Privy Council Appeal No. 137 *of* 1915.

In the matter of part cargo *ex* steamship "Panariellos."

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 13TH APRIL, 1916.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

This is the claimants' appeal from the condemnation, for trading with the enemy, of 1,020 tons of silver-lead *ex* steamship "Panariellos," as droits of Admiralty. They raise points little, if at all, relied upon below. This explains how it is that evidence, now much needed, was given below scantily or not at all, though often it was in the claimants' possession. The appellants now accept much that before was disputed, and raise issues before their Lordships which must be decided by inference from indefinite and imperfect materials. It may be that they suffer from the course so taken.

On the 11th August, 1914, the Greek steamer "Panariellos" sailed from Ergasteria for Belgium and the United Kingdom with a cargo of minerals belonging to the appellants, the Compagnie Française des Mines du Laurium. The cargo consisted of about 1,020 tons of lead, stowed in the bottom of the ship, and about 3,500 tons of calamine and 600 of speiss stowed above the lead. There were three bills of lading: one for the entire cargo, one for half of the lead, another for the other half. Each bill of lading expressed that the cargo, which it covered, was consigned to the appellants themselves. The lead was made deliverable at Newcastle; the bill of lading for the entire cargo made it deliverable at Antwerp and Newcastle,

but the calamine, at any rate, was in fact to be discharged at Antwerp. The bills of lading incorporated a voyage charter, dated the 18th July, 1914, for Antwerp and Tyne below bridges. It gave a lien for freight and demurrage.

The loading of this cargo began on the 29th July, 1914 and finished on the 10th August. The appellants, whose *siège social* is in Paris with an office at Laurium, where they exploit mines, have not contested that at all material times they were aware of the outbreak of war between Great Britain and France and Germany. The appellants had long been in commercial relations with the firm of Beer Sondheimer and Co., of Frankfort-on-the-Main, who traded in metallic ores. Running contracts existed between them, under which Beer Sondheimer and Co. sent cargoes of galena from Tunis to Ergasteria, where the appellants treated them and re-shipped the resulting lead ore as arranged with their German customers. In form, the appellants bought the galena from Beer Sondheimer and Co. and sold to them the lead extracted from it. As these transactions regularly followed one another, there was a running account between the parties on which a balance was outstanding in favour of the appellants. In this way the shipment of lead ore in question came to be made. It is common ground in the present proceedings that the lead still belonged to the appellant company at all material times. At one time a claim was made on behalf of Beer Sondheimer and Co., as owners, but it was abandoned, and the ownership of the cargo need not be pursued further.

As soon as war broke out Beer Sondheimer and Co. set to work to get possession of the bills of lading. Communication being suspended between Frankfort and Paris, they telegraphed to the appellants' office at Ergasteria on or before the 4th August to send the bills of lading direct to Beer Sondheimer and Co., of London, and asked that the appellants' Paris house might be directed to transmit these instructions to this London firm. The appellants forwarded these instructions, but at that time no bills of lading had been signed, and nothing further was done.

The London firm of Beer Sondheimer and Co. consisted of one person, a German named Emil Beer. Whether he had any other business than that of agent in London for Beer Sondheimer and Co., of Frankfort, does not appear. At any rate, his firm in London were sole agents for the Frankfort firm, and, as he is said to be "a partner" in the Frankfort firm, presumably that firm had other members. The Frankfort and the London firms were distinct, but in intimate relations with one another. On the 21st August the London firm, then in charge of an Austrian clerk named Weissberger, began inquiring of the appellants' Paris office where the bills of lading were, and the appellants' *secrétaire général* replied that they were not yet to hand, but would be forwarded as soon as they were received in accordance with the instructions of the Frankfort firm. On the 22nd August the appellants'

administrateur délégué, M. le Baron Jules de Catelin, was in London and saw Herr Weissberger, whose business had not up to that time been interfered with by the authorities. It was verbally agreed that, if the parcel of lead was delivered by the London firm, a complete settlement of accounts would follow. Such a settlement was a matter of some anxiety to M. de Catelin both then and for some time afterwards, and, as far as can be ascertained from the evidence, the appellants would have been substantially better off if they could have got a full settlement of this account against delivery of the bills of lading for the lead than if they took delivery of the lead themselves under the bills of lading and sold it, after paying freight, demurrage, and warehouse charges.

