Privy Council Appeal No. 121 *of* 1919.

In the matter of part cargo ex Steamship "Noorderdijk."

Vermet and Fuchs - - - - - - - - *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 19TH APRIL, 1920.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
THE LORD JUSTICE CLERK.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

In this case the Dutch owner of certain acetic acid shipped on board the Dutch steamer "Noorderdijk" on a voyage from New York to Rotterdam appeals against a decree dated the 3rd December, 1918, made by Lord Sterndale when President of the Admiralty Division sitting in Prize, condemning the acetic acid as contraband. The only question in the case is whether the goods which were, in fact, contraband, and had been seized on the 6th November, 1916, were destined for Germany.

The appellant, Jan Jacobus Vermet, carries on business under the firm name of Vermet and Fuchs, but he is, and has been at all material times, the sole member, his former partner, one Fuchs, a German, having retired some time ago. Under his firm name he carries on a considerable business at Tiel, in Holland, in acetic acid, glacial acetic acid, and vinegar essence.

The principal business of the firm appears to be to make glacial acetic acid, which contains 98 to 100 per cent. of acetic acid, and is made either from ordinary acetic acid (80 per cent.), such as that which is the subject of the present appeal, or from acetate of lime or possibly from some other materials. It is used for " doping " the wings of aeroplanes, and also in the making of explosives. It and the ordinary acetic acid are admittedly absolute contraband under a proclamation dated the 15th October, 1915. The case of the appellant is that he bought the acetic acid (80 per cent.) in question in America as the raw material for making glacial acetic acid, and that he intended to export the glacial acetic acid so made to England or to the English Colonies or to the Dutch Indies. It is a fact that he has so exported considerable quantities of glacial acetic acid, and he alleges that in 1915 as much as 80 per cent., and in 1916 as much as 84 per cent. of the production of his factory was so sold, but the evidence as to these exact figures is for reasons to be mentioned hereafter not entirely satisfactory. Down to 1914 the appellant had made his glacial acetic acid from acetate of lime, but after the war began this became difficult to obtain or to ship, and he then began to use the 80 per cent. acetic acid to make the glacial. In the early part of 1916, he says, he became very short of raw material, and through an agent in London named Van den Hurk, who acted for him as agent both in purchases and sales, he bought from America a parcel of 150 tons of the acetic acid. The 76 tons the subject of the present proceedings was part of the 150 tons so bought, and it was shipped under a bill of lading dated the 20th November, 1916, to the Netherlands Oversea Trust (N.O.T.) on account of the appellant. Another parcel of at least 50 tons (the actual quantity is not quite clear) was shipped in a vessel called " The Sekstant," and eventually got to Bristol, where it was detained, and after considerable delay it was ultimately released to the appellant on the terms that it should be sold in England, and not sent on for the appellant's use in Holland. The dates of this seizure and release are not clear, but the acid seems to have been released about May, 1917, and the correspondence shows that it was under detention, and that its unconditional release was hoped for in the end of the year 1916 and the early part of 1917. It is said that the contract for the balance of the 150 tons was cancelled owing to the difficulty of shipment. In October-November, 1916, Van den Hurk commenced to offer for sale in London on behalf of the appellant small parcels of glacial acetic acid for shipment to the East, and prior to the 6th December he had sold two parcels of 2 and 1 tons. On the 6th December he sold another parcel of 2 tons. On the 6th December the acid on the " Noorderdijk " was seized as prize, but Van den Hurk did not know of this seizure until his receipt early in January of a letter from the appellant dated the 29th December, 1916. He continued to sell small parcels, and to report the sales to the appellant, and by the 29th December he had reported sales amounting to 23 tons. These sales were

