*

crew'.[71] Because the governing rule was one of general application, the British contended, the fact that Britain had not ratified the convention did not relieve the USA of the obligation to treat ships and property of all nations in accordance with Article 21's strictures.[72]

7 The Judiciary Steps In – and Takes Over

To the executive branch, specifically the State Department, fell the onus of resolving the very difficult issues presented by *Appam* or, at least, so it initially seemed. In his deliberations, the secretary of state drew upon the assistance of an interesting advisory body – the Joint State-Navy Neutrality Board. Lansing created this board in August 1914 to assist him in dealing with the extraordinarily difficult neutrality issues that were presented during World War I (most of which, ironically enough, involved the British and their aggressive actions towards US vessels at or near the three-mile limit of US waters).[73] Its members were James Brown Scott, a noted international lawyer and special advisor to the State Department, as chairman, and Captains H.S. Knapp and James H. Oliver of the US navy.[74] The Board's opinions were of considerable importance to Lansing and were often cited by him in recommendations he made to the president.[75] It swung into immediate action in the *Appam* case, providing Lansing with three extensive memos containing historical research, conclusions of law and policy recommendations within just over a week of the vessel's arrival in the USA in an effort to help him resolve the myriad legal issues the case presented.

The executive's movement towards a diplomatic resolution of the case was interrupted and ultimately derailed by the actions of private foreign parties, namely the vessel's owner and her captain ('libellants'), who sought recourse in the federal judiciary by filing two suits in admiralty in the Eastern District of Virginia.[76] The first, Case no. 650, was a libel brought by the British and African Steam Navigation Company on 16 February 1916 to recover possession of the vessel.[77] The second suit, Case no. 722,

[71] Hague Convention XIII, *supra* note 5, Art. 21.

[72] Embassy Memorandum, *supra* note 68. The British position was informed by British prize courts, which earlier in the war had ruled that Hague Convention XIII applied in cases involving vessels of non-signatory neutrals, due to its status as customary international law. Foreign Secretary Memorandum, *supra* note 43.

[73] Carruthers, *supra* note 59, at 1, 3, 78. The board served as a 'clearinghouse for various problems of neutrality'. *Ibid.*, at 1.

[74] *Ibid.*, at 1.

[75] *Ibid.*, at 2.

[76] Before permitting the case to go forward, Wadill J, who would be presiding over the case, telegrammed the US attorney general and asked him to confirm 'whether the allowance of [the law suit] by me will involve any embarrassment to Executive Department in handling same'. This request was transmitted by the attorney general to the Secretary of State, who apparently had no objection to this parallel, concurrent judicial process. Letter from the Attorney General to Counselor Department of State (Polk), 16 February 2016, reprinted in *Foreign Relations*, *supra* note 39, at 726–727.

[77] *Appam*, *supra* note 10, at 143

was a libel filed on 13 March 1916 by Captain Harrison, master of *Appam*, for possession of cargo on board the ship.[78]

In seeking a judicial remedy so soon after *Appam*'s arrival in the USA, the private British parties acted contrary to the wishes of the British diplomatic corps, whose principals correctly anticipated that the lawsuit would give the State Department a convenient excuse to defer the tough legal and dispositional decisions both the Germans and British were demanding on the grounds that the matter was now in the jurisdiction of the court.[79] Their preference would have been to await a decision of the US government and only apply to the courts in the event that the decision was unfavourable.[80] Publicly, once the libels were filed, Spring-Rice informed the State Department that 'the British Government reserves all rights under accepted principles and practices of international law with respect to the *Appam*, and that any action taken in the matter by the owners in maintenance of [their] interests is not in any way to be considered as prejudicing any claim advanced or to be advanced by the British government'.[81]

The Germans reacted with shock to the lawsuits, which were rendered even more unpalatable when the Deputy US Marshal in Norfolk boarded *Appam* on 19 February, served the libel in Case no. 650 on Berg and took custody of the vessel in the name of the US District Court for the Eastern District of Virginia, leaving two watchmen aboard the vessel in the process.[82] Their first counter-salvo was a visit by Berg and von Schilling to Hamilton at the Newport News Customs House, where they presented an unsigned note of protest, claiming that since the USA had declared *Appam* to be a prize, execution of the judicial process was not permitted by the 1799 Treaty.[83] The letter asked for the immediate removal of the watchmen left on board and for dismissal of the libel.[84] Berg later informed Hamilton that he would neither feed nor house the watchmen nor allow them to move from the spot where they had been dropped off.[85]

These German field-level assertions were supported and expanded upon by Bernstorff, who informed Lansing: 'You may well appreciate my surprise at the action which has been taken.'[86] He cited Article 19 to the effect that prizes brought to the USA under treaty provisions shall not be 'put under legal process when they come to and enter the ports of the other party' and that, as a result of the US action, he was 'at a loss to understand why such action has been taken by a court of your country'.[87] He concluded by

78 *Ibid.*

79 Letter from C.A. Spring-Rice to Foreign Office, No. 344, 11 February 1916, ADM 137/2755, TNA; Foreign Office telegram to C.A. Spring-Rice (Foreign Office telegram), 11 February 1916, ADM 137/2755, TNA.

