Privy Council Appeal No. 135 *of* 1916.

In the Matter of Part Cargo *ex* Steamship "Lutzow."

The American Trading Company - - - *Appellants,*

v.

His Majesty's Procurator in Egypt - - - *Respondent,*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD WRENBURY.
SIR SAMUEL EVANS.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal against a decree dated the 11th August, 1916, of His Britannic Majesty's Prize Court in Egypt, rejecting the claim of the appellants to certain goods seized as prize on board the German steamship "Lutzow," and pronouncing that the goods belonged at the time of seizure to a house of business in an enemy country, and as such were liable to confiscation, and condemning the same as good and lawful prize.

The American Trading Company, which claimed the goods as owner, is an American Company registered in the State of Maine, in the United States of America. The head office of the Company is in New York. Its head and direction is there, and its shares are held by subjects of the United States, except a few held by British subjects. It has branch offices in other countries. These branches are not incorporated separately, and are in no way separate firms or entities. They are merely places where the business of the Company is carried on by employees of the Company. The branches kept, of course, separate accounts of the transactions of the branch, and they seem also to have kept some account or estimate of the profits made, or conventionally assumed to have been

made, by the work of the branch. This was mere book-keeping, for all profits earned anywhere were for account of the Company, and all property was the property of the Company. Such accounts of profits are usual and almost necessary in such cases. The head office requires to know how the branches are doing to guide them as to continuing and developing or discontinuing the branches, and very commonly, and possibly in the present case, the managers of the branches are remunerated by a percentage on the profits of the branch. The Company had and have a branch at Yokohama, and before the war had one at Hamburg. On the outbreak of the war something was done in the direction of discontinuing the business at Hamburg, and one of the questions in the Court below and on the appeal is as to the effect of what was so done. The learned Judge below has held on the facts proved before him that the appellants had not acted with reasonable promptitude in winding-up their business at Hamburg which they professed to be doing, and that they must be considered to have been after the commencement of the war and at the date of the seizure of the goods and down to the time of his judgment continuing to have a house of business and to trade in Germany.

This finding, if it stands, brings the appellant Company within a rule of International Law: that, although it is a neutral Company, it is liable to be treated as an enemy for some purposes, and that some, although of course not all, of its property may be treated as enemy property. When the present appeal was argued there was pending before the Board the appeal *in re* Part Cargo *ex* "Anglo-Mexican," which appeared to involve some questions arising on that rule, and their Lordships have reserved judgment in this case until that case was disposed of. That judgment has just been delivered, and various points on the rule in question have been dealt with. The principal question on this appeal is, however, one which in that case was abandoned, viz., whether the goods of the appellants seized on the "Lutzow" come within the category of goods which are liable to be condemned as enemy property by reason of the appellants having so continued to carry on business in Germany. In the cases which establish the rule, the property liable to be treated as enemy property is described in words which vary somewhat, and which are often rather vague.

In the "Portland" (3 Christ. Rob., 41) Lord Stowell speaks of "the property of a merchant embarked in that trade," meaning the trade in the enemy country, and further down in the judgment, at p. 44, says:—

"I know of no case nor of any principle that could support such a position as this: that a man having a house of trade in the enemy's country as well as in a neutral country should be considered in his whole concerns as an enemy merchant, as well in those which respected solely his neutral house as in those which belonged to his belligerent domicil."

Again, in the "Jonge Klassina" (5 Christ. Rob.. 297):—

"A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both with respect to transactions originating respectively in those countries."

In the "Venus" (8 Cranch, 252) there occur in the judgment of the majority, the expressions "so much of the property concerned in the trade of the enemy as is connected with his residence," and again "as to property engaged in the commerce of the enemy"; and Chief Justice Marshall, at the commencement of his dissenting judgment in that case, says that he concurred in so much of the judgment of the majority "as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy." Recently, Sir Samuel Evans, in the "Manningtry" (1 Treherne, 497), says "if a person be a partner in a house of trade in an enemy country, he is, as to the concerns and trade of that house," to be deemed an enemy, for which he refers to Pratt's edition of "Story," 60, where that expression is to be found. Wheaton (Dana's edition, 33) states the proposition thus: "The property of a house of business established in the enemy country is considered liable to capture and condemnation as prize." Hall, in his Treatise on International Law, following apparently the "Jonge Klassina," states the proposition as to a trader in two countries that he must be regarded as a belligerent or a neutral, according to the country in which a particular transaction has originated.

