Privy Council Appeal No. 77 of 1916.

In the Matter of Part Cargo *ex* Steamship "Kronprinzessin Cecilie."

(Appeal of the American Smelting and Refining Company.)

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 26TH MARCH, 1917.

Present at the Hearing:

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

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal by the American Smelting and Refining Company, a United States Corporation of New York, the claimants in the Court below, against a decree of the President dated the 29th November, 1915, whereby 350 tons of pig-lead, part of the cargo of the steamship "Kronprinzessin Cecilie," were pronounced to have belonged to enemies of the Crown at the time of seizure of the steamer and her cargo as prize, and ordering the proceeds of sale of the pig-lead to remain in Court until further order; and against another decree dated the 28th March, 1916, whereby the President condemned the proceeds as good and lawful prize. The substantial question in the appeal is whether the property in the 350 tons of lead had prior to the seizure passed from the claimants (the shippers) to the Metallgesellschaft, of Frankfurt, a German corporation. The case of the appellants was that the Metallgesellschaft, to whom the lead was consigned by them, were merely agents for the sale of the lead and that the property remained in them (the appellants) until by the act of the Metallgesellschaft as agents it might become vested in some purchaser from them on the continent of Europe. The course of business under which the appellants disposed of the lead was very complicated.

On the 19th March, 1909, they, with eight other producers of lead, carrying on business in various parts of the world, had become parties to an agreement for the purpose, as it is called, of "pooling" their lead. This was called the "Pig-lead Convention." The producers parties to it all agreed to appoint the Metallgesellschaft as their sole selling agents for the continent of Europe, and a company, Henry R. Merton and Co. (Limited), their sole agents for Great Britain. All their lead was to be sold, and each producer was to receive as payment not what was produced by the sale of his own lead, but a sum arrived at by taking an average of all the sales. They thus bought off each other's competition, and hoped to, and no doubt did, obtain higher prices in consequence. In 1913 the appellants withdrew from that Convention, but by letters dated the 29th May, 1913, and the 11th July, 1913, they entered into an arrangement with the Metallgesellschaft and Mertons for their continuing to act as their selling agents on terms very similar to, even if they were not identical in their effect with, the terms of the Convention agreement. It is convenient, therefore, to consider first what was the legal effect of the course of business provided for by the Convention, and then to consider how far, if at all, the legal effect was altered by the subsequent agreement. Both in the Convention and in the agreement the Metallgesellschaft were called agents, but it is well known, and was in this case admitted by counsel for the appellants, that in commerce it is common to use the term "agents" and "sole agents" to describe persons who dispose of produce for others by purchasing and reselling it, and who are therefore not in law really agents. Counsel also referred to a case (*Weiner* v. *Harris*, 1910, 1 K.B. 285) in which it was laid down that the Court had, for the purpose of deciding whether a contract amounted to an agency or a sale, to look at what the contract really was, and not at what the parties said it was—a proposition, however, which hardly required to be supported by authority.

The material provisions of the agreement of March 1909 were as follows:—

II. A committee was appointed to see that the agreement was carried out in its entirety.

III. The producers were every month to state the quantity of lead they undertook to supply in the succeeding month, and expected to supply in the second month.

IV. The Metallgesellschaft and Messrs. Merton were appointed "exclusive selling agents" for the producers' entire production so far as the sale was to take place on European markets, and enquiries for lead were to be passed on to the Metallgesellschaft for continental business, and to Mertons for England, and the producers were to inform the enquirers who the agents were.

V. The Metallgesellschaft and Mertons undertook to realise the best prices for the lead, and to safeguard the interests of the producers as if they were their own.

VI. That as credit might have to be given, the Metallgesellschaft and Mertons were to stand *del credere* as to their respective transactions.

VII. That the Metallgesellschaft and Mertons were to receive a commission varying with the market price of lead in each month, but to be 1⅜ per cent. whenever the market price was over 15*l.*, as it was at the time of the transaction in question.

VIII. That the agents were not, with certain specified exceptions, to sell any soft lead on their own account, or for producers outside the Convention, and were to endeavour to induce other producers to become members of the Convention. The agents were to bring under the operation of the agreement such lead as at the date of the agreement they had already bought from any of the producers parties to the agreement, and were permitted to acquire for their own account any part of the soft lead of these producers, provided that they brought such lead under the operation of the agreement.