80 Foreign Office telegram, *supra* note 79.

81 Memorandum from British Embassy to Department of State, 15 February 1916, reprinted in *Foreign Relations*, *supra* note 39, at 726.

82 Letter from N. Hamilton to A. Peters, 19 February 1916, Department of State World War I Records, NARA.

83 *Ibid.*, at 7.

84 *Ibid.*

85 *Ibid.* These interactions with Hamilton occurred despite his belief, not at all unreasonable, that the actions of the Court and the marshal left him with 'no further jurisdiction over the vessel except in the matter of the protection of the revenue'. *Ibid.*, at 9.

86 Letter from J.H. Bernstorff to R. Lansing, No. A 1293, 22 February 1916, Department of State World War I Records, NARA.

87 *Ibid.*

requesting that Lansing ask the attorney general to take the steps 'as may be necessary and proper to secure the prompt dismissal of the libel'[88] and, if that was not possible, by proposing that the case be referred to the Hague Court of Arbitration.[89]

The USA's response, both with respect to the power of the judiciary to hear the case and the Germans' arbitration proposal, was unfavourable to the Germans. In a letter personally approved by the president, Lansing informed Bernstorff that '[w]hether in these circumstances the US court has properly or improperly assumed jurisdiction of the case and taken custody of the ship, is a legal question which, according to American practice, must now be decided by the municipal courts of this country'.[90] However, to ensure German interests were protected, he informed Bernstorff that he had conveyed his 22 February note to the attorney general with the request that he instruct the US district attorney for the Eastern District of Virginia, Richard H. Mann, to appear in the case as *amicus curiae* and to present to the court a copy of that note.[91]

8 Movement towards, and Issuance of, the District Court Decision

During the pendency of the trial court rulings, US officials became concerned about the possibility of *Appam* making a break for the high seas or of the prize crew taking action to disable or otherwise render her unusable in the event the decisions were unfavourable to the Germans.[92] In March, in response to these concerns, these officials decided to move *Appam* from an anchorage to a private dock in Norfolk. Bernstorff protested such a move, citing the 'increased difficulty of [Berg] controlling his crew, the danger of annoyance from curiosity seekers, and the possibility of injury from hostile sources'.[93] To forestall such an action, Bernstorff, while 'reserving all the rights of the German government in this case', gave his assurance that 'no change shall be made in the status quo with respect to the augmentation of the crew or equipment that might be considered a breach of neutrality, and that no attempt to run the vessel away will be made so long as such ship remains under the custody of [the] court'.[94]

The *Appam* did move to a dock in April 1916, not by direction of the executive branch to secure US national security interests but, rather, as a result of a preliminary

88 *Ibid.*

89 Letter from J.H. Bernstorff to R. Lansing, No. A 1727, 16 March 1916, reprinted in *Foreign Relations*, *supra* note 39, at 732.

90 Letter from Lansing to Bernstorff, 2 March 1916, *supra* note 51.

91 *Ibid.*

92 Spring-Rice repeatedly warned Lansing of imminent German perfidy and sternly admonished the USA as to her duty to prevent her from escaping and of the dire diplomatic consequences that would result should the USA to fail to do so and British shipping be harmed as a result. See, e.g., Letter from C.A. Spring-Rice to R. Lansing, 15 May 1916, Department of State World War I Records, NARA.

93 Letter from J.H. Bernstorff to R. Lansing, No. A 1829, 14 March 1916, reprinted in *Foreign Relations*, *supra* note 39, at 731–732.

94 *Ibid.*

action of the Court. After a survey indicated that portions of the cargo, particularly cocoa, cocoa beans and palm oil, were perishable and subject to decay and injury, the Court, upon motion by libellants, issued an order of sale.[95] *Appam* was accordingly taken to a dock in Newport News on 3 April 1916, where her cargo, under the watchful eye of one officer and 25 enlisted members of the 12th Company of Marines, was offloaded on 4–10 April, at which time she returned to her previous anchorage.[96] The sale netted over US $600,000, which was deposited with the registry of the Court, and the unsold portions of the cargo were placed in the custody of the marshal of the Eastern District of Virginia.[97]