not in any way earmarked as being made out of the acid, or the produce from the acid, *ex* "Noorderdijk." They might have been executed out of acid made from that on "The Sekstant," or from any other source. The appellant must have known of the seizure on the 6th of December very shortly after it happened, and it is not clear why he did not communicate it to Van den Hurk before the 29th December, but from the terms of the letter of that date it may be inferred that he was hoping to get reports of sales up to 50 tons of glacial, the amount which would be produced by the distillation of 76 tons ordinary acid, so that he could represent that the whole produce of the consignment of 76 tons was already sold to English buyers. In that letter he asked Van den Hurk to send him as soon as possible contracts for quantities in the whole not exceeding 50 tons. Comment is made on this as being a manufacturing of evidence for the Prize Court, but as the orders were not antedated and the actual dates of the orders were not concealed, it could hardly have deceived any Court. It was no doubt done in hope of persuading the authorities to release the goods in order that the produce might go to England. If there had been the intention of sending to Germany the produce of the "Noorderdijk" consignment it would, of course, have been abandoned after the seizure, and the selling at that date does not negative such an intention having previously existed, especially as the order might have been executed from any other source. The limitation of the sales to "not exceeding 50 tons" was probably directed in order not to draw attention to the other sources which did exist. It was said that these sales were conditional upon the necessary raw material being obtained, but no documentary evidence of any contract to that effect was produced, and the sale notes contain no such terms. If the matter stood there, the claimant would appear to have a fairly good case, as he was importing through the N.O.T., and he was in fact a considerable exporter to England, and he was in course of making contracts for sales to England for the completion of which the product of this acid might probably but not necessarily have been destined.

The case for the Crown depended principally on the fact that the appellant was on the 27th January, 1917, fined by the N.O.T. in the considerable amount of 50,000 florins for having in the previous November-December sold to a firm of Nieucastel and Van den Heuvel, of Utrecht, 520 demijohns and 177 vats of acetic acid without having taken a guarantee against re-export. The obligation to get such a guarantee would, of course, arise from the appellant having imported that acid or the raw material for making it through the N.O.T. That acid appears clearly to have been exported to Germany by Nieucastel and Van den Heuvel. The appellant has given three explanations of this matter, which are alleged by the Crown to be inconsistent and unsatisfactory. The first is in a letter of the 25th July, 1917 :—

> "We beg to inform you that we have been made the dupe of a very cleverly arranged combination. Unfortunately we do not possess any

correspondence exchanged between ourselves and Messrs. Nieucastel, as this firm knew very well that we would not supply them, and it was only on the statement made by our own representative, who informed us that the goods were destined for a vinegar-maker at Haarlem, who was in turn supplying it to the Dutch Government for pickling herrings. As it is not in the interest of the vinegar manufacturers to admit that they use vinegar made by our factory, they always buy through an intermediary, so that it was impossible for us to obtain N.O.T. Declaration. It was only on the assurance of our own traveller that we decided to supply the vinegar. The N.O.T. fines us heavily for our mistake, and, although we only made our usual trade profit on the transaction, we were obliged to pay the fine, as our works have to buy their raw material in America, and we had also several shipments of acetic acid ready for shipment to England and India. We had no option to do otherwise."

This was enclosed to the Procurator-General in a letter from Van den Hurk, in which he explained that the appellant's vinegar was not malt vinegar, but made from "grey acetate of lime," and therefore vinegar makers do not like to admit that they use the appellant's vinegar, and buy through an intermediary.

The second explanation was in an affidavit sworn by the appellant on the 19th June, 1918. In this he said :—

"In September, 1916, it became known to me that the firm of Nieucastel and Van den Heuvel had been placed on the black list. From this moment I refused all further sale and delivery to the firm of Nieucastel and Van den Heuvel. The sale to N. & V. d. H. to which the affidavit of the Treasury refers, is supposed to have taken place November-December, 1916. This, therefore, is some time after the date when I got to know that this firm was on the black list, and resolved to refuse definitely all further sale to them. It is, therefore, absolutely false that acetic acid has been sold to this firm, and that they exported it to Germany again. Indeed, this has never happened, no more in November, 1916, than at any other time, as has already been stated. The truth of this statement is corroborated by the declaration in the accompanying notarial deed. From what was said above it already sufficiently appears that the fine of f.50,000, to which the affidavit refers, was entirely due to a misunderstanding. This fine was connected with the Excise Law (Accijnswet) which existed in Holland up till March, 1917, and upon which it is impossible for me to enter minutely, as this most intricate and technical question would demand too much trouble and time from the judge, without a chance of any result as far as this case is concerned."