IX. The details of the policy as regards sales were to be fixed by the selling agents in consultation with the committee.

XII. Invoices to the selling agents to be rendered by the producers at time of the despatch of the lead were to be made out provisionally on the basis of the prices quoted in a list published on the Friday of the preceding week less 3 per cent. Payment to be made against delivery of documents, but earlier payment might be arranged for on certain terms.

XIII. At the end of each month statements to be made out showing the sales made and the average prices realised. The price of each sale was to be reduced to the basis of "c.i.f. usual European ports." On the basis of these statements definite account sales were to be made out at the end of each period of three months in such a manner that the average price was to be accounted for. Any difference to the debit or credit of such producer was to be settled within a fortnight from receipt of the three-monthly account.

XIV. The selling agents were to allot the forwarding instructions to the producers and arrange matters to the best advantage as regards freights to the prospective markets, and to allot forwarding instructions in such way as to distribute the sales

and deliveries amongst the works as equally as possible, having regard to the respective proportions of their production.

The producers were to be responsible for the due delivery of the quantities they had declared, and for any claims made as to the quality of these deliveries, but in case any producer could not deliver the quantity declared, although the lead had been produced, the selling agents were, if possible, to arrange for the delivery from other works without claim for damage against the producer, but the deficiency was to be shipped subsequently.

XV. If the average price fell below 14*l*. 10*s*. per ton, the committee might direct each producer to retain certain proportions of the lead declared by him, but in no case beyond 10 per cent. of the producer's annual production. There were provisions as to what was to be done with the retained lead.

XVII. Contained provision as to any party withdrawing on notice.

The above are all the terms of the agreement which appear material, but at some time (the date is not stated) the provision as to the payment being made against documents ceased to be acted on, at all events between the appellants and the Metallgesellschaft, who were old customers and had many dealings. The bills of lading were sent direct to the Metallgesellschaft but payment was made of the amounts of the provisional invoices by drafts drawn by the appellants on Mertons and accepted by them for one or more consignments together, at times independent of the receipt of the documents, but apparently on the intimation that the goods had been shipped.

These being the material terms of the Convention agreement as thus modified, it is clear that in transactions carried on under it the producer parts with the goods which he sells on terms different from those on which the purchaser who ultimately gets them receives them. The original seller does not receive the price paid for his goods less the remuneration of the agent conducting the sale, as should be the case on a sale by an agent. He receives a sum, arrived at by taking an average of the prices obtained for other people's goods as well as his own, and the sum he receives may be more or less than his own goods sold for. It is the duty of an agent for sale to bring about privity of contract between his principal and the buyer, subject, of course, to the rule, which is an apparent rather than a real exception, that in the case of a foreign principal the dealing is, by mercantile usage, taken to be exclusively between the agent and the buyer in his own country, so that the foreign principal, as between himself and the buyer, neither incurs contractual

liability nor acquires contractual rights. Here no privity is created, or would be if the principal were not a foreigner, for the contracts of the buyer and seller are different. The goods are to be invoiced to the agent, and the invoice is provisional only as to amount, and not as to the person made debtor. The bills of lading are delivered to the so-called agents, indorsed to them specially or in blank. At or about that time the seller receives by accepted draft a provisional sum, and he never has anything further to do with the goods, and afterwards either receives or pays a balance, the amount of which does not depend on what his goods sold for.

The process is somewhat similar to sales on the London tallow market under the custom proved in *Mollett* v. *Robinson* (7, H. L. 802; 7, C. P. 84; 5, C. P. 646). In that case there were great differences of judicial opinion as to the proper view to be taken of the facts, but the judgments both of the Judges who took the view ultimately taken by the House of Lords and of those who did not, are most instructive as to the duties of brokers in buying and selling, and by the House of Lords the custom was held not binding on a merchant who did not know of it, on the ground that it was inconsistent with the broker being a mere agent, and that it in effect made him a principal.

There is therefore much to be said for the view that sales under the "Pig-lead Convention" are carried out in a way which in law amounts to a sale by the producer to the so-called selling agent, and a resale by him to the ultimate purchaser. It is of course clear that the selling agents are restricted by the terms of the contract from making by resales any profit beyond their commission, but the fact that they are paid by commission for work that is substantially that of agents does not go far to show that the mode of carrying out the agency is not by having the property transferred to them by a sale, and distributed by resale to the ultimate purchasers. The introduction of the term *del credere* certainly does go to show that agency was contemplated, but that is not conclusive, as it may have been merely a mode of making it clear that the agent was to be responsible for those to whom he sold.

The case for the appellants, which as will be mentioned, has varied from time to time, has been put finally on the ground of the Metallgesellschaft being agents for them, the claimants, but it might perhaps be put more plausibly by alleging them to be agents for all the purchasers, that is, for the combine, as it may be called, and this was hinted at rather than put directly by counsel in the course of his argument. The true view may be that the producers parties to the agreement should be considered to throw all their produce together so as to form a common stock from which the sellers sell, not as agents for the individual producers selling the lead produced by them, but as agents for the combine selling parcels from the common stock. Thus the agents selling the common stock for the combine the owners of it, could

make contracts, to which the objection that the selling and buying terms did not correspond could not be taken. The combine would receive what the buyers paid, and the proceeds of all the sales would form a fund, which the agents no longer as selling agents but as agents authorised for the purpose by the combine would distribute among the producers by paying to them the average price agreed under the convention as the compensation for what they had brought into the common stock; on that view the agents might, as mere agents, without having any title themselves convey to the purchasers the title of the combine to the parcels of the common stock sold. The property would, however, have passed from the producer to the combine before it got to the buyer, although it would not have passed to the agent.

Another view perhaps possible would be that the Convention agreement gave a special and exceptional authority to the agents to apply the property of individual producers to the satisfaction of contracts to which those producers were not parties, and that, if so, they might under that special authority personally transfer the property without its being ever in them. Many legal problems appear to arise as to the true construction of the Convention agreement, but as the lead in question in this case was not dealt with under the Convention agreement, but under a subsequent agreement, it is not necessary, having regard to the view their Lordships take of the withdrawal of the appellants from the Convention, and of the subsequent agreement, to solve all these problems.

The letters of the 29th May, 1913, and the 11th July, 1913, are set out in full in the judgment of the learned President. They only allude in the vague terms "for local and personal reasons" to the reason for the appellants withdrawing from the Convention. This appears rather more fully from the second of the three affidavits of Mr. Brush, the vice-president of the appellant company, who says that "in view of certain legislation by the Congress of the United States, and of the attitude of public officials of the United States toward commercial dealings of a certain type, a question arose in the spring of 1913 as to the propriety of the claimant company remaining a party to the contract commonly referred to as the Pig-lead Convention, and, being in doubt in the premises," they decided to withdraw. Counsel told the Board that that reference was to legislation against what are known in America as Trusts, being in the nature of combinations to affect prices. The details of this legislation are not before the Board, nor are they material. It is sufficient that the apprehension of contravening the law was the motive for withdrawing, and that what was necessary in order to avoid contravening the law was to have no agreement with other producers.

The letter of the 29th May gives notice to the Metallgesellschaft of their intention to withdraw after getting the consent of the other members to the withdrawal at a time not

corresponding exactly with the time at which the terms of the Convention gave the right to do so, and the letter went on to state the general nature of the proposal they intended to make for the Metallgesellschaft to continue as their selling agents. It was in accordance with the proposal actually made in the letter of the 11th July written after the withdrawal, which, therefore, it is sufficient to quote. That letter, addressed both to the Metallgesellschaft and to Mertons, said :—

"We desire to enter into an arrangement with you, beginning with the 1st July, whereby you will act as sales agents for this company in the selling of all pig-lead which we may have for sale on the continent of Europe or in Great Britain during the balance of this year and the year 1914. We will pay you the same commissions that have been paid by us in the past. We will notify you the 1st of each month how much we desire to have you sell for shipment during the following month, and will estimate as closely as we can how much we expect to have for sale, which shall be shipped during the second succeeding month. We will be willing to accept from you a proportion of your total sales for shipment in each month equal to the proportion existing between the lead which we give you for shipment in each month and the total amount which is shipped for all of your customers in each month. The price paid to us shall be the same as that paid by you to your other customers for similar shipment and similar delivery."

The proposal in the letter further provided for information as to sales, delivery, and prices, and as to the condition of unsold lead, so that it might be seen whether they received a proper proportion of orders and prices, and also provisions as to withdrawal from the arrangement on notice.

By letter dated the 21st August, 1913, the Metallgesellschaft and Mertons agreed to the arrangement set forth in the letter of the 11th July, subject to matters which they had explained verbally to one Mr. Loeb, and which appear to have related entirely to temporary matters arising out of the transition from the old course of business to a slightly different one.

This new arrangement therefore included no agreement between the claimants and any other producers. The object was to avoid that. It was simply an agreement between the appellants, on the one hand, and the Metallgesellschaft and Mertons on the other. The appellants were to be paid for their goods not what they realised on being sold by the so-called agents, but a price arranged with those agents, which the proposal in terms says, "We will accept from you." To make the agreement intelligible, it is necessary to take into account what was known to the parties making it as to the agreement which was to continue with other producers. Otherwise, "the price paid by you to your other customers" would be unintelligible; but this knowledge is, of course, legitimately taken into

consideration in construing the agreement, under the rule as to surrounding circumstances.

The agreement thus made could be nothing else but a sale to the agents, and from this time, if there was any doubt of it before, the ultimate purchasers take by a resale by the agents to them of the goods which the agents had bought. The element of agreement between all the producers, which alone made any other view of the Pig-lead Convention possible, has now been eliminated, and eliminated purposely in order to avoid danger of contravening the law. The new agreement does not expressly provide for the course of business as to bills of lading and payment on account and final settlement. It obviously was meant to be continued as before, and this was done as is shown by the documents put in showing transactions in February 1914. Under the new agreement, whatever may have been the case under the old, it appears clear that in endorsing and parting with the bills of lading the appellants parted with the property in the goods they had agreed to sell to their buyers, the Metallgesellschaft or Mertons, as the case might be. It is true that the passing of property is a question of intention, but the intention is that shown by what the parties do, and not what they say they intended, or even what they think they have done. In this case Mr. Brush, the vice-president of the appellant company, who appears to have conducted the transaction and also signed the important letters, and who ought to have known all about it, in his first affidavit stated more than once, and very distinctly, that the lead had been sold to the Metallgesellschaft. This in subsequent affidavits he tried to explain away, but he does not seem to give what would have been the best explanation, and probably the true one, that whether there was a sale or not was a matter of legal inference rather than of fact, and that his legal advisers told him he had misunderstood it. Their Lordships think that his first view was right, and the advice given him, if it was given, was wrong. At the same time the difference between the first claim and the subsequent one is not, under the circumstances, inconsistent with honesty, and so is not very important. So far as intention in fact outside the intention shown by the documents is material, Mr. Brush's first impressions are the best indication of it.

In this case no point has been taken as to the time when the transfer of any of the property took place, and whether it was before or after the seizure. That was the point raised in the case "Part cargo *ex* 'Belgia,'" to which the present appellants were parties and which was argued before their Lordships on the same day as this appeal. It is fairly clear that the point does not arise in this case, and the facts to raise it, if it did arise, were not brought before the Board. In the course of the present case several applications have been made to admit further evidence after the case had been once closed. One was made to the President when he was about to deliver a considered

judgment, and that, as their Lordships think, he quite properly refused. Another application was made by petition to this Board, on the hearing before them, to receive some evidence, on the absence of which the President had commented in his judgment. Their Lordships refused this application, on the ground that there was ample opportunity to have obtained the information at the proper time; but there is the further ground that it was directed to a point which, in the view of the case which their Lordships have taken, is not material, and it was not really pressed by counsel. The appeal is in form against two decrees, but the second decree merely followed a decision of the President's which had not been questioned. When the decree of November 1915 was pronounced it had not been decided whether the "Kronprinzessin Cecilie" was or was not liable to detention only, and not to confiscation under The Hague Convention as a ship in port on the outbreak of war. It was decided that the ship was not entitled to the benefit of the convention, and that was not appealed from. Subsequently the decree of the 28th March, 1916, condemning her cargo was made.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and also that the petition to receive further evidence should be dismissed with costs.

In the Privy Council.

In the Matter of
PART CARGO *EX* STEAMSHIP "KRONPRINZESSIN CECILIE."

DELIVERED BY
SIR ARTHUR CHANNELL.

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

1917.