While this action was taking place, other developments of potential significance to the outcome of the litigation occurred. The first was a 11 May 1916 *in absentia* decision by the Imperial German prize court in Hamburg that '[t]he captured vessel [*Appam*] and the cargo therein have been legally captured and are to be confiscated'.[98] The cargo was described in the decree as about 3,000 tons of general cargo, including £36,549 in gold bars. An authenticated copy of the decree was presented to the US embassy in Berlin a week later on 18 May. The other development – developments, actually – were letters from Lansing to Bernstorff on 2 March and 7 April 1916, which contained executive branch pronouncements regarding the law applicable in the *Appam* matter. With respect to the 1799 Treaty, Lansing informed Bernstorff that a 'reasonable interpretation' of Article 19 makes clear that it is 'applicable only to prizes which are brought into American ports by vessels of war. The *Appam*, however, … was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew'.[99] Lansing further stated that it was clear that the 'port of refuge was not to be made a port of ultimate destination or indefinite asylum'.[100] As a result of all of this, 'the government of the United States considers itself free from any obligation to accord the *Appam* the privileges stipulated in Article 19 of the treaty of 1799'.[101]

Furthermore, this exclusion, as it were, of the 1799 Treaty from applicability in the *Appam* matter left only one other legal regime, that of Hague Convention XIII. And as to Hague Convention XIII, Lansing stated that *Appam* could enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war – namely, to enter neutral ports only in accordance with the provisions of Article 21 (those being unseaworthiness, stress of weather or want of fuel or provisions).[102] Implicit in

[95] *The Appam*, 240 F 676 (4th Cir 1917).

[96] *Appam*, *supra* note 10, at 147; Letter from Acting Secretary of the Navy to Secretary of State, 3 April 1916, Department of State World War I Records, NARA.

[97] *Appam*, *supra* note 10, at 147.

[98] Enclosure to Despatch no. 3192, certified copy of action of Imperial Prize Court decision, 22 May 1916, Department of State World War I Records, NARA.

[99] Letter from Lansing to Bernstorff, 2 March 1916, *supra* note 51.

[100] *Ibid*.

[101] *Ibid*.

[102] *Ibid*.

this assertion was an executive branch conclusion that Hague Convention XIII was applicable between the USA and Germany, either as a conventional obligation or as an expression of customary international law, but Article 23 was not. Such a conclusion was consistent with the USA's prior resort to Hague Convention XIII in managing the internment of the *Prinz Eitel Friedrich*.[103]

Finally, Lansing informed Bernstorff that in the event the libels were dismissed there were two possible outcomes. Either *Appam* would be allowed to depart from US territorial jurisdiction after she had a reasonable time to take on board such supplies as may be necessary, in the judgment of the US government, for a voyage to the nearest port subject to the sovereignty of Germany. Failing this, she would be released, and the prize master and crew interned for the remainder of the war.[104] The relevance, if any, of these developments to the deliberations of Judge Waddill remained an open issue until he issued the final decree of the Court on 29 July 1916. Waddill J stated the ultimate issue in the case as follows:

> [T]he question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.[105]

He then subdivided the ultimate issue into three sub-issues, each of which he dealt with in turn: (i) what are the rights existing between the USA and Germany, respecting the right of entry of prizes of war captured at sea and of asylum, in the waters of the USA, whether arising under treaty or international law; (ii) has this court jurisdiction to entertain these suits for restitution of the property in question to its owners and (iii) what is the character of the property seized, whether public or private, and can the Court, as against the German government, who claims the right to adjudicate its title by its own prize court, determine the rights thereof and afford relief as between the litigants.[106]

With respect to sub-issue (i), Waddill J quoted at length from Lansing's letters to Bernstorff of 2 March and 7 April 1916 and paid them great deference, which was not surprising given the judge's further statement that 'the court is in full accord with his interpretation'.[107] Waddill J then concluded that Article 19 of the 1799 Treaty, 'when read in the light of the rulings and interpretation placed upon other contemporaneous treaties', did not permit prizes to be brought into the waters of the USA for

[103] As discussed in note 59 above and accompanying text.

[104] Letter from R. Lansing to J.H. Bernstorff, Washington, DC, 7 April 1916, Department of State World War I Records, NARA.

[105] *The Appam*, 234 F 389, 392 (ED Va 1916).

[106] *Ibid.*, at 393.

[107] *Ibid.*, at 396. As stated by the judge, '[t]he weight that should be given to the opinion and ruling of the secretary of state, an able and accomplished diplomat, in construing the Prussian treaty, need not be dwelt upon … further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, rendered after its authority had been invoked by the German government, in this very matter'.

the purpose of being laid up, but only allowed them to be 'brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and [even] then, not for an indefinite period, but for the temporary causes recognized by international law'.[108] And, as for general international law, Waddill J opined that '[t]he provisions of articles 21 and 22 of the Hague Convention (XIII) of 1907 are declaratory of the existing law of nations, and the fact that article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasizes its policy respecting the subject'.[109] And even though Britain did not adopt Hague Convention XIII, Germany and the USA had done so, which to the Court demonstrated a meeting of the minds, so to speak, between the USA and Germany as to the use of their waters and harbours for belligerent prizes. Thus, as to sub-issue (i), the Court held that the 'right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for'.[110]

As to sub-issue (ii), Waddill J first approvingly cited Lansing's statement in his 7 April letter to Bernstorff to the effect that the question of the Court's jurisdiction was one for judicial ascertainment and not executive determination.[111] And as to that jurisdiction, Waddill J concluded that the jurisdiction and authority of the US courts of admiralty to entertain possessory actions for the restitution to their owners of prizes of war seized for violation of the neutrality laws 'is no longer open for serious consideration'.[112] Although this question had been the source of some controversy in the early years of the republic, the issue was resolved by the US Supreme Court in the case of *The Betsey*.[113] There, 'the question of jurisdiction was directly raised, and the US Supreme Court held that the district courts, being possessed of all the powers of courts of admiralty – instance as well as prize courts – were competent to decide whether restitution should be made, and the law has been thus settled for more than 100 years'. In short, '[t]his power on the part of the courts of the United States may not be given specifically by any statute, as required for the exercise of criminal jurisdiction, but arises from the authority reposed in them under the Constitution as courts of admiralty and common law, charged with the duty of administering the law of nations'.[114]

As to sub-issue (iii), the Germans had argued that the libels respecting *Appam* and her cargo could not be maintained because title to the vessel and her cargo vested in the German government upon her capture and, further, that this title 'can only be inquired into and divested by' the action of a German prize court. Waddill J found it 'manifest that the claim that this court should wait, or be controlled by what the German prize court does, is without merit'.[115] According to Waddill J, such a position had been asserted in the past, and, citing the *L'Invincible* case, he concluded that it had

[108] *Ibid.*, at 396–397.
[109] *Ibid.*, at 397.
[110] *Ibid.*, at 398.
[111] *Ibid.*, at 395.
[112] *Ibid.*, at 398.
[113] *Ibid.*, at 399, citing *Glass v. The Sloop Betsey*, 3 Dall 6, 1 L Ed 485 (1795).
[114] *Ibid.*, at 401.
[115] *Ibid.*, at 402.

been completely refuted by the US Supreme Court.[116] Thus, as to sub-issue (iii), the Court concluded that:

> [t]he validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the prize property to its owners, and in a proper case to restore the same to them.[117]

As none of the sub-issues resolved in Germany's favour, the Court reached the following ultimate decision and order:

> [T]he manner of bringing the *Appam* into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the imperial government of the German Empire; and it will be so ordered.[118]

9 Effect of Ruling; Pendency of US Supreme Court Appeal

The Germans, obviously disappointed by this ruling, quickly announced their intent to appeal to the US Supreme Court,[119] and, on 8 August, Berg and von Schilling executed an appeal bond as principals, in which they bound themselves for the full amount of the sum of US $2,000,000. The surety agreement accompanying the bond stated that '[t]he condition of this obligation is such that if … [they] (1) shall prosecute their appeal to effect and (2) answer all damages and costs, if they fail to make good their plea, then the above obligation is void, else to remain in full force and virtue'. The same principals executed a second bond on 28 September 1916 for US $30,000 to secure their appeal of the adverse decision regarding *Appam*'s cargo.[120]

The Germans' appeal led, naturally, to immediate diplomatic wrangling regarding the status of the vessel during the pendency of the appeal. Although the vessel remained in the custody of the Court, the prize crew was left aboard, much to the ire of the British.[121] The British demanded that the prize crew be removed and the

[116] 1 Wheat 238, 4 L Ed 80 (1816).

[117] *Ibid.*, at 404.

[118] *Ibid.*

[119] The appellate process in this case went directly from the District Court to the Supreme Court, bypassing the Circuit Court of Appeals.

[120] Surety agreements, dated 8 August and 20 September 1916, Department of State World War I Records, NARA.

