Privy Council Appeal No. 101 *of* 1919.

In the matter of part cargo ex *Steamship "Orteric."*

E. F. Newing - - - - - - - - *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 30TH APRIL, 1920.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

The claimant is a British subject, carrying on business at Galveston, Texas, U.S.A. On the 22nd of July, 1914, he sold to Eicholz and Loeser of Hamburg 32,000 bushels of wheat at a price reckoned in gold reichsmarks, "payment in Hamburg by net cash in exchange for shipping documents." By the terms of the contract it was "deemed to have been made in England, and to have been performed there." The seller had no anticipation of war at the time.

The wheat was shipped on board the British steamship "Orteric," under bills of lading dated the 24th of July, 1914, making the wheat deliverable to shipper's order. The claimant duly endorsed them in blank. Insurance was effected with the Union Marine Insurance Company of Liverpool, through their New York branch. The claimant drew at eight days' sight on Eicholz & Loeser for the contract price in reichsmarks, attaching the certificate of insurance and the bills of lading, and, wishing not merely to collect money forthwith but to collect it in dollars, he "sold" the draft with documents attached through a firm of brokers to the National City Bank of New York, endorsing it

specially to that bank. The brokers' " contract of exchange " describes this transaction as a " sale." The claimant rendered an invoice to the National City Bank for the amount of the draft less ⅛nd, in dollars at a rate of exchange of 95, and drew a sight draft on them for that amount, which was duly paid. The first question in the case is whether this transaction was a sale in any sense.

The " Orteric " sailed for Hamburg before the outbreak of war, and on passage was diverted to Liverpool, where the wheat was seized. The Crown ought to have proved the date of this seizure, for it was very material, but did not do so. It was, however, stated at the trial that the seizure took place on the 22nd of August, 1914, and this date the claimant accepted. The wheat was afterwards condemned by Sir Samuel Evans as enemy property.

The National City Bank of New York endorsed the draft to the Norddeutsche Bank in Hamburg on the 28th of July, 1914, and forwarded it, per the steamship " Savoie," to that bank with the documents, for collection for account of the Direction der Disconto-Gesellschaft of Berlin, the documents to be delivered to the drawees against payment. A special authority was added in the following terms : " You are hereby authorised, if requested to do so, to give a guarantee on our behalf to deliver to interested parties, if entitled thereto by reason of acceptance or payment, the remaining bills of lading when received." These duplicate bills of lading went forward by the " Carmania." The Disconto-Gesellschaft of Berlin was advised of this remittance of the documents to Hamburg " for the favour of collection and credit of our account with your goodselves." In due course the " Savoie " reached Havre on the 5th of August, and the " Carmania " reached Liverpool on the 7th of August, 1914.

What happened in Hamburg is the second question in the case, and there is a good deal of dispute as to the facts and more particularly as to the date when those facts occurred. Eventually the draft and bills of lading came back to the National City Bank of New York. The draft was unpaid and unaccepted ; the bills of lading had on the back of them something elaborately obliterated with black pigment. Beyond any real doubt that something was the endorsement of Eicholz and Loeser. After an interval, the Bank sent these documents to the present claimant, and called on him to pay the draft, but never pressed their demand. He has neither paid nor been sued.

Certain letters are forthcoming from Eicholz & Loeser to the claimant and from the Disconto-Gesellschaft of Berlin to the National City Bank of New York. If the story they tell is true, the effect of it is this. Eicholz and Loeser had resold the wheat in four parcels, three to sub-purchasers in Hamburg and the fourth to a sub-purchaser in the interior of Germany. When they applied to them to know whether they would take up the documents, these persons in Hamburg, who probably had a very shrewd idea that they would never see the wheat, prudently replied

