

*Privy Council Appeal No. 193 of 1919.*

*In the matter of part cargo ex Steamship "Arkansas."*

Nickels and Todsens - - - - - *Appellants*

*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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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE  
18TH FEBRUARY, 1921.

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*Present at the Hearing :*

LORD SUMNER.  
LORD PARMOOR.  
LORD WRENBURY.  
SIR ARTHUR CHANNELL.

[*Delivered by* LORD WRENBURY.]

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This is the appeal of claimants to cargo from a judgment of the late Sir Samuel Evans, dated 8th November, 1917, by which he condemned the goods as prize. The vessel was a Danish vessel bound from New York for Copenhagen. The goods were 47 barrels of nickel. They were seized at Kirkwall on or about the 12th March, 1916. The claimants are a firm of Nickels and Todsens, Swedish subjects residing and carrying on business at Stockholm. By proclamation of the 29th October, 1914, nickel and nickel ore were made absolute contraband. The Order in Council of the 29th October, 1914, therefore, which relates to conditional contraband does not apply in this case. And the Order of the 30th March, 1916, which made the provision of Article 1 (ii and iii) of the Order of the 29th October, 1914, applicable to absolute contraband and (Article 4) threw upon the owner of the goods the onus of proving an innocent destination was of date later than the seizure. There is, therefore, no Order in Council

which governs this case. The question is whether the Crown has made out a case requiring an answer and if so whether the claimants have answered it. There is no question as to the property in the goods. The question is one of destination only.

The 47 barrels of nickel were bought as to part from Walker M. Levett Company of New York and as to the balance from the Syracuse Smelting Works. The purchases were effected by one Frederick Frolen, who acted under a power of attorney dated the 24th November, 1915, and were made in the autumn of 1915. The shipment was made in February, 1916. The "Arkansas" sailed from New York on the 22nd February, 1916. The bills of lading were dated the 15th February, 1916. The cargo was consigned to Gothenberg and was seized on arrival of the ship at Kirkwall. The consignees named in the bills of lading were Jonkopings Mekaniska Verkstads Aktiebolaget. The claimants say that they were named as consignees by a mistake. They were not the real consignees—no one says that they were, and it is not true that they were named consignees by a mistake. On the 14th February, 1916, Frolen, writing to the claimants from New York, wrote, "The whole nickel parcel is marked 'J. M. V., Gothenberg,' and addressed to the Jonkoping Mekaniska Verkstads A/B Jonkoping via Copenhagen and Gothenberg on through-going bills of lading." Again on the 28th March, 1916, the claimants wrote to Frolen a letter containing the following passage :—

"Your letter, No. 88. Your communications respecting Dr. Dinshah are quite interesting, but, unfortunately, we cannot comply with your wish to send you the undertakings in question as Jonkoping, as well as Pythagoras, have made difficulties respecting the consignment of goods to him, and the iron works to whom we had applied respecting the pro-formâ purchase with an undertaking have altogether declined. All these tricky affairs are, moreover, very unpleasant, because if the goods are captured the business will, of course, be complicated to a very great degree, for the reason that we who are to take out the insurance and thus are not the consignees of the goods are to conduct the correspondence. If matters were such that the respective consignees would be really the purchasers of the goods and themselves the consumers, the matter would be different. As we have had no consignees for the goods in question, we can only figure ourselves as consignees of the goods, and in case that Dr. Dinshah refuses this, we must, to our regret, renounce the business and try to sell our nickel in the United States."

On the 27th March, 1916, the claimants, Nickels and Todsén, made a declaration that the goods (which had then been seized) were exclusively intended for consumption in Sweden and would not be exported to any foreign country. On the next day, the 28th March, in the letter to Frolen from which a quotation has already been made above, they wrote :—

"In this connection we wish to mention that we have tried to sell the nickel in Russia, of course, first of all the 20 tons which are now under seizure, and if we succeed in this, and there are further requirements in Russia, we shall cable to you. We have not much trust in this, however, and it is only an attempt so that we may not leave anything undone."

The claimants say that at some time prior to the 20th November, 1915, they sold 9,000 kg. of the nickel to A, B Bjorneborgs Jernverk of Wernlands Bjorneborg in Sweden and at some time prior to the 20th December, 1915, sold 2 tons to A/B Osterby Bruk of Dannemora in Sweden. But no contracts or documents relating to these sales have been produced. Moreover, if there really were such sales the proposed sale in Russia in the event of the goods being released is quite inconsistent with them.

The inference which their Lordships draw from the above facts is that the name of a fictitious consignee was inserted in the bills of lading in order to conceal a real ultimate destination and that the claimants' story that the goods were exclusively intended for consumption in Sweden is untrue.

The name of Jonkoping as consignee was probably adopted for the reason given in the claimants' letter of the 28th March, 1916, where they write:—"This firm (Jonkopings) therefore stands on the 'Whitest list' which exists."

There is reason to believe that the claimants did not stand solely interested in this 20 tons nickel, for on 28th March again they wrote:—

"The 20 tons nickel by s.s. 'Arkansas' have been seized in England. Particular difficulties for us have arisen in consequence of the fact that the 20 tons nickel were sent on one bill of lading and it would have been better if you had distinguished between our lot ("Winneconne" lot) and that which does not belong to us. We were compelled to share in the insurance for this lot and an identical action is now demanded from both the insurers, etc."

The other interest, whatever it was, remains unexplained.

For some reason which again remains unexplained the appellants described their goods in a manner which both as regards its nature and its weight was untrue. They described 20 tons of nickel as 200 tons of paper. They did so, they say, by request of the firm Walker M. Levett, "by whom it was explained that the correspondence would be accelerated and facilitated." The explanation does not commend itself to their Lordships.

Their Lordships do not think it necessary to dwell in detail upon other matters such as the proposals to run a motor schooner from New York to Germany with contraband goods (proposals to be found in the letter of the 28th March), or the character of the claimants' associates such as the consignors Walker M. Levett Company of New York, Frolen, Alpen and Coccoaro. They agree with the view the learned President took as regards these matters. They agree with the conclusion which the President reached that the ultimate destination intended by the claimants was not Sweden but Germany. It results that this appeal will be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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HIS MAJESTY'S PROCURATOR-GENERAL.

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DELIVERED BY LORD WRENBURRY.

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