In order to see whether the goods seized on the "Lutzow," and which were beyond doubt the property of the appellant Company, were the concerns of the branch business of the appellants at Hamburg as to be liable, upon the assumption that the business of that branch was continued after the war began, to be condemned as enemy property, it is necessary to see what is to be found in the record as to the actual dealings with those goods.

They consisted of a large number of packages containing aniline dyes made in Germany. The Japanese branch sent directions from time to time to the Hamburg branch telling them to order these goods from named German manufacturers, the Chemikalien-Werk Griesheim Limited Company, Griesheim. Specimens of the various documents, that is, the so-called orders given by the Japan branch, the confirmations of those orders by the Hamburg house, the invoices by the Chemikalien-Werk to the Hamburg house, the invoices by the Hamburg house to the Japanese house, and the bills of lading are in the Record, pages 27 to 33. As the documents selected to be copied are specimens only, the exact dates of each of the orders do not appear, but they seem to have been sent off by Japan in November and December 1913, they were confirmed by Hamburg in due course, and the orders were given to the Chemikalien-Werk who, apparently executed the orders by about June 1914,

and the goods were shipped on the "Lutzow" by the 13th July, 1914, the date of the bills of lading. The so-called orders were in a form in which they might have been, if the branches were separate and independent firms or companies, carrying on separate trading, but doing business together on joint account, according to a course of business established between them—in fact, of course, they operated merely as directions by one employee of the Company to another as to work to be done for their common employers. They directed that the goods should be "invoiced at cost for division of profits according to new rules," and stated that "financing was required for months," [*sic.* in the specimen in the record] and that the drafts by Hamburg on Japan were to be arranged accordingly. The "new rules" referred to are not copied in the record or explained by any evidence. They doubtless were rules of the Company providing for the mode of making out the estimate of the profits of each branch in cases where business was done partly by one branch and partly by another. It is not quite easy to see from the documents copied on the record how much is the original document, and how much a note subsequently made on it, nor is it easy to trace the sums paid as the documents copied are specimens only, but it seems that the Chemikalien-Werk were paid on the 27th July, 1914, for the goods shipped on the 13th July, 1914, by money raised by negotiating with the Hong Kong and Shanghai Banking Corporation a draft dated the 27th July, 1914, drawn by the appellants' Hamburg branch on their branch in Japan, payable to the order of the bank at four months' sight. This was done under a letter of credit obtained either by the Japanese branch or by the head office of the appellants; and as security to the bank for the acceptance and payment by the Japanese house of this draft, the bills of lading, dated the 13th July, were endorsed to and handed to the bank. As this was all in time of peace, there is no question here of any trading with an enemy in respect of these goods, nor is it possible to say that the goods were in any way tainted. It is only as enemy property at the date of the capture that they can be condemned, if at all.

The draft and the bills of lading arrived in Japan in September and on the 28th September the draft was accepted. On either the 6th or the 8th October (the dates of the indorsements as copied in the record are not quite clear) the bank handed to the appellants' Japanese branch the bills of lading indorsing them to their order, in exchange for a letter of trust agreeing to hold the bills of lading and the goods if received, and their proceeds if sold in trust for the bank, until the acceptance was met. At some time or other this letter of trust was cancelled, but it seems quite clear that on the 15th October when the "Lutzow" was captured the bills of lading duly endorsed were in Yokohama in the actual custody of the bank and at the disposal of the appellants' branch there subject only to the bank's lien, or else they were in the

actual possession of the branch on the terms of the letter of trust. It has not been suggested and could not be maintained that the acceptance of the draft drawn on the Japanese branch by the Hamburg branch although after the war began could be a dealing with the enemy by an ally of Great Britain which would justify the condemnation of the goods. It was obviously a dealing only with the bank who were the holders both of the draft and of the bills of lading and, moreover, the transaction was done in pursuance of engagements entered into *bonâ fide* before the war.