[121] Letter from C.A. Spring-Rice to Foreign Office, No. 2372, 3 August 1916, ADM 137/2755, TNA.

vessel, after payment of a bond, be speedily restored to mercantile service, as 'the vessel is needed at the present time and to detain her after two such decisions does not seem just. Her detention entails a loss which it might be impossible to obtain adequate compensation for.'[122] Any resolution short of the British demand would allow the Germans to 'practically gain their contention which was that they had a right to take the ship into an American port'.[123] The Foreign Office instructed Spring-Rice to inform the US government that if the prize crew was allowed to remain on board and 'in consequence the ship were ultimately destroyed or sunk, the US government would be responsible'.[124]

As for the Germans, Bernstoff brought to Acting Secretary of State Frank Polk's attention the fact that at a hearing in Norfolk on 2 August, Waddill J manifested a desire and intention to order her release to her former owners upon payment of a bond.[125] The Germans opposed this, stating that 'our rights would be seriously prejudiced if the lower court should endeavor to deprive the Commander of the "Appam", a duly commissioned prize master and officer of the German Navy, of physical possession of the ship prior to the decision of all questions by the United States Supreme Court on appeal'.[126] To reassure Waddill J regarding Germany's honourable intentions as to the vessel, entrusted as it was to the custody of the Court, Bergstoff asked Lansing to relay the following pledge:

> In order to relieve any apprehensions in the mind of the Court in reference to the safety of the 'Appam' pending the decision on appeal to the Supreme Court, I wish to give assurance to you on behalf of Lieutenant Berg that every effort will be made to preserve and protect the property itself as well as the relations of the vessel and its crew to the interest of your Government. No explosives capable of doing injury to the vessel or the public peace will be allowed aboard the vessel.[127]

This message was in fact conveyed by letter from Lansing to the attorney general on 24 August 1916.

US internal deliberations regarding this issue reflected the uncomfortableness of a situation whereby the judiciary was in a position of primacy involving a matter of such significant import to the USA's foreign policy. Upon being informed by Acting Secretary of State Polk of the German objection to restoring *Appam* to her former owners during the pendency of the US Supreme Court litigation, Attorney General T.W. Gregory passed on this request to Waddill J:

> The State Department tells me that they regard it as of the utmost importance, for diplomatic reasons, that the Germans should not be dispossessed of the *Appam* pending appellate proceedings. … I join the Secretary of State in the urgent request that no change be made in the

[122] Letter from C.A. Spring-Rice to Viscount Grey, 4 August 1916, MT 9/1089, TNA.

[123] *Ibid*.

[124] Letter from Foreign Office to C.A. Spring-Rice, No. 2044, 4 August 1916, ADM 137/2755, TNA.

[125] Letter from J.H. Bernstorff to Acting Secretary of State Polk, 3 August 1916, Department of State World War I Records, NARA.

[126] *Ibid*.

[127] Letter from J.H. Bernstorff to R. Lansing, No. A 5106 (Serial J), 12 August 1916, Department of State World War I Records, NARA.

> possession of the vessel until the higher courts have passed on the question involved. Ordinarily, I would not presume to make any suggestions in regard to any matter pending before you for judicial determination. International conditions, however, are so extraordinary, and the anxiety of the State Department so pronounced that, in view of your recent generosity in expressing a willingness to consider the views of the Executive Department of the Government, I make bold to prefer this request.[128]

And so ultimately it was decided; *Appam* would remain at anchorage under the control of her prize crew pending the US Supreme Court's decision. Lansing informed Spring-Rice of this determination on 24 August, stating that, in view of Bernstorff's pledge to safeguard the vessel:

> I am of the opinion that there is no need for apprehension in regard to the safety of the ship, without admitting, however, on the part of my Government, that it is responsible for the effective custody of a vessel within the jurisdiction of the court pending an appeal in a case where private individuals of foreign nationality have declined to admit the results of Executive action and chosen to take advantage of such judicial proceedings as are open to them in this country.[129]

10 The US Supreme Court Decides

The US Supreme Court issued its opinion on 6 March 1917. Much had occurred between Waddill J's decision on 29 July 1916 and March 1917. Germany announced the resumption of unrestricted submarine warfare on 1 February 1917, which prompted the USA to sever diplomatic relations with Germany and recall its ambassador to Berlin two days later. This led also to the removal of the prize crew from *Appam* on that same day – 3 February.[130] It was in this inauspicious (for Germany) environment that the unanimous opinion of the Court was announced. As had Waddill J, the US Supreme Court opined that the cases involved three 'decisive questions': (i) whether the use of an American port, under the circumstances shown, was a breach of this nation's neutrality under the principles of international law; (ii) whether such use of an American port was justified by the existing treaties between the German government and our own and (iii) whether there was jurisdiction and a right to condemn *Appam* and her cargo in a US court of admiralty.[131]

[128] Letter from Attorney General (Gregory) to Acting Secretary of State (Polk), 5 August 1916, Department of State World War I Records, NARA.

[129] Letter from R. Lansing to C.A. Spring-Rice, 24 August 1916, reprinted in *Foreign Relations*, *supra* note 39, at 742.

[130] The Germans were true to their word in the care they took of *Appam*; Waddill J himself toured the vessel after the prize crew's departure and 'was exceedingly gratified to find in what condition she is and expressed the belief that the ship had been taken excellent care of by the German crew very much better than any crew that the Marshal could have provided and at much less expense'. Letter from Coudert Brothers (attorneys in New York) to C.A. Spring-Rice, 16 February 1917, MT 9/1089, TNA.