On the 25th August the appellants' *secrétaire général* sent from Paris to Beer Sondheimer and Co., of London, the two bills of lading for the lead in accordance with the promise contained in his letter of the 21st August. He purported to endorse both per procuration of the *administrateur délégué*, but by some accident only one endorsement was completed with the secretary's signature. Baron de Catelin asserted that the secretary had no authority to endorse away the appellants' property at all, but it does not appear that his action was ever repudiated, nor does it appear whether the *administrateur* was himself in Paris on that day or not. The learned President, sitting in Prize below, expressly refrained from accepting the statement that the act of the secretary in writing the letter which covered the bills of lading, was beyond his authority, and said that on the evidence he must take it to have been done in the ordinary course of business. Presumably he intended his observation to extend to the secretary's endorsement of one of the bills of lading as well. As things turned out, these bills of lading did not fall into the hands of Beer Sondheimer and Co., of London, for on the 25th August their office was closed and their papers impounded by the Home Secretary's orders. M. de Catelin was speedily informed. He held no further communication with Beer Sondheimer and Co.

On the 26th August the "Panariellos" arrived in the Downs. It was already questionable whether it was wise to proceed to deliver the calamine at Antwerp, and the captain demanded instructions. As to the cargo in the upper part of the holds, something had to be done. The lead, which was stowed underneath the calamine, was a less pressing matter. On that day M. de Catelin was in London, and, although after the 22nd August he was entirely unable to fix any dates in his evidence, it is tolerably clear from the documents produced that he went to Swansea, sold part of the calamine for delivery there *ex* ship, and then returned to Paris. There he found that his company still had the general bill of lading covering both the calamine, the speiss, and the lead, and so was in a position to claim delivery of the whole cargo at Swansea if the ship went there to discharge.

He must have returned to London on or after the 29th August and there began or went on trying to sell the lead either to or through Messrs. Enthoven for delivery at Swansea or elsewhere. When this negotiation was concluded does not appear. It certainly took some time. It clearly was still unsettled on the 31st August, on which day M. de Catelin wrote from Paris again, contemplating the possibility that either Beer Sondheimer and Co., of London, or His Majesty's Government might claim part of this lead as bill of lading holders, and insisting that, if so, the balance of Beer Sondheimer and Co.'s account ought to be discharged. On the 1st September the appellants telegraphed to their agents in London, Messrs. Walford, that they accepted the "Panariellos" at Swansea, and that the lead, speiss, and unsold balance of the calamine were to be warehoused, and they sent the general bill of lading over to London by messenger. From this it would seem that, although the owners of the "Panariellos" were entitled under the charter to insist on proceeding to Antwerp and Newcastle, they were soliciting the nomination of some safer ports, and the substitution of Swansea was agreed without other alteration of the chartered terms. The "Panariellos" left Deal on the 3rd September, and Messrs. Walford instructed agents in Swansea on the 4th and 5th September, in accordance with the appellants' telegram of the 1st September, to put the lead into warehouse "for our account." They made it plain that their clients' chief concern as to the lead was that their claim against Beer Sondheimer and Co. should take priority over any other claimant under any bill of lading.

It is very improbable that the appellants would have thus directed that the lead should be landed and warehoused at their own expense if any sale had as yet been concluded by or through Messrs. Enthoven. No document evidencing such a sale earlier than the 24th September has been produced. The "Panariellos" arrived at Swansea on the 7th September, and the collector of customs on its arrival at once gave notice of detention of the lead. It was ultimately discharged into the warehouses of the Swansea Harbour Trust and storage charges were incurred. The discharge of the lead clearly took some considerable time and the ship was three days on demurrage, but the dates of the commencement and completion of the discharge do not appear. Ultimately the lead seems to have been sold by M. de Catelin on the 24th September for delivery to buyers at Newcastle-on-Tyne, but this sale was afterwards cancelled. On the 25th September the lead was formally seized as prize by the collector of customs at Swansea and it was subsequently sold and the proceeds, 16,000*l.* or thereabouts, were paid into Court.