that they would take them up when the wheat arrived. The fourth was telegraphed to but did not answer. It is consistent with these letters that Eicholz and Loeser were asked by the Norddeutsche Bank to accept the draft and made the above inquiries on one and the same day, namely, the 25th of August. It is improbable that three days had elapsed between the presentation of the draft for acceptance and that date. Eicholz and Loeser say that the documents only arrived in Hamburg on the 25th of August, and then were handed to them by the Norddeutsche Bank but were not taken up by them, and that they were then presented to the sub-purchasers. To make this presentation regular Eicholz and Loeser, as they say, endorsed the bills of lading. Whether this was done by arrangement with the Norddeutsche Bank does not appear. In any case it was superfluous, for the bills of lading were already endorsed in blank. When the sub-purchasers refused or failed to take up the documents, the endorsement of Eicholz and Loeser was obliterated, and the bills of lading were returned to the bank.

The proceedings before the Prize Court form the conclusion of these transactions. The first to claim in Prize were the National City Bank of New York, alleging that they owned the wheat. They supported their claim by inconsistent and contradictory affidavits. Their claim failed, and they do not now appeal. The appellant did not appear until nearly two years after the issue of the writ, and about seven months later he delivered his claim, alleging that the wheat was his. A passage from his evidence was much relied on for the Crown. It is as follows :—

> "112. *Q.* You considered, did you not, the documents belonged to the National City Bank of New York ?—*A.* Yes, only as a rule, when you sell documents and endorse them, you are supposed to be back of them. 113. *Q.* Certainly. In other words, you were subject to your liability as endorser in case the drafts were dishonoured and not paid ?—*A.* Yes, sir. 114. *Q.* But your transaction with the National City Bank was intended to be an absolute sale of the documents ?—*A.* Certainly. . . . 119. *Q.* You don't know what authority . . . may have been given by the National City Bank of New York to its correspondent in Germany ?—*A.* No. In the usual course of events, when you part with those documents, you have said 'good-bye' to the transaction."

The learned President, the late Sir Samuel Evans, relying on this passage among other circumstances, held that the appellant "never had any intention to reserve any property or interest in the wheat after he parted with the documents to the National City Bank of New York"; that the Bank were pledgees only, and that "the property had before the seizure passed to the German buyers." Plainly, therefore, not only the passing of the property but the date on which the property passed were considerations germane to his conclusion that the wheat should be condemned.

Where, as in the present case, cargo is seized and a decree is asked that such cargo "belonged at the time of capture and seizure thereof to enemies of the Crown and as such is subject

and liable to confiscation as good and lawful prize," the question before the Court is whether what was seized in prize was good prize—that is, whether the goods did or did not then belong to the King's enemies. This is the crucial date for the case of the captors. On the other hand, the position of things at subsequent dates may affect the claimant's rights, independently of any mere traverse of the captor's claim. Thus a claimant, having succeeded in his contention that what the captors seized was then his property, may fail nevertheless to establish a right to have it released to him, if before he comes before the Court to claim as owner it has become enemy property. He cannot then truly claim the goods as his. In order to obtain the release of the goods to himself, he has to prove that the goods were his when seized and that he is still the person who, so to speak, can give a good discharge for them if the Court decrees their release to him. In this attempt he has failed, apart from condemnation, if, in fact, they belong to an enemy (*The Prinz Adalbert* [1917], A.C. 586). It is in accordance with this principle that before releasing goods to a claimant the Court satisfies itself that no enemy has any title to or interest in them. Many other considerations may affect the question of seizure. The time and circumstances of the alleged seizure may be inquired into in order to decide whether the seizure was valid (*The Roumanian* [1916], 1 A.C. 124), or to decide whether what passed amounted to a seizure at all (*Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft* [1919], A.C. 291). Belligerent rights are not exhausted by a single seizure ; if a first seizure should be deemed bad, or its invalidity be apprehended, a second seizure under proper conditions may be made and relied upon. These are the questions, which usually make the precise date of a seizure material, but none of these questions arose in the present case. If, as appears to be the fact, the goods did not become enemy goods, if at all, till after the 22nd of August, the respondent was driven to contend that, for the purpose of deciding the issue of enemy goods or not enemy goods, the date of the writ will suffice as the material date. For this no authority was produced. Reliance was indeed placed on the *Schlesien* [1916]. P. 225, where, the goods seized having been neutral-owned at the date when they were first seized and at the date when a writ in prize was first issued, Sir Samuel Evans held that retention of possession by the Crown might be regarded as a continuous seizure, so that, when the goods had become enemy goods by the outbreak of war with Austria and a second writ had been thereafter issued, the requisites for their condemnation as enemy property were satisfied. If the first seizure was invalid and there was nothing to justify possession except such seizure, a second might be made, when the outbreak of war with Austria made seizure legitimate. The intention of the Crown after the original seizure to hold in the exercise of belligerent rights was found as a fact. The mode in which the cargo had been dealt with was not such as to exempt the goods from further seizure. The issue of the writ tiself was