[131] *Appam*, *supra* note 10, at 147.

With respect to the first issue – that of the applicability of principles of international law to the *Appam* situation – the Court concluded that while Hague Convention XIII:

> may not be a binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions.[132]

Appam was not brought to the US port for any of these reasons; instead, the vessel 'proceed[ed] over a distance of more than three thousand miles, with a view to laying up' there.[133] The USA expressly 'refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court' in its ratification process for Hague Convention XIII since 'thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port'.[134]

As to the second 'decisive question' – that of the effect of any existing treaties between Germany and the USA – the Court first recalled that the Germans had principally relied upon Article 19 of the 1799 Treaty. With respect to that treaty, the Court agreed with the State Department's conclusion and that of the lower court that the privileges enunciated in the treaty applied to vessels of war and the prizes that accompany them into the port of a contracting party.[135] *Appam*, a merchant vessel, captured on the high seas and sent alone and unescorted into an American port 'with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty' did not qualify for these privileges.[136] 'Such use of one of our ports was in no wise sanctioned by the Treaty of 1799', the Court found, and constituted 'a clear breach of the neutral rights of this Government'.[137]

With respect to the third 'decisive question' – that of jurisdiction of the Court – the US Supreme Court found that the vessel was in an American port and, thus, under US practice, was within the jurisdiction and possession of the District Court, which had 'assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly'.[138] The German prize court ruling had no effect on the District Court's jurisdiction. Were the rule otherwise, continued the Court, 'our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning'.[139] Accordingly, the Court found that:

[132] *Ibid.*, at 151.
[133] *Ibid.*, at 148.
[134] *Ibid.*, at 151.
[135] *Ibid.*, at 153.
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*, at 156.
[139] *Ibid.*

> [t]he violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each [of the two libels being appealed] the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.[140]

As a result, the Court affirmed the decisions of the District Court in both libels.

11 Aftermath of US Supreme Court Decision

As a result of this decision, *Appam* was restored to her rightful owners on 28 March 1917, who, after a period of refit and repair, renamed her *Mandingo* and returned her to service on the Britain–West Africa route.[141] Waddill J re-assumed the principal remaining judicial role, which mainly consisted of unravelling the complex monetary issues related to the case. On 1 August 1917, he issued a supplemental opinion in which he made various awards out of the bond provided by Berg and von Schilling to secure their appeal, with the largest being US $447,000 to the libellants for 'damages and costs suffered by reason of the respondents' failure to prosecute their appeal to effect, and failure to make their plea good'.[142] As to the remaining balance – the property of the German government – Waddill J, after receiving a State Department opinion that '[t]here seems to be no question that, internationally, the public property of one belligerent found within the jurisdiction of the other may be rightfully taken and confiscated',[143] issued a final decree in February 1918 that 'the balance of the money in the registry of this Court, … the sum of $323,321.21, should be declared confiscated and held to be the property of the United States, [and] doth so adjudge, order and decree'.[144]

12 Conclusion and Analysis

And there is the story of *Appam* – her saga and the diplomatic and legal angst that her capture and conveyance to America caused. An intriguing question left unanswered by the archives or the court opinions is why *Appam* was sent to America in the first place, instead of to Germany or the port of an ally. This contemporary analysis by Brown Scott, a renowned jurist and member of the Joint State-Navy Neutrality Board, seems to provide the best answer:

[140] *Ibid*.

[141] L. Dunn, *Famous Liners of the Past Belfast Built* (1964), at 72. She was eventually scrapped in 1936.

[142] Court order, Eastern District of Virginia, 1 August 1917, Department of State World War I Records, NARA.

[143] Letter from State Department to Assistant Attorney General, 1 December 1917, Department of State World War I Records, NARA.

[144] Court order, Eastern District of Virginia, 4 February 1918, Department of State World War I Records, NARA.

> The *Appam* was 130 miles from the Madeiras, but the neutrality of Portugal was questionable, and the prize might not be safe in its waters. Emden, the nearest German port, was 1,590 miles away, but the British command of the sea made it dangerous if not impossible for the *Appam* to attempt to reach a German port in the neighborhood of the British fleet. Hampton Roads was 3,051 miles from the place of capture. The journey to this port was thought to be free, as the event proved, from British cruisers, and the *Appam* therefore speeded across the Atlantic to an American port to escape the consequences of British command of the seas.[145]

With respect to some of the principal players in this maritime drama, *Möwe* continued her spectacular run of success after parting company with *Appam*, sinking seven more British or Allied merchant vessels before arriving home to a hero's welcome on 4 March 1916.[146] She made one additional voyage, from 22 November 1916 to 22 March 1917, but, after that, was rendered unnecessary by the advent of unrestricted submarine warfare.

Captain Harrison of *Appam*, though a successful plaintiff in the suit to recover *Appam*'s cargo, did not fare nearly as well as his counterpart on *Möwe*. He and other merchant captains of vessels captured or sunk by *Möwe* had closely adhered to familiar trade routes despite repeated Admiralty insistence that they vary their routes, drawing the official admonishment that '[t]he folly of this is apparent and should be well rubbed in to all Masters confidentially'.[147] Furthermore, by failing to alter course at a right angle upon first sighting *Möwe*, and by failing to assume she was an enemy upon her continued approach and altering course to put her astern, Harrison violated paragraph 8 of Admiralty Instruction on 'Trade Routes during War'. This violation, so the officials concluded, played a material role in *Appam's* capture, as with her available speed, 'had prompt steps been taken to turn away from the raider as soon as she was sighted … there might have been a reasonable chance of escape'.[148] As a result of Captain Harrison's 'lamentable disregard' of these instructions, the Committee of the Liverpool and London War Risks Association informed Elder Dempster that '[t]he Captain's statement has been forwarded to the Admiralty who will no doubt take action'.[149]

Of course, the principal significance of the *Appam* matter was its role in the clarification or establishment of the law of neutrality as interpreted and applied by the USA. Such clarification was particularly necessary following the demise of the 1909 Declaration Concerning the Laws of Naval War (Declaration of London), which was agreed upon by the 10 principal naval powers during the London Naval Conference of

[145] Brown Scott, *supra* note 62, at 820.

[146] The commander-in-chief of the High Seas Fleet sent three cruisers and four battleships (plus destroyers) to escort her into port. The entire crew was awarded the Iron Cross, and zu Donha-Schlodien was awarded the Iron Cross first and second class as well as the Order pour le Mérite. Chatterton, *supra* note 7, at 215, 242.

[147] Shipping Intelligence Officer (SIO), Memorandum entitled 'Folly of Keeping to Trade Routes', Liverpool, 8 February 1916, ADM 137/2755, TNA.

[148] SIO, Liverpool to Director Trade Division, 25 August 1916, ADM 137/2755, TNA.

[149] Letter from Manager and Secretary to the Committee of the Liverpool and London War Risks Association to Messrs Elder Dempster & Co., ADM 137/2755, TNA.

1908–1909.[150] This naval conference was deemed necessary to provide clarity as to what the 'rules of international law' were with respect to neutral and belligerent rights at sea that were to be applied by the International Prize Court established by Hague Convention XII.[151] Due to its rejection by the British House of Lords, the Declaration of London, which focused principally on prize law and the law of blockade, was not ratified by any signatory, and, as a further consequence, the International Prize Court was never established.[152] An American proposal at the beginning of World War I for a general recognition of the Declaration of London so that maritime law would have definite principles was rejected.[153] Great Britain, with the concurrence of her allies France and Russia, adopted the declaration in modified form as a statement of the principles governing her conduct of warfare at sea; however, this unilateral action by Britain and her allies was not recognized by other nations, including the USA.[154] In short, the law of maritime neutrality, particularly the law as to prizes, was in significant disarray at the time the USA was faced with the complex issues presented by the *Appam*, which renders all the more significant the decisions made by the USA in that case.

As to the effect of decisions of foreign prize courts respecting prizes in US waters, while Wadill J conceded the power of such a court to determine the validity of the capture, as well as all questions of prize law, he also found it to be 'manifest that the claim that [a US] court should wait, or be controlled by what [a foreign] prize court does, is without merit'. What was also made clear as a result of the *Appam* matter is that 'the public property of one belligerent found within the jurisdiction of another may be rightfully taken and confiscated'.[155] Article 19 of the 1799 Treaty was revealed to be a dead letter, with the German contention as to unescorted prizes being rejected as an 'ancient abuse' and the balance of its provisions yielding to the modern statement

[150] Declaration Concerning the Laws of Naval War (Declaration of London) 1909, Cd 4554, reprinted in D. Schindler and J. Toman, *The Laws of Armed Conflicts* (1988).

[151] Convention (XII) Relative to the Creation of an International Prize Court (Prize Court Convention), reprinted in D. Schindler and J. Toman, *The Laws of Armed Conflict* (2004) 1096. Hague Convention XII, *supra* note 5, Art. 7 provides that '[i]If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.'

[152] Schindler and Toman, *supra* note 150, at 1111. The US Senate, at the request of President Taft on 21 April 1909, advised and consented to the Prize Court Convention on 15 February 1911, and the president had been ready since that date to deposit US ratification at The Hague. Carnegie Endowment for International Peace, 'The Report to the Hague Conferences of 1899 and 1907', in Brown Scott, *supra* note 62, 825.

