

*Privy Council Appeal No. 24 of 1918.*

In the matter of part cargo ex steamship "Palm Branch."

The Asociacion de Agricultores del Ecuador - - - - *Appellant*

*v.*

His Majesty's Procurator-General - - - - *Respondent*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND) PROBATE, DIVORCE AND  
ADMIRALTY DIVISION (IN PRIZE).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1918.

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*Present at the Hearing :*

LORD SUMNER.

LORD WRENBURY.

LORD JUSTICE PICKFORD.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

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This appeal raises some questions of prize law and practice which appear never to have been expressly decided.

The appellants are a neutral firm or company carrying on business in Equador, and they claimed 4,000 bags of cocoa which were seized as prize or droits of the Admiralty, on board the British ss. "Palm Branch" in the Port of Liverpool on the 18th September, 1914, and were alleged on the writ to be enemy property. The appellants had shipped the cocoa at Guayaquil under bills of lading which made it deliverable to a German firm, Schlubach Thiemer & Co., of Hamburg, but it was proved to the satisfaction of the late President, and is not now disputed by the Crown, that the German firm were merely agents of the appellants for sale and that no property passed to them, and the President expressly found that the goods at the date of their actual

seizure at Liverpool were the property of the neutral claimants. The German agents had, however, insured the goods against war risks through a German insurance agent with underwriters, about 97½ per cent. of the risk being underwritten by Germans. After seizure and before the claim of the appellants had been filed (which was not done until October, 1915) the German underwriters had paid as for a total loss. The cocoa had been sold under an order of the Prize Court, and in consequence of the rise in price caused by the war the proceeds of the sale largely exceeded the sum for which the cocoa had been insured. A desire to get this profit may have had something to do with the subsequent course of procedure. The underwriters who paid claimed from the assured the property in the goods, and considerable correspondence took place which is set out in the record. The learned President thought that this correspondence showed that the appellants had admitted the right of property to have passed to the underwriters who had paid, and that they had constituted themselves express trustees for those underwriters and had made the claim as such trustees and were being indemnified as to the costs. On this view of the facts the question certainly arose which the learned President considered it necessary to deal with, that is to say, what order should be made by the Prize Court when goods which were the property of a neutral when seized had become, before the neutrals' claim to them was made, the property of an enemy. He based his judgment on his answer to this question. It appears to be novel, and the late learned President dealt with it, in the way in which he has, in his too short career, dealt with other novel questions of Prize law, by developing and applying to new facts the principles to be found in previously well established law. He referred in detail to the ancient forms of affidavits claims and interrogatories directed to be used in the Prize Court as showing that the Court always required to be satisfied before ordering goods or their proceeds to be delivered up to claimants that no enemy had any interest in them. The allowance of a claim is obviously followed in ordinary cases by an order for delivery up of the subject-matter claimed. Their Lordships entirely agree with the late President as to what is the right rule in such a matter and do not desire to add anything to the reasons given in his judgment on this point. The decision of this Board in "*The Prinz Adalbert*," 1917, A.C. at page 586, as to the 290 barrels, part of the cargo there in dispute, is in accordance with this view of the rule. On the view of the facts taken by the learned President and particularly in the view that the claim was in fact made by the appellants for and on behalf of enemies, it became unnecessary to discuss any of the difficult questions which would commonly arise on claims made by underwriters, such as the question whether in the particular case a right of property had passed of a character which the Prize Court would recognize, or merely a contractual right which it would not recognize (see the 63rd section of the Marine Insurance Act, 1906, "*The Ariel*," 11 Moore, P.C. 119, "*The Miramichi*," 1915, P. 71; "*The Odessa*," 1916, 1 A.C. 145; "*The Parchim*," 1918, A.C. 157; and the older cases referred to in those cases).