not merely the expression of the purpose with which the Crown had continued in possession, though there had been no intermediate release, but it was in itself an overt and notorious act which, coupled with due service, might amount to a second and a valid seizure. It is not quite clear that this was Sir Samuel Evans's finding, but, whatever may be thought of this decision if it proceeded on other grounds, it is inapplicable to the present case. Here there is no second writ and no extraneous event at all to affect the status of the goods after the first seizure. The goods were seized once only and were seized as being then good prize, and this they were not if they were still British-owned. If the seizure was wrongful then, it does not become rightful by continuing the wrong. The captor cannot be allowed to benefit by the chance of what may happen while he delays to issue a writ, so that the chapter of events in the meantime may repair what was imperfect in his own proceedings. If the goods had been enemy goods when seized, the captors would not have been defeated by a transfer of the property to a neutral before the writ could issue. If the captors take the goods of a neutral or a British subject by a bad seizure, they must, in order to avail themselves of a subsequent passing of the property to an enemy, make a fresh and valid seizure. Of this there was no vestige here.

In the present case the respondent proves nothing adverse to the claimant's title without either showing that the title to the wheat had been divested in favour of the National City Bank of New York before the decree, or had passed from the claimant and had become vested in Eicholz & Loeser before the seizure. As to the latter he proves nothing unless he relies on the statements made by Eicholz & Loeser in the letters which were put in. These letters say that the documents only arrived in Hamburg on the 25th of August, and on this point at least the letters are self-consistent. The respondent produced nothing to the contrary except that the "Savoie" reached Havre on the 5th of August and the "Carmania" reached Liverpool two days later. In the circumstances then existing no inference can be drawn as to the date at which letters for Hamburg brought by these vessels would reach their destination. Substantial delay is certain. If the letters arrived on the 25th of August, it may well be that they arrived earlier than might have been expected. Their Lordships are unable to conclude that the documents were in Hamburg by or before the date of the seizure of the wheat, namely the 22nd of August.

Further, in their Lordships' view, it is very improbable that the wheat ever vested generally in the National City Bank of New York, apart from a mercantile pledge, or ever vested in any German owner at all, and they conclude that neither vesting happened. There is no evidence whatever that Eicholz & Loeser or their sub-purchasers ever paid anything. Such evidence as there is goes entirely to the contrary. It was most strongly against the interest of both purchasers and sub-purchasers to part with any money under the circumstances against wheat

that had not arrived and might well never arrive. It was contrary to the interests of the Norddeutsche Bank, who were in any case only agents and were acting on the instructions of an important Bank in the principal neutral country, to allow the wheat to vest in others, if no money was forthcoming. It is true that the bills of lading were endorsed by Eicholz & Loeser, but the Norddeutsche Bank, which allowed this to be done, also allowed the endorsement to be obliterated—a stupid thing in itself and provocative of objection by third parties—and returned them to America. The statement of Eicholz & Loeser is that most consistent with the probabilities of the case, namely that for the purpose of getting money from the sub-purchasers, in case they could be prevailed upon to pay, they endorsed and presented the bills of lading without either taