

Privy Council Appeal No. 59 of 1918.

In the matter of Part Cargo ex Steamship "Prins der Nederlanden."

P. Onnes and Zoon - - - - - *Appellants*

v.

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

Privy Council Appeal No. 61 of 1918.

In the matter of Part Cargo ex Steamship "Rijn."

P. Onnes and Zoon - - - - - *Appellants.*

v.

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

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1919.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

LORD STERNDALE.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

The S.S. "Rijn."

The appellants claim as owners of part cargo *ex* S.S. "Rijn." Their claim has been disallowed in the Prize Court, and the goods have been condemned as conditional contraband on the ground that they were owned by enemies at the date of seizure and that they were destined for an enemy basis of supplies. The goods consisted of 15,555 bags of cocoa beans shipped between the 27th of May and 17th of June, 1914, before the outbreak of war, on the German S.S. "Assuan" by a South American firm called the Asociacion de Agricultores del Ecuador. The "Assuan" was

proceeding on her voyage when the war broke out, and then put into Las Palmas, remaining there for several months with her cargo on board. No bills of lading, or shipping documents of any kind, were produced to show in whom the property in the goods was vested at the time when the "Assuan" took refuge at Las Palmas, and further there was no evidence that the South American firm at any time took any measure to obtain the release of the goods held up in the "Assuan" or any other action indicating that they had any interest in relation thereto. It is obviously a matter of crucial importance to the appellants to be able to prove that the goods, at the date of the suggested sale to them, were the property of the South American firm. There should be no difficulty either in obtaining the necessary documents or, in the event of their loss, giving evidence of their contents, and the failure to produce any such evidence constitutes an element of grave suspicion.

The appellants are a firm of Dutch merchants carrying on business in Holland. The particular business, with which the appeal is concerned, was introduced to them by a Hamburg merchant named George Otto Embden. The terms as originally proposed are contained in a letter of the 13th January, 1915, written from Hamburg by Embden to the appellants. In this letter it is stated that the goods could probably be purchased "from the owners here." There is no suggestion that the goods are the property of a neutral firm in South America. It was suggested in argument on behalf of the appellants that the words "from the owners here" should be read "here from the owners," but there is no reason to justify this transposition, and the words as they stand appear to accurately denote the true nature of the transaction. The letter was as follows:—

"Hamburg 14.

"13th January, 1915.

"DEAR MR. ONNES,

"I should like to propose to you to-day a large remunerative business. It is a question of about 15,000 bags of Arriba cocoa, which are at Las Palmas in the steamer 'Assuan,' and which could be probably purchased from the owners here at 70 pfennige per pound *ex* Las Palmas. To that would be added about 5 per cent. general average charges, which the purchaser must bear.

"You will be able to arrange the freight from Las Palmas at yours or *via* Lisbon at 3-4 pfennige per pound, and the marine and war insurance at about 3 per cent., so that the cocoa would come out at about 80 pfennige *c.i.f.* Holland. The present value is about 65-68 cents there; the sum concerned amounts to about 1,400,000 marks. Perhaps you can arrange the financing at yours wholly or partially with your banks or with the Warren-Liquidations-Kasse. If you should arrange the whole of the financing at yours, I should claim a quarter of the profit for bringing the business to you; if you do not succeed in arranging the financing at yours, I should contingently be willing to finance the business for you up to an amount of 1,000,000 marks, but in such case I want at least five-eighths share, as I must renounce participating in the profit. I would purchase the cocoa here for your account. The payment would have to be made against delivery of the bills of lading for cash less 1 per cent., or nett cash against three months' bank acceptance.

" I have just received some further particulars. It is a question of 7,100 bags and 8,000 bags of Summer Arriba and 400 bags of Machala.

" The expenses of the transshipment at Las Palmas from the steamer to the export steamer are to be borne by the sellers.

" Quality according to Hamburg Arbitration.

" Weight guaranteed 2 per cent. Any loss in weight in excess of that to be made good.