Their Lordships agree in the view of the facts taken by the learned President, except so far as it may be affected by his having overlooked the fact that a small percentage of the underwriters were not enemies, and that those underwriters had not paid. This, however, has no bearing on the disallowance of the appellants' claim as it was clearly shown that the claim was in fact the claim of German enemies. This seems to their Lordships as it did to the President to be clear ground for disallowing the claim. The fact that a small portion of the underwriting was by neutral or British subjects had been mentioned in the argument below, but had not been seriously pressed, being of course somewhat inconsistent with, and at any rate not supporting, the then main argument of the appellants. He does not deal with it in his judgment, and it was not again mentioned to him when the judgment was delivered. If his attention had then been drawn to it he might have altered the form of the order he made, still of course disallowing the claim.

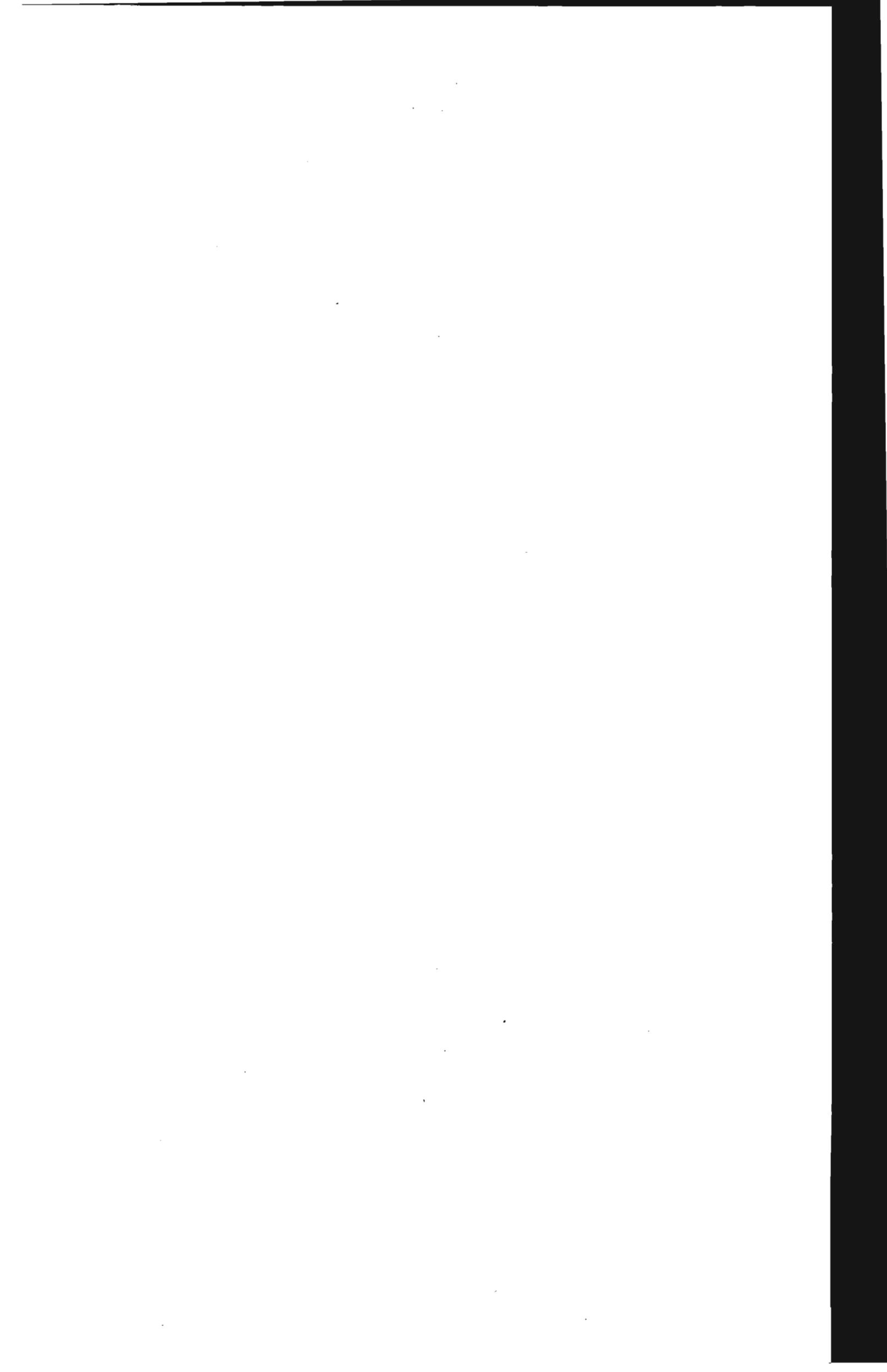
Their Lordships therefore think that the appellants' appeal against the disallowance of the claim fails, and should be dismissed with the usual consequences.

The President having disallowed the claim went on to condemn the goods, and this appears on consideration to give rise to some difficulty. It is said that the judgment in "*The Prinz Adalbert*" (290 barrels) already referred to supports the condemnation, as well as the disallowance of the claim. The particular point does not appear by the judgment in that case to have been considered, and when the facts are looked at, it will be seen that the difficulty which arises here did not arise there. The "*Prinz Adalbert*" was an enemy ship, and the cargo on board of her when she was captured would be presumed, if no claim to it was substantiated, to be enemy property. The "*Palm Branch*" is a British ship. So in "*The cargo ex Remonstrant*," which was also referred to, the judgment really was based on the fact that the claim made in the appeal was a different one from that made below. The reasons of the President for condemning the goods are very shortly given. He merely says "The claim is to the goods themselves. The hands of the captors have remained on the goods and their proceeds from the time when the underwriters obtained and claimed the ownership. No fresh act of seizure was necessary." This appears to mean that he treated the case as though the goods had been seized after they became enemy property and so condemned them. This seems to require rather careful consideration. Counsel for the Crown suggested that on its appearing that the goods although not enemy property at the time of the seizure had become enemy property whilst they were in the hands of the Court, a fresh writ could have been issued and that condemnation would have followed as of course. For this "*The Schlesien*," 1916, P. 225, was quoted. Here, however, there was no fresh writ. It must be remembered that there is no general right to forfeit enemy goods, and that the right of a belligerent to capture enemy property and ask for its

condemnation by a Prize Court as lawful prize is a maritime right and is confined to property actually or constructively at sea. Their Lordships having regard to the difficulty of the various points which arose, and doubting whether the material facts for the decision of all the points were fully before them, asked counsel for the Crown before their argument was concluded whether they would consent to have the condemnation set aside and the money directed to remain in Court until further order, and this consent was given. That being so their Lordships are of opinion that such an order should be made.

Their Lordships do not decide that the condemnation was wrong as the argument in support of it was not concluded, and moreover it is far from clear that the appellants whose claim was rightly dismissed have any locus standi to question the condemnation (see "*The cargo ex Antilla*," 1918, W.N. 311) but it was in their Lordships' opinion right that the Crown should give the consent which it did having regard to the doubts which had been raised. In any further proceedings as to the money in Court, it will be open to the Crown to make such application as they think fit either after issuing a fresh writ against the proceeds in Court or otherwise in order to get payment of all or such part as they may be advised of the money in Court. It also will be open to any underwriters who are neutrals or British subjects, or any reinsurers who are not enemies (for it was suggested that some at any rate of the underwriters who had paid had reinsured) to put in such claim as they may be advised. Further, the dismissal of the appellants' claim, made as it was on behalf of the enemy underwriters, is not intended by the Board to prevent the appellants from putting in any claim they think they can establish, either on their own behalf or for any neutral beneficially interested, to that part of the money which in no case would have gone to the enemy underwriters. In any such further proceedings the facts will have to be brought before the Prize Court more fully than they have been before this Board, and it will be more convenient that they should be dealt with by that Court. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that by consent of the Procurator-General on behalf of the Crown that part of the decree which condemns the proceeds of the goods as lawful prize should be set aside and that the money should remain in Court until further order of the Prize Court.

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In the Privy Council.

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IN THE MATTER OF PART CARGO EX STEAM-  
SHIP "PALM BRANCH."

THE ASOCIACION DE AGRICULTORES DEL  
ECUADOR

o.

HIS MAJESTY'S PROCURATOR-GENERAL.

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DELIVERED BY SIR ARTHUR CHANNELL.

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