

Privy Council Appeal No. 116 of 1916.

In the matter of Cargo *ex* Ship "Remonstrant."

Justus Scharff (Limited) - - - - Appellants
v.
The Proper Officer of the Crown - - - Respondent.
The Proper Officer of the Crown - - - Appellant,
v.
Justus Scharff (Limited) and Another - - Respondents.
Rostrup - - - - - Appellant,
v.
The Proper Officer of the Crown - - - Respondent.

Consolidated Appeals

FROM

**THE SUPREME COURT OF NEW SOUTH WALES ADMIRALTY
JURISDICTION (IN PRIZE).**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 20TH NOVEMBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD WRENBURY.
SIR SAMUEL EVANS.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

On the 21st October, 1914, the Norwegian barque "Remonstrant" arrived in Sydney Harbour, New South Wales, with a cargo of copra from Jaluit in the Marshall Islands. The copra had been shipped by the representatives of the Haupt Agentur der Jaluit Gesellschaft, of Hamburg, during the previous month, under a bill of lading, which named as the consignees Justus Scharff, Limited, of Sydney, a company incorporated in New South Wales, who now bring the principal appeal. After the ship's arrival they disbursed various

sums on account of freight and for other charges payable before delivery of the cargo, and both they and the master of the "Remonstrant" were ready and desirous to have the cargo discharged, but the representatives of the Crown refused the necessary permission, until at last, on the 25th January, 1915, the cargo was seized by an officer of Customs and in due course was landed and proceedings were taken for its condemnation in prize as enemy property. Of this delay the learned trial Judge, Chief Justice Cullen, observes that "it could have been prevented by prompt action on the part of the Commonwealth authorities as soon as the facts came to their knowledge." In the proceedings in prize the master claimed payment of the balance of his freight and damages for detention of his ship, and Justus Scharff, Limited, claimed reimbursement of the sums which they had paid in order that the cargo might be discharged. Both claims succeeded and are now the subject of the cross-appeal by the Proper Officer of the Crown. Justus Scharff, Limited, however, further made a direct claim to the goods. They entered an appearance for themselves, it is true stating that they did so "as legal owners and as agents for Haupt Agentur der Jaluit Gesellschaft, as beneficial owners," but still not purporting to bring the German company as parties before the Court, and it clearly appears from the course of the proceedings and the tenor of the judgment that the case actually presented to the Court was the claim on behalf of Justus Scharff, Limited, themselves, "as consignees," as the learned Judge says, and that no claim by the German company, represented by Justus Scharff, Limited, as their authorised agents, was presented to the learned Judge at all. This claim of Justus Scharff, Limited, to the goods themselves was dismissed and is the subject of the principal appeal.

At their Lordships' bar it soon became apparent that the case made in argument was the case of the Haupt Agentur der Jaluit Gesellschaft, which was not the case made below, and that the case made below, namely, that in one right or another Justus Scharff, Limited, themselves were entitled to the goods, was abandoned. In other words, the appellants, who appeared before their Lordships, turned out to be the German company, seeking for themselves the judgment, which in the Court below had been sought by and refused to Justus Scharff, Limited, alone. In truth, this was not an appeal but a new proceeding, and was incompetent. It would have raised questions, upon which their Lordships would have desired to have the benefit of the judgment of Chief Justice Cullen, such as the admissibility of a claim to receive from His Majesty the benefit of the Declaration of Paris, which was preferred, not by a neutral, but by an enemy, and that enemy one whose Sovereign for his part respects neither neutral ships nor the goods covered by their neutral flag.

Their Lordships are accordingly of opinion that the principal appeal fails.

They are equally of opinion that the cross-appeal fails also. Admittedly, the master was entitled to the balance of his freight, unless he had been guilty of unneutral conduct, of which there was no evidence. The damages for detention which were adjudged to him were rightly given, if the representatives of the Crown had been guilty of undue delay, and this the learned Judge found to have been the case. It is not contested that the foundation of such a claim must be exceptional and unreasonable delay, or that the responsible decisions, which the representatives of the Crown are obliged to take, require, in adequate and ample measure, time and opportunity for inquiry and deliberation, but there was evidence on which the learned Judge could find, as he did, that the delay was nevertheless "undue," and their Lordships were not invited to differ from his decision on a mere question of quantum. Furthermore, as to the sums disbursed by Justus Scharff, Limited, their Lordships are of opinion that in the circumstances in which they made the disbursements the judgment in their favour for reimbursement was right. The master of the "Remonstrant," apparently under a misapprehension, gave notice of appeal and delivered a case in support of it. In fact, he asks nothing except that the judgment in his favour be affirmed. His appeal fails, for it is misconceived; but, for the purpose of costs, his case should be treated as if it had been delivered in opposition to the appeal of the Proper Officer of the Crown, in which he succeeds.

Their Lordships will, accordingly, humbly advise His Majesty that each of these appeals should be dismissed with costs.

In the Privy Council.

IN THE MATTER OF CARGO *es* SHIP
"REMONSTRANT"

JUSTUS SCHARFF (LIMITED)

v.

THE PROPER OFFICER OF THE
CROWN,

THE PROPER OFFICER OF THE
CROWN

v.

JUSTUS SCHARFF (LIMITED) AND
ANOTHER,

ROSTRUP

v.

THE PROPER OFFICER OF THE
CROWN.

DELIVERED BY LORD SUMNER.