The general principles upon which trading with the enemy is forbidden to the subjects, or those who stand in the place of subjects, of His Majesty and of His Allies, are well settled and need not be restated. Ample citations from the authorities are

to be found in the learned and elaborate judgment in the Court below. Before their Lordships little, if any, stress was laid on points much relied on at the trial, namely, that the *administrateur délégué* of the company had no intention to offend and believed that what was done was legitimate as long as Beer Sondheimer and Co.'s office had not been closed; that in these proceedings a French company was more favourably situated than an English company; and that the intercourse in this case fell short, somehow, of technical 'trading.' Their Lordships think it sufficient to say that none of these points avail the appellants.

The questions with which it is necessary to deal are, first, whether at any time the goods condemned were engaged in trading with the enemy; and, secondly, whether such trading had not ended before seizure, so that the goods were no longer liable to condemnation.

In their Lordships' opinion, the despatch of the ore from Ergasteria, for delivery as directed by Beer Sondheimer and Co. of Frankfort and for their benefit, engaged the goods in forbidden intercourse with the enemy. Consignment of goods to an enemy port and vesting of them in an enemy while on passage, though common features in the reported cases, are not essential to the imputation of forbidden trading. Geographical destination alone is not the test. Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom. The development of communications, the increased complexity of commercial intercourse, and the multiplication of facilities for enemy dealings with goods though at a distance from the enemy country, are incidents in the growth of modern commerce, to which in its application the rule of law must be adapted. They do not in themselves operate to defeat the application of an established principle. In the present case it is true that on shipment the consignors retained the indicia of title to the goods and the *jus disponendi* over them; that the lead ore was shipped for discharge at an English port, and that the enemy buyers selected as the actual recipients of the ore a firm carrying on business in London, which had a manager there who, though not licensed to trade, was in one sense tolerated, since for some days his business premises were not officially closed. Indeed, this agent was informed by the Board of Trade (with what authority, if any, does not appear) that he needed no licence; but this advice was given on the express representation, made on his behalf, that his intention was to trade only in the United Kingdom or with Allied or neutral countries. Hence this official reply had no reference to or effect upon dealings with this ore, which, if Beer Sondheimer and Co. of London entered into them at all, would plainly be dealings on behalf of Beer Sondheimer and Co. of Frankfort. These circumstances do not take the case out of the rule.

Their Lordships being of opinion that the ore was so shipped as to be engaged in commercial intercourse with the enemy, the

burden is upon the claimants to establish that subsequently such events happened or such a course was taken as effectually relieved it from liability to forfeiture.

The affidavit of the collector of customs at Swansea at the beginning of the Record says: "The said ship arrived at Swansea on the 7th day of September last, having on board the said goods . . . . which were detained by the pending inquiry as to the ownership thereof, and were ultimately seized by me as prize on the 25th day of September last." Not till this appeal was heard does it appear that any question was raised, which made it necessary to inquire into the exact steps taken or the exact formalities observed at Swansea on the 7th September. Their Lordships, therefore, presume that the collector, as his duty required under the circumstances, assumed effective control over the ore immediately on the ship's arrival and before the voyage was over. Thenceforward, wherever the ore actually was stored, it was no longer controlled by the consignors or their agents and could no longer physically be dealt with on their behalf. If so, the 7th September becomes the critical date. It may be that when, in the interest alike of the goods owner and of the Crown, a reasonable time is necessary for proper inquiry and deliberation in order to avoid delay, litigation, and expense, detention during such a period without seizure is a correct incident in the regular course of the exercise of the rights which are given to a captor by prize law and is not opposed to the established rules of prize court procedure. It may be again the better opinion in such a case to regard the detention, when it culminates in seizure, as one with it and to hold that the seizure commences provisionally with the first detention, though the ultimate character of that detention cannot yet be known. It is not necessary to decide this somewhat theoretic point, for it is plain that after the 7th September the claimants did and could do nothing to the ore itself, and as proceedings for the forfeiture of this ore are proceedings *in rem*, there must be some dealing with the goods themselves to terminate that engagement in prohibited trade, which was constituted by loading and despatching them from Ergasteria to abide the directions of Beer Sondheimer and Co. of Frankfort. For this purpose mere personal declarations of intention or negotiations or even contracts with reference to them would not suffice. The appellants' contention that at the time of the seizure all trading with the enemy had ceased, and that the appellants were selling the lead on their own account only begs the question.