[153] Burchard, 'The Case of the "Appam" and the Law of Nations', 11(2) *American Journal of International Law* (1917) 273.

[154] By an Order in Council of 20 August 1914, the Declaration was ordered 'adopted and put in force by HM's government as if the same had been ratified by HM' subject to certain additions and modifications. It was later modified and re-enacted by another Order in Council on 29 October 1914. Francis Wickware (ed.), *The American Yearbook: A Record of Events and Progress 1915* (1916), at 2.

[155] Letter from State Department to Assistant Attorney General, 1 December 1917, *supra* note 143.

of the law, which were contained in Articles 21 and 22 of Hague Convention XIII. Also most emphatically rejected as a component of the American law of neutrality was the modern incarnation of the 'ancient abuse' – Article 23 of Hague Convention XIII. As stated by the US Supreme Court, the USA had expressly 'refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court', since 'thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port'. In short, the *Appam* case clearly established that, as Secretary Lansing stated, US ports will not be available to belligerents as a place to deposit the 'spoils of war'.

A further consequence of the *Appam* case is that the USA indicated its willingness to adhere to the principles of Hague Convention XIII to the extent the principles at issue reflect a meeting of the minds of the involved nations, notwithstanding any purported limitation on the applicability of the treaty in Article 28. Whether such adherence would be owed as a conventional obligation or because of Hague Convention XIII's incorporation and reflection of customary international law is not entirely clear and would probably be determined on a principle-by-principle basis. But, at a minimum, as the US Supreme Court stated, Hague Convention XIII is 'very persuasive as showing the attitude of the American Government when the question is one of international law'.

What was made entirely clear as a result of the *Appam* case is perhaps its most important conclusion, that Articles 21 and 22 of Hague Convention XIII were a 'declaration of the existing law of nations'.[156] As a result, under US practice, prizes may only be brought into US ports on account of unseaworthiness, stress of weather or want of fuel or provisions, and, furthermore, under Article 22, a prize brought into a US port for any other reason must be ordered to leave at once, and should it fail to do so, the USA is authorized and obliged to release the prize and intern the prize crew. President Franklin D. Roosevelt restated this principle of law in his neutrality declaration at the onset of World War II,[157] and it remains a cornerstone of US doctrine *vis-à-vis* prizes in US ports.[158] Also, because of its status as customary international law, the USA considers this to be a binding obligation on all other neutrals or at least those that have ratified Hague Convention XIII and made no reservations as to those articles. Such a position was strongly asserted by the USA to all involved states in the matter of the US-flagged SS *City of Flint*, which was seized in 1939 by Germany after the outbreak of World War II and conveyed to ports in Norway and the Soviet Union before being released by Norwegian authorities for violating Article 21.[159]

[156] *The Appam*, *supra* note 105, at 397.

[157] Franklin D. Roosevelt, 'Proclamation 2348: Neutrality of the United States', 5 September 1939, available at http://www.presidency.ucsb.edu/ws/?pid=15802.

[158] *Commander's Handbook on the Law of Naval Operations*, *supra* note 1, s. 7.3.2.3.

[159] The USA's position in the *City of Flint* case, which was apparently shared by all of the principal participants, was that these provisions were 'declaratory of the existing law of nations independently of conventional undertakings'. Letter from Secretary of State Hull to US Ambassador to the Soviet Union Steinhardt, 24 October 1939, General Records 1939, Telegram 208, Department of State World War I Records, NARA. For the full *City of Flint* story, see Norris, 'A Maelstrom of International Law and Intrigue: The Remarkable Voyage of the S.S. City of Flint', 54(1) *Journal of American Legal History* (2014) 1.

Though not directly an issue in the *Appam* litigation, one final principle of general international law that was strongly affirmed was that of the power of a sovereign state within its own territorial waters. As stated by a US court called on to unravel some lingering financial issues following the US Supreme Court's *Appam* decision,

> [t]he captor's title and possession was forfeited, not for any violation of international law, but for an infraction of American law, and restitution decreed because of a violation of American neutrality; that is, of our own fixed ideas of what could and should be done in our own waters. The private owners of hull and cargo profited by the tort committed in the territorial waters of the United States and against the United States.[160]

This principle is fully consonant with the US Supreme Court's decision in the *Wildenhus* case of 1887, in which the Court said that '[i]t is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another, … it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement'[161] and, with modern international law, as reflected in, for example, Article 2 of the United Nations Convention on the Law of the Sea.[162]

[160] *The Appam*, 243 F 230 (SDNY 1917).
[161] *Mali v. Keeper of the Common Jail of Hudson County (Wildenhus Case)*, 120 US 1 (1887).
[162] 1982, 1833 UNTS 3.