The third explanation was in a second affidavit of the appellant, sworn on the 29th October, 1918. In this he gives a very lengthy statement to the effect that the acid sold through them to Nieucastel and Van den Heuvel was not made from acid imported through the N.O.T. at all, nor from grey acetate of lime, but from calcium carbide and acetate of sodium, which were home products. By this mode of manufacture he avoided certain taxation, and in order that this state of things might continue, he had to keep it secret from the customs authorities. He goes on to say :—

"This explains why there were not allowed to exist at my office any direct proofs, books, correspondence, etc., with regard to the purchases of calcium carbide and acetate of sodium, and the sales of the vinegar essence made from these materials. Nothing was booked of these transactions, and the documents were destroyed."

He adds a little further on :—" I had a fairly important stock of vinegar essence free from N.O.T. conditions."

These various explanations contain several small inconsistencies, such as describing Cohen sometimes as agent of the appellant's firm, and sometimes as the agent of the buyer or the actual buyer, but the main inconsistency is that two entirely different excuses are offered for the transaction. At first it is admitted that the subject matter of the sale was an importation through the N.O.T., in respect of which there was an obligation to the N.O.T. to procure a declaration, and that the appellant was tricked into parting with the goods without getting a declaration by conduct about which he expresses indignation. Afterwards his explanation is that the goods sold were not manufactured from anything obtained through the N.O.T., and that there was no obligation to take a guarantee against re-exportation, and that they were sold in ordinary course through an intermediary. In fact, it is said that the appellant would have been at liberty to export these goods to Germany himself. The final story in its details is not very intelligible, and is quite inconsistent with the paragraph in the appellant's first affidavit as to the matter on which he was reluctant to trouble the Judge of the Prize Court. It may, however, fairly be assumed against the man who makes these statements that he did make " an important amount of stock " in such a manner as to avoid payment of taxation, and that he did, in order to conceal what he was doing, destroy documents, and omit from his books all reference to an important part of his business.

He also appears to admit, in a passage at the top of page 35 of the record, being a party to the sale of vinegar essence to vinegar dealers for the purpose of their representing it to be malt vinegar, which it was not, and to the transaction of such business through " a man of straw," for the purpose apparently of avoiding being himself liable to damages in any proceedings that might be taken against the vendor. The evidence of a person who makes such admissions does not deserve to carry much weight in any Court.

There is, however, a more direct importance in the omission from his books of an important part of the appellant's business, and in the destruction of the documents relating to that business. The appellant's case depends a great deal on the notarial certificate as to what is in his books and documents, and on the 84 per cent. export to England which is shown by the books. But if the important part of the business, which included as we now know at least one considerable export to Germany, had been included, the percentage must have been less, and might have been much less. It turns out that the statement of the contents of books is as unreliable as most such statements are when made by one party and not by an independent accountant appointed by agreement between the parties.

There are many minor matters in the evidence which it is not necessary to go into.

The learned President arrived at two conclusions. First, that the Crown had made out a case which put the onus of proving that there was no German destination on the claimant, and, secondly, that the claimant had not given evidence which satisfied that onus. Their Lordships are of opinion that there is evidence justifying both of these conclusions, and they are not prepared to differ from them. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

In the matter of part cargo ex Steamship "Noorderdijk."

VERMET AND FUCHS

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY SIR ARTHUR CHANNELL.

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