The French company can only be said to have thus dealt with the goods by sending them to Swansea and by retaining control through bills of lading made out to their own order, subject to the effect of the *de facto* endorsement and delivery of one parcel bill of lading. In the circumstances of this case the alteration of the port of delivery certainly did not constitute an abandonment of the old voyage and an undertaking of a new one. Not as an exercise of dominion over the goods, so as to

change their character, but largely at the instance and for the safety of the ship, a Bristol Channel port was substituted for a north-east coast port. If the destination of the ore was for enemy hands and enemy control, this change did not affect it. Moreover, as late as the 4th September, the claimants, in their letters and those of their agents, still contemplated that some at least of the ore might be delivered in such circumstances that the claim to hold the ore until final settlement of the account of Beer Sondheimer and Co. of Frankfort might be successfully asserted. Up to the 7th September nothing else appears except negotiations for a possible sale of the lead if new buyers could be found, and it certainly is not established, nor is it even probable, that these negotiations had been concluded before the critical date.

Their Lordships are of opinion that upon these facts the appellants have failed to discharge their obligation to show that the engagement of the ore in enemy trading had been abandoned in time. It is not enough to show a mere repentance or a change of intention without some dealing with the *res*. There must be something which withdraws the goods from the forbidden adventure. Up to the 7th September even the intentions of Baron de Catelin are obscure and evidently provisional, and after that date it must be observed that, in view of the action of the Crown, they are rather intentions to avert, if possible, the consequences of what had been done, than to abandon a course of business which financially was beneficial to the company though exposed to the hazards involved in trading with the enemy. In short, what he did after the 7th September was rather mending his hand than changing his mind. Accordingly, some of the appellants' contentions of law do not arise. They cited cases to show that unless seized *in delicto* their goods escape, and that their *delictum*, if any, was over, when the "Panariellos" arrived in Swansea Dock. These cases, however, related to neutral goods seized for breach of blockade or as contraband of war. They differ from the present case in one important respect. Maritime trade in contraband goods and breach of blockade are acts on the part of neutrals, which belligerents are entitled to prevent. Trading with the enemy on the part of his subjects or the subjects of his allies is an act, which the belligerent sovereign is entitled to prohibit. To hold that, if a neutral engages in enterprises which, to him, are permitted though undertaken at his peril, his goods are only liable to condemnation if seized *in delicto*, is no warrant for further holding that, if a subject engages his goods in enterprises which to him are prohibited and unlawful, they may not be visited with the penalty of forfeiture, even if seized after the actual *delictum* has come to an end. It is not necessary to pursue the point, as no case applicable to trading with the enemy was brought forward.

The learned President in his judgment stated that "the Baron de Catelin disavowed with emphasis any intention in

these transactions to do anything which would be helpful to the enemy or prejudicial to this country" and accepted the disavowal. Their Lordships do so too and they recognise further that Baron de Catelin found his company engaged in a financial difficulty of considerable magnitude, from which it was not easy to extricate it without loss, and probably only desired to protect its interests in a way which appeared to him to be void of illegality or of offence. These, however, are considera-tion which, though weighty, can only be addressed to the clemency of the Crown. They cannot affect the judgment which a Court of Prize, strictly administering the universal rule as it finds it, is bound to pronounce in the grave case of trading with the enemy.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, but as the Procurator-General made no submission that costs should be allowed, that this appeal should be dismissed without costs.

In the Privy Council.

IN THE MATTER OF PART CARGO *ex* STEAMSHIP "PANARIELLOS."

DELIVERED BY LORD SUMNER.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.