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

The Executive Committee of the appellants did, on the 25th August, resolve to close the Hamburg office, "as soon as it can be done without serious loss on the Company through liquidation of stocks on hand, &c." They acted on this resolution so far as not to do any new business except in one small transaction said to have been done by the manager by inadvertence and in contravention of orders of his superiors. They proceeded, however, very slowly in the liquidation of their affairs, being apparently afraid of the serious loss they had contemplated as possible. They seem to have removed nothing from the country. They did materially reduce their stock, but at the date of the seizure of the goods in question, and at the time (11th August, 1916), when the Judge of the Court delivered his final judgment in this case, after having adjourned it for further evidence of what the Company were doing, and having got that further evidence they were, in the opinion of the learned Judge, still carrying on trade in Germany to some extent. That being a finding of fact, their Lordships would not, even although the same materials are before them as were before the learned Judge, interfere with it unless it were in their opinion clearly wrong. On the whole their Lordships are inclined to the opinion that the view of the learned Judge below on this point was right, but having regard to their opinion on another point of the case, it is not necessary to decide this. This judgment is based on the assumption that the Judge was right in his view that the appellants had not so acted as to free themselves from the imputation of continuing to trade in Germany after the declaration of war. Does that make the goods on the "Lutzow" goods which the appellants must be considered to own as Germans and not as neutrals? The

goods were of course not the property and never had been the property of the Hamburg branch as such in fact, and even if that branch had been a separate firm or entity it is by no means clear that these goods bought as they were on directions coming from Japan, which in that case would have been properly called orders to buy for Japan, would ever have been the property of that firm at Hamburg. The directions they received were specific, both as to the goods to be bought, and as to the firm from which they were to be bought. They might have been merely agents to buy, and the property might have vested not in them but in their principals. The adventure was the selling in Japan of goods to be obtained from Germany, for which the Japanese agents of the appellants had either found purchasers or had ascertained that there was a market. The first origin of the matter was in Japan. The agents of the appellants who carried on trade for the appellants in Hamburg, under the name of a branch were certainly the persons who arranged the terms of purchase from the Chemikalien Werk, and it was by their act that the property in the goods became vested in the appellants, but they had nothing further to do with the matter. They arranged as agents the details of the finance, but advanced no money, acting under a letter of credit not obtained by them ; and before the war broke out they had parted with all control over the goods. They had indorsed the bills of lading and handed them over, not indeed with the intention of passing their property in the goods, for they never had any property, but with the intention of putting a final end to their part of the transaction, subject only to some bookkeeping credit in their favour of a share of profits in consideration of the work they had done.

It has been suggested that a test whether these goods were "concerns" of the German branch would be whether they would be assets of the branch if it had become bankrupt at the date of the seizure. But on the facts the goods could not have been assets. There might have been a claim possibly for some share of profit out of the transaction, but the Trustee in such a bankruptcy would not get the general property in the goods which is the only thing seizable in prize. (See the "Odessa," 1916, 1, A.C, 145.)

If on the 15th of October the Germans had seized these goods and claimed to have them condemned as prize as being the property of persons liable to be treated as Japanese enemies they would seem to have had a stronger case than the British captors have. The fact that the goods were on a German ship undoubtedly raises a presumption against the claimants, but the claimants have clearly shown that the real and true ownership of these goods was neutral. In their Lordships' opinion the dealings with the goods seized on the "Lutzow" by the appellants and their branches were *bonâ fide* from the beginning to the end, and the only British complaint against them is want of promptness in closing their trade in Germany. The

rule as to concerns of a foreign trade is somewhat vague. but a careful examination of the dealings with these particular goods does not seem to bring them within the fair meaning of the expressions used or to make the ownership of them liable to be treated as German by reason of the appellants continuing some trade in Germany after the war had begun. If any nationality other than its own were to be attributed to the appellant Company as owner of these goods it would be a Japanese nationality rather than a German. They were more the concerns of the Japanese than of the German branch, and the transaction had really originated in Japan, although the title to the goods had originated in Germany. On the view their Lordships take of the facts, it is unnecessary on this appeal to express any opinion on any other question. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed with costs of the appeal. It is not a case for damages or costs in the Court below.

In the Privy Council.

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v.

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1917.