" The insurance policies are also to be handed over as they now stand.

" Delivery to be taken by the 31st January.

" Awaiting your reply by return after the receipt of this letter, stating whether you will do the business and in which way.

" I am, with kind regards,

" Yours truly,

" GEORGE OTTO EMBDEN.

" Perhaps a further quantity will be purchaseable."

A subsequent letter of the 23rd January records the result of a conversation at which it was arranged that Embden should lend the appellants 1,000,000 marks at 7 per cent. interest, together with a participation of five-eighths of the nett profit, in which a Mr. C. Z. Thomsen was to participate to the extent of one-fourth. These financial arrangements were subsequently modified, but no importance attaches to the modification. In the result the appellants undertook to provide 590,000 marks on the 1st February, 1915, and 50,817·36 marks on the 15th February, 1915, leaving over a sum due of 1,066,557·49 marks as an advance from Embden. It was alleged that these amounts of 590,000 marks and 50,817·36 marks were duly paid in accordance with entries in a ledger kept by the appellants and as stated in a letter written from the appellants to Embden on the 28th January, 1915. An examination of the ledger kept by the appellants shows that it contains figures on the debit side of a sum in florins representing the amount due in marks, and an entry to a like amount on the credit side, but there is no receipt produced to show that such a sum was ever in fact paid, and the learned President has found that the evidence adduced on behalf of the appellants did not satisfy him that any payment was made for the goods, although nothing could have been easier than to give the usual proof of payment if payment had been made in the ordinary course of business. After hearing a full argument directed to the question whether there is sufficient proof that the appellants made any payment for the goods, their Lordships are not prepared to differ from the conclusion formed by the learned President. There is no doubt that the question whether the appellants did in fact pay for the goods, which they claim, is a material factor in determining whether at the date of the seizure the appellants had any property in the goods such as would entitle them to make a claim in respect thereof in proceedings in the Prize Court.

On the 26th January, 1915, three separate contracts, which it is unnecessary to set out in detail, were made in which Peterson and Paulsen of Hamburg purported to have purchased for the

appellants from Messrs. Schlubach, Thiemer & Co. 1,850 bags of cocoa, from Messrs. Schroder Gebruder & Co. 8,000 bags, and from Messrs. L. Behrens & Sohne 7,500 bags of cocoa, and the sale in each case was expressed to be made on the instructions and for the account of the South American firm. The invoices were issued by Schroder Gebruder & Co. and L. Behrens & Sohne on the 27th January, 1915, and by Messrs. Schlubach, Thiemer & Co. on the 10th February, 1915. The only difference is that the last invoice does not state that the sale was carried out on the instructions and for the account of the South American firm, but this omission is not of substantial importance. The case for the appellants is that all these bags of cocoa were bought by them from the neutral South American firm on their own account, and not as agents or nominees of Mr. Embden, or of any other person. All the contracts are in the same form, and each of them contains a provision that the contract must be kept secret from everybody. There is no evidence of any communication which passed between the appellants and Petersen and Paulsen, and no explanation given as to the terms on which they were authorised to act for the appellants. There are sworn declarations from the notarial register at Hamburg that the firms of Schroder Gebruder & Co., L. Behrens & Sohne, and Messrs. Schlubach, Thiemer & Co. did sell to the appellants the respective numbers of bags of cocoa beans specified in the invoices, being goods sent to them with instructions to sell on account of the South American firm.

The appellants chartered the S.S. "Rijn" at Amsterdam on the 27th January, 1915, and intended that the cargo should be consigned to the Netherland Oversea Trust. It was, however, not practicable to carry out this intention. The Netherland Oversea Trust would not accept the consignment to them of the cocoa, for the reason that the British Government, at that date, were not treating cocoa beans as included in the definition of foodstuffs declared to be contraband. Accordingly by a supplementary agreement between the appellants and the shipowner, dated the 9th February, 1915, it was agreed that if cocoa beans should be declared contraband, the bills of lading should be transferred to the Netherland Oversea Trust. The "Rijn" duly proceeded to Las Palmas, loaded the cocoa beans, and sailed on the 23rd March, 1915, to Amsterdam, with instructions to call at the Hook of Holland for orders in case it was decided to send her to Rotterdam. The ship was seized on the 6th April, 1915, and the goods condemned as contraband on the 6th June, 1917.

Various questions were raised before their Lordships on the hearing of the appeal. It was argued that at the material dates the cocoa beans were not contraband, or alternatively that they only became contraband under such circumstances as to entitle the appellants to compensation as provided in Article 43 of the Declaration of London, and further that they were protected by the Order in Council of the 29th October, 1914, being consigned to a named consignee at a neutral port. These questions,

however, do not arise for determination unless the appellants can show that the goods were their property at the time of seizure. On this point the learned President has found :—

- (1) That the claimants have failed to establish that the property of the goods ever became vested in them.
- (2) That if the property had become vested in them they acted in the whole transaction merely as instruments for Embden, and subject to his directions, for the purpose of getting the goods through to Germany.
- (3) That the appellants acted in concert with Embden in an attempt to get the goods to Hamburg by pretending that they were neutral purchasers on their own account.

The case for the appellants, so far as it relates to the ownership of the goods, was that the goods, up to the date of the alleged sale to them through the agency of the three German firms, remained the property of the neutral shippers. If the original transaction, at the date of the shipment of the goods, was such that the goods were consigned by the S.S. "Assuan" for sale in Germany, this would have appeared on the shipping documents, or, if the documents had been lost, by proof of their contents. No such proof was suggested or tendered, although no difficulty would have been involved in its production, and the first reference to ownership is contained in the letter of Embden, in which he refers to "the owners here," that is to say, the owners in Hamburg. All the surrounding factors point in the same direction. There is no evidence that the neutral shippers took any interest in the goods after their shipment in May, 1914, or that any communication was addressed to or received from the neutral shippers in reference to the alleged sale of the goods to the appellants, or as to the conditions or terms on which payment should be made, or that any payment was ever made to them. In fact, after the arrival of the "Assuan" for refuge at Las Palmas there is a complete silence as to any dealing with the goods until the communication made by Embden to the appellants in January, 1915. Having regard to these facts their Lordships agree with the finding of the learned President, and are unable to assume, or find, in favour of the appellants that the property in the goods remained in the neutral shippers up to the time of the alleged sale and transshipment, or that the appellants ever had transferred to them the ownership of the goods. Their Lordships are further of opinion that the extracts from the ledger of the appellants are not satisfactory evidence that the appellants in fact ever made any payment in respect of the goods either to Embden, the German agents, or any other body.

There is, however, a further element which, apart from the considerations already stated, throws a doubt on the whole case set up by the appellants, and which makes it impossible for their Lordships to dissent from the second and third findings of the learned President set out above. In the course

of the proceedings a letter was discovered marked "private" and written on the 6th April, 1915, from Embden to the appellants:—

"To MESSRS. P. ONNES AND ZOON, Amsterdam.

"I received the following telegram from you: 'Steamer "Ryn" detained at Ryde, Isle of Wight. We await explanation and to know what requirements may in the end be imposed by England.

"'We have requested our Government to aid us in obtaining the release of ship and cargo, as it is possible at any moment that important decisions may have to be taken. We think your presence here desirable as we do not wish to bear the responsibility of coming to a decision alone.'

"To which I replied as follows: 'Re "Ryn," my presence here is important. Further details by letter. Keep me informed about everything by telegram.'

"If England will release the 'Ryn' only if the cargo is re-consigned to the Overzeetrust, you must undertake the business of re-consigning it, and get the captain to warn you of the exact hour when he leaves the port in which he is interned. I will then go to Berlin and try to induce our Government to allow the 'Ryn' to be brought into Zeebrugge by putting it to them that we are dealing with a cargo sold to Germany which cannot be carried to its place of destination on account of its re-consignment to the Overzeetrust, effected at the desire of England.

"I cannot to-day say whether the naval staff will accede to my request; but there is a prospect of their doing so. In the meantime it is necessary that we should be informed when the 'Ryn' can sail again so as to be able to receive her at the proper time.

"I hear, furthermore, the bank guarantees for the Overzeetrust are only given if the shipment were to be discharged to the Trust in the first instance, and not in the case of subsequent re-consignment. That would be very favourable for us. Even if you cannot break off the agreement which you entered into with the Trust, there is still this way out of the difficulty, namely, that you should sell the cargo to the firm of C. W. H. van Dam & Co., Rotterdam, Rivierstraat 7, and that this firm should attempt to export it as though in transit. If the re-exportation cannot be worked in any way at all, the cocoa must be sold there, which would not be so bad as we should get a comparatively high price. Still, we want first to direct all our energies towards facilitating the re-exportation.

"As regards the indemnification of Carl Lessen, I had at the time settled with him that he should receive 9,000 marks for all forwarding charges, inclusive of all extra expenses exclusive of freight, and beyond that, a special further compensation of 1,000 marks for the agent. Further, in the event of re-exportation being impossible, 500-1,000 marks, according to the time spent and the expenses entailed. Herr Zeuner looked me up on Sunday and informed me that he would reckon 0.50 per 100 kilos for the cost of unloading the cargo from the steamer and transshipping it into the trucks. I did not, at that moment, bring it to his attention that these expenses were included in the 10,000 marks which had been agreed upon, as I had not with me the agreement which was made as the result of our conversation at the time. I am writing to him to-day as per enclosed copy, and am asking him to verify from you the fact that I informed you immediately at the time that I had agreed to the indemnity of 10,000 marks, including all extra expenses* excluding freight.

"Yours, etc.,

"GEORG OTTO EMBDEN.

"* Hence also cost of transport from the ship to the trucks."

The following explanation given in the affidavit of the 30th March, 1917, cannot be accepted as satisfactory :—

“Mr. Embden made various suggestions in his letter. I never for a moment paid any attention to these suggestions. I swear that I never replied to that letter, and that its contents have in no wise influenced my conduct. The idea that I, a Dutch subject, should co-operate towards the capture of a Dutch steamer with a Dutch cargo by a German submarine boat appeared to me so objectionable and in fact criminal, that it was out of the question that I should consider it for a moment. I put Mr. Embden's suggestion to the account of the abnormal mental condition and the so-called war psychose, which I knew that at the time prevailed among the Germans, and I never took it seriously. The more so as I knew Mr. Embden for a man whose nerves were overstrained, especially in those days, when he expected every day to be called in as a soldier.

“I have no recollection of the further suggestion which Mr. Embden seems to have made in his letter. This is not to be wondered at, considering that the letter is about two years old. Those suggestions were certainly never considered by me.”

It is not necessary to make any further comment on this letter and the explanation offered on behalf of the appellants. Such a letter is only consistent with the position of the appellants, being such that they were acting merely as instruments of Embden, and subject to his directions, and that the appellants in concert with Embden were concerned in an attempt to get the goods through to Germany, and that they were not neutral purchasers on their own account.

Their Lordships are therefore of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

The S.S. “Prins der Nederlanden.”

There are no special factors affecting the goods in this case which differentiate it from the case of the goods *ex* the S.S. “Rijn.”

Their Lordships are of opinion that the same order should be made dismissing the appeal with costs as in the case of the goods *ex* the S.S. “Rijn.”

During the course of the hearing of this appeal an application was made to allow the introduction of further evidence. Their Lordships intimated at the time that this application could not be entertained, and that any costs incurred should be regarded as costs in the appeal.

The petition ought to be formally dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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SHIP " PRINS DER NEDERLANDEN."
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HIS MAJESTY'S PROCURATOR-GENERAL.

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DELIVERED BY LORD PARMOOR.