Privy Council Appeal No. 53 of 1917.

In the Matter of Part Cargo *ex* Steamship "Louisiana."

The Baltimore Pearl Hominy Company - - *Appellant,*

v.

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

In the Matter of Part Cargo *ex* Steamship "Tomsk."

The Baltimore Pearl Hominy Company - - *Appellant,*

v.

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

In the Matter of Part Cargo *ex* Steamship "Nordic."

W. L. Fordtran - - - - - - *Appellant,*

v.

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

In the Matter of Cargo *ex* Steamship "Joseph W. Fordney."

The Atlantic Export Company - - - *Appellant,*

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 1ST FEBRUARY, 1918.

Present at the Hearing:

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

[*Delivered by* LORD PARKER OF WADDINGTON.]

These four appeals relate to certain fodder stuffs (being part of the cargoes of the steamships "Louisiana," "Tomsk," and "Nordic," and the whole cargo of the steamship "Joseph W. Fordney") which were seized on behalf of His Majesty in April and May 1915, and have been condemned by the President as lawful prize. Each appeal is against the order of condemnation.

Fodder stuffs are not absolute contraband. They are conditional contraband only, that is to say, they cannot be condemned as lawful prize unless destined for the enemy Government or the enemy's naval or military forces. On the other hand, in determining this destination, the doctrine of continuous voyage is clearly applicable, and must be applied in every case in which the Crown has not waived its strict rights. The first question, therefore, in each appeal is whether the goods to which the appeal relates were destined for the enemy Government or the enemy's naval or military forces. The second question is whether, if so destined, the Crown has not, as contended by the appellants, waived its right to condemnation by the Order in Council of the 29th October, 1914, adopting during the present hostilities the provisions of the Declaration of London with certain additions and modifications, this Order, though since repealed, having been in force when the goods were seized.

In considering cases such as those with which their Lordships have now to deal, it is well to bear in mind that, according to international law, neutrals may during a war trade freely as well with the belligerents as with other neutrals. If, however, the goods in which they trade are in their nature contraband, the traffic involves certain risks. For a belligerent State is entitled to seize the goods in transit, on reasonable suspicion that, being in their nature absolute contraband, they are destined for the enemy country, or, being in their nature conditional contraband, they are destined for the enemy Government or the enemy naval or military forces. The goods when seized must of course be brought into the Prize Court for adjudication, but in the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the Court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question.

In each of these appeals their Lordships find that the evidence discloses no such simple story supported by documents as one would expect in the case of straightforward transactions between neutrals in America and neutrals in Sweden or Denmark. The position of almost every person concerned is obscured in a cloud of mystery. The evidence is in some points insufficient and in others conflicting or misleading, and the several claimants have thought fit to leave entirely unexplained a number of circumstances which urgently call for explanation.

The cases of the part cargo *ex* steamship "Louisiana" and the part cargo *ex* steamship "Tomsk" may be taken together and their Lordships note the following points:—

1. The position of Klingener in the case of the shipment per steamship "Louisiana," and of Fritsch in the case of the shipment per steamship "Tomsk," is by no means clear. According to the appellants' manager, Mr. Harry B. Smith, these gentlemen were named as consignees in the bills of lading on the initiative of the appellants themselves, because it was thought that Insurance Companies required that there should be a named consignee resident in the country of the port of ultimate discharge. The appellants certainly gave Christensen and Schrei a guarantee that Klingener and Fritsch would endorse and deal with the bills as required by them. On the other hand, Klingener and Fritsch say that it was Christensen and Schrei who asked them to accept the respective consignments; but Christensen and Schrei do not confirm this story. There is no evidence that the appellants had any prior transactions with either Klingener or Fritsch, or how the appellants came to know of the existence of either of them. It is, however, quite certain that neither Klingener nor Fritsch had any real interest in the transaction or any duty beyond endorsing and dealing with the bills as directed either by Christensen and Schrei or the appellants, or possibly someone behind the appellants.

2. It appears that Christensen and Schrei originally claimed to be owners of the goods. In the case of the shipment per steamship "Louisiana," this claim was first put forward on their behalf by the Danish Minister on the 25th April, 1915, in a letter to Sir Edward Grey. In their declaration made on the 15th July, 1915, to the Danish Ministry of Commerce they refer to the goods as having been "purchased and consigned to" them. The meaning of this is obscure. It looks at first sight as if they meant to suggest, though without saying this in so many words, that they had purchased the goods; but this is inconsistent with the correspondence annexed to the declaration. To what purchase they refer remains a mystery. In their subsequent affidavit they in effect say there was no purchase, the goods having remained throughout the property of the appellants. Their own claim to ownership was thus abandoned.

3. The case ultimately put forward was that Christensen and Schrei were the appellants' agents for the sale of the goods

in question on the Scandinavian markets, but there appears to have been no formal contract of agency, nor any arrangement as to how the agents were to be remunerated. Indeed, the transactions in question were the first transactions between the appellants and Christensen and Schrei, whose address had been obtained by the appellants from a firm in New York whose name is not disclosed. Assuming that Christensen and Schrei were agents for sale, their authority to sell would appear to be in the nature of a simple mandate revocable at will by the appellants, or possibly by someone behind the appellants In case of such revocation, Christensen and Schrei would be bound to deal with the bills of lading, or the goods represented by these bills in manner directed by the person entitled to revoke the authority.

4. Though the appellants are claiming as owners, it is remarkable that Mr. Harry B. Smith does not anywhere in his affidavit commit himself to the statement that his Company ever at any material time owned the goods. The bills of lading, after endorsement by Klingener and Fritsch, appear to have been sent to him by Christensen and Schrei, and he says that his Company is the holder or owner of the bills of lading, and entitled to the immediate possession of the goods. But the "ownership" of a bill of lading, in the sense of holding it with a right to possession, which is what the affidavit seems to mean, does not always connote ownership of the goods comprised in the bill, and his affidavit is quite consistent with the ownership being in a third party on whose directions the appellants had acted throughout. It is also to be observed that Mr. Harry B. Smith does not state who forwarded the bills to Christensen and Schrei. He merely states that they were duly forwarded. It is left to Christensen and Schrei to depose to the appellants' ownership of the goods, as to which they would not necessarily know anything, and as to the appellants having forwarded the bills to them. In the case of the shipment per steamship "Louisiana," they produced a letter from the appellants enclosing the bills, but they produced no letter covering the bills in the case of the shipment per steamship "Tomsk." In the latter case there is reason to suppose that the bills were so forwarded by the firm of K. and E. Neumond of New York, who are admitted to have made some of the arrangements in connection with the shipment, though it does not appear in what capacity. This firm obtained the bills of lading per steamship "Tomsk" from the agents for the ship, and, in consideration of the bills omitting reference to the fact that some of the bags had been torn and mended, gave the guarantee printed on p. 55 of the record. The connection of K. and E. Neumond with the transaction is wholly unexplained. Christensen and Schrei claim to have been their selling agents in Europe. This seems to suggest that K. and E. Neumond, and not the appellants, were in real control of the business in America. If, as originally declared by Christensen and Schrei, the goods

had been purchased at all, that firm may well have been the purchasers, either on their own account or as agents for someone else.

5. That there was someone behind the appellants is rendered certain by the two wireless messages of the 1st and 9th April, 1915, from the Guaranty Trust Company, of New York, to the Disconto-Gesellschaft, Berlin. In the first the Guaranty Trust Company tell their Berlin correspondent that the shipment per steamship "Louisiana" is being forwarded by them on account of "Albert." In the second the Guaranty Trust Company tell their Berlin correspondent that the shipment per "Tomsk" is being forwarded by them on account of "Albert" to Christensen and Schrei.

6. Mr. Greenwood, in his affidavit on behalf of the Crown, states certain facts which inevitably lead to the inference that the Albert mentioned in these messages was Heinrich Albert, a well-known agent of the German Government in the United States, who appears to have been acting through K. and E. Neumond, to whom he had been recommended by Christensen and Schrei, and to have been financed by the Disconto-Gesellschaft of Berlin, through the Guaranty Trust Company, of New York. The appellants, who must be fully aware of the connection of Heinrich Albert, K. and E. Neumond, the Disconto-Gesellschaft, and the Guaranty Trust Company with the transaction in question, have chosen to leave this connection entirely unexplained and Mr. Greenwood's affidavit entirely unanswered.

Under the circumstances above mentioned, the only possible conclusion is that the shipments per "Louisiana" and "Tomsk" were made by or on behalf of the German Government through its agents in America, and that the details of the transactions were so arranged as to conceal the fact.

In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control such destination which is really material. Had Klingener and Fritsch had any real interest, it might have been their intention which mattered. Had Christensen and Schrei purchased the goods, or even had they obtained possession of the bills of lading under circumstances which entitled them to dispose of the goods, notwithstanding orders to the contrary from the appellants, or someone for whom the appellants were acting, the intention of Christensen and Schrei would have been a material point. Had the appellants been dealing with their own goods on their own behalf, their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German Government, it is the intention of the German Government which must be looked for. It would be ridiculous to suppose that the German Government were

speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilised for war purposes. It is true, no doubt, that the municipal laws of both Denmark and Sweden prohibit the export of fodder stuffs, but it is not clear that this prohibition includes transhipment at Danish or Swedish ports, or that licences for export are not readily granted by the Danish or Swedish authorities, at any rate if the stuffs in question are not really needed for home consumption. The experience of the Prize Court during the war has made it clear that the laws referred to, however stringent, can be evaded.

Their Lordships come to the conclusion that the President was fully justified in finding that the shipments per steamships "Louisiana" and "Tomsk" were destined for the German Government.

The facts in the case of the part cargo *ex* steamship "Nordic" are surrounded with equal mystery. The goods in question were consigned by the appellant Fordtran to Klingener. The bills of lading say that the vessel was bound for Gothenburg with liberty to call at any other port or ports in or out of the customary route in any order and for any purpose whatever. The goods were to be transhipped or forwarded at ship's expense, but at owners' risk from Gothenburg or any port of call to Landskrona. Attached to the bill was a declaration by the appellant that "to the best of his knowledge" the goods had been sold and were intended for consumption in Sweden. If, as he now claims, he was the owner as well as the shipper of the goods, he must have known whether or not he had sold them and to whom. He says in his affidavit that he made the shipment on order to Klingener on condition that payment was made after arrival of the goods. He does not say who gave the order or who was to pay, nor does he produce the order. Klingener was first put forward as owner of the goods. He says he ordered them from the appellant in or about February 1915, but he does not say on whose behalf he gave the order. There is no evidence of business relations having previously existed between Klingener and the appellant, or how they became acquainted. Neither Klingener nor the appellant mentions Christensen and Schrei or K. and E. Neumond in connection with the transaction.

On the other hand, Christensen and Schrei say that in March 1915 K. and E. Neumond notified them by cable of the shipment to Klingener, adding that in ordinary course if the goods had been received by Klingener he would have received them on their account. Klingener, therefore, had no real interest in the transaction. If he ordered the goods, it was on the request of K. and E. Neumond, who obtained the bills of lading and sent them to Christensen and Schrei, though why this was done is unexplained, unless an explanation

be found in the statement that Christensen and Schrei were selling agents for K. and E. Neumond, which suggests that the latter firm were purchasing the goods and consigning them to the former firm for sale. The appellant, who ultimately claimed as owner of the goods, deposes to his right to immediate possession by virtue of his "ownership" of the bills of lading, presumably in the sense already mentioned, but not to his ownership of the goods. Lastly, there is the wireless message of the 1st April, 1915, in which the Guaranty Trust Company, of New York, inform the Disconto-Gesellschaft, of Berlin, that they had forwarded the documents relating to the shipment per "Nordic" to Christensen and Schrei. Although this message does not mention "Albert," it may reasonably be inferred that the real transaction was similar to that in the former cases, and their Lordships come to a like conclusion as to the destination of the goods.

The case of the cargo ex steamship "Joseph W. Fordney" differs in some respects from the cases already dealt with. The cargo was shipped by the appellants, the Atlantic Export Company, and consigned to Klingener. Klingener had by letter dated the 18th February, 1915, ordered the goods for delivery c.i.f. Gothenburg or Malmö (at shippers' option) at specified prices, shippers covering war risks, and guaranteeing out-turn of weights within ½ per cent. Payment was to be by ninety days' acceptance from date of shipment. The draft was to be on Klingener's firm with documents and insurance certificates attached. Klingener guaranteed that the goods were intended for consumption in Scandinavia and would not be exported to any country at war with Great Britain. Though this letter appears on the face of it to bear the marks of a genuine transaction between seller and buyer, there is no evidence that the appellants had had any prior business relations with Klingener or how they became aware of his existence, and it would be somewhat remarkable if without further enquiry they had been ready to enter into a transaction of such magnitude with a total stranger. Klingener, however, appears to have had no real interest in the matter. He says he was requested to order the goods by Christensen and Schrei, but he does not produce any correspondence between himself and Christensen and Schrei on the matter. The latter firm say that Klingener ordered the goods on their behalf, but give no details as to how he came to do so. They say, however, that arrangements for the shipment were made by K. and E. Neumond, and that they acted as selling agents for this firm for Scandinavian business, which seems to suggest that the real purchasers were K. and E. Neumond, and that Christensen and Schrei were agents for sale only.

The appellants throughout have claimed as owners. They appear to have drawn a bill of exchange on Klingener for $375,831·26, the invoice price of the goods, making it payable

to the Guaranty Trust Company of New York, who are said to have discounted it. The Guaranty Trust Company on the 23rd March, 1915, forwarded the bill, with documents attached, to a Swedish bank, and on the 2nd June, 1915, wrote to this bank that they were instructed by the drawers that the usance of this bill might be extended to 180 days. The draft was ultimately returned to the Guaranty Trust Company because Klingener refused to accept it or to take up the documents, and it appears to have been subsequently retired by the appellants. J. E. Baermann, the president of the Atlantic Export Company in his first affidavit dated 20th March, 1915 declares that the shipment was made pursuant to a contract dated the 5th March, and that neither the negotiations preliminary to such contract nor such contract itself contained any information that the goods were for account of anyone other than Klingener. Neither the contract of the 5th March nor the negotiations preliminary to it are disclosed. There appear to have been no preliminary negotiations with Klingener. The contract of the 5th March must have been with someone else. He gave the order of the 18th February on someone else's instructions, and there was no contract with him except such as resulted from the order and its acceptance by the shipment of the goods. The goods were not shipped till the 20th March. The only possible inference is that it was entered into by or through K. and E. Neumond. There is not, as in the other appeals, any wireless message connecting Heinrich Albert or the Disconto-Gesellschaft with the transaction, but the date of the transaction and the fact that it was controlled by K. and E. Neumond and financed by the Guaranty Trust Company support the inference that it too was originated by the German Government. If K. and E. Neumond were acting for themselves, it would be their intention that would determine the destination of the goods in applying the doctrine of continuous voyage, and as to their intention there is no evidence. Indeed, the appellants' evidence betrays a desire to conceal the position of this firm in the matter.

Under all the circumstances, their Lordships come to the conclusion, though with more hesitation in this case than in that of the other appeals, that the President was right in finding that the goods were destined for the enemy Government.

The remaining point to be considered is whether the Crown has or has not by the Order in Council of the 29th October, 1914, waived its right to the condemnation of the goods the subject of these appeals.

The Declaration of London was a provisional agreement embodying certain somewhat sweeping changes in international law. Its 35th Article in effect entirely abrogates the doctrine of continuous voyage in the case of conditional contraband. Parliament refused to consent to its ratification, and it never became binding on this country. It was, however, by Order in Council dated the 20th August, 1914, adopted by His Majesty for the period of the present war with certain additions and

modifications. By one of these modifications it was provided that, notwithstanding Article 35, conditional contraband, if shown to be destined for the armed forces or a Government department of the enemy State, should be liable to capture to whatever port the vessel was bound or at whatever port the cargo was to be discharged. This modification, in effect, neutralised Article 35, and the doctrine of continuous voyage remained as applicable to conditional contraband as it had been before the Order.

The application of the doctrine of continuous voyage to conditional contraband appears to have given rise during the earlier months of the war to certain diplomatic representations on the part of the United States. These representations are said to have led to the repeal of the Order of the 20th August, 1914, and to the substitution therefor of the Order in Council of the 29th October, 1914. By this last-mentioned Order the Declaration of London was again adopted by His Majesty for the period of the present war with certain additions and modifications. The material modification, however, now provided that notwithstanding Article 35 of the Declaration, conditional contraband should be liable to capture on board a vessel bound for a neutral port (1) if the goods are consigned "to order," or (2) if the ship's papers do not show who is "the consignee of the goods," or (3) if they show "a consignee of the goods" in territory belonging to or occupied by the enemy. The effect of the Order is therefore to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification. The appellants contend that none of the goods in question in these appeals can be brought within any of the cases referred to. None of the goods were consigned "to order." The bill of lading, which formed one of the ship's papers, showed in every instance who was the consignee of the goods, and neither the bill of lading nor any other of the ship's papers showed in any instance a consignee of the goods in territory belonging to or occupied by the enemy.

Their Lordships are of opinion that this contention cannot be sustained. It assumes that the words "if the ship's papers do not show the consignee of the goods" mean "if the ship's papers do not show a consignee of the goods." But on this interpretation there is no difference between the first case and the second, for a bill of lading which does not show a consignee is in effect for present purposes a bill to order. Further, the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interests may dictate or circumstances may admit. This control may, however, be retained by the shipper, even if he consigns to a named person, provided that the consignee be bound to endorse or otherwise deal with the bill of lading as directed by the shipper. It would be useless to retain

the doctrine of continuous voyage in the case of consignments to order, if the shipper could escape the doctrine by consigning to a clerk in his office and procuring the clerk to endorse the bill. He would in this manner retain as full control of the goods as if the consignment had been to order. It is impossible, in their Lordships' opinion, to construe the Order as an intimation to neutrals that, provided they make their consignment to named persons not residing in territory belonging to or occupied by the enemy, they may, in the case of conditional contraband, safely disregard the doctrine of continuous voyage. If the Order were so construed, the modification of Article 35 would be absolutely useless, and conditional contraband could be supplied to the enemy Government through neutral ports as freely as if the 35th Article had been adopted without any modification at all. In their Lordships' opinion, the words "the consignee of the goods" must mean some person other than the consignor to whom the consignor parts with the real control of the goods. It is said that such a construction would defeat the object in view, which must have been to make some concession for the benefit of neutral traders. But even if construed, as in their Lordships' opinion it ought to be construed, the effect of the Order is to make a considerable concession. Under it merchants in one neutral country can, without risking the condemnation of their goods, consign them for discharge in the ports of another neutral country to the order of buyers or others to whom the principal in the ordinary course of business finally transfers the control of the goods. They are not concerned to enquire how such buyers or other persons intend to deal with the goods after delivery. No intention on the part of the latter to forward the goods to the enemy Government will render the goods liable to condemnation. This is no small concession.

In no one of the present appeals would the named consignee have had any real control over the goods consigned to him. In each case the named consignee was a mere agent for someone else and bound to act as that someone, whoever he might be, should direct. Under these circumstances their Lordships hold that the named consignee was not "the consignee of the goods" within the meaning of the Order in Council.

Each of these appeals must therefore, in their Lordships' opinion, be dismissed with costs, the costs of the Petition to admit the supplemental record, in the case of the part cargo ex steamship "Louisiana," being made costs in that appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

In the Matter of
PART CARGO *EX* STEAMSHIP
"LOUISIANA,"
THE BALTIMORE PEARL HOMINY
COMPANY
v.
HIS MAJESTY'S PROCURATOR-
GENERAL.

In the Matter of
PART CARGO *EX* STEAMSHIP "TOMSK,"
THE BALTIMORE PEARL HOMINY
COMPANY
v.
HIS MAJESTY'S PROCURATOR-
GENERAL.

In the Matter of
PART CARGO *EX* STEAMSHIP
"NORDIC,"
W. L. FORDTRAN
v.
HIS MAJESTY'S PROCURATOR-
GENERAL.

In the Matter of
CARGO *EX* STEAMSHIP "JOSEPH
W. FORDNEY,"
THE ATLANTIC EXPORT COMPANY
v.
HIS MAJESTY'S PROCURATOR-
GENERAL.

DELIVERED BY
LORD PARKER OF WADDINGTON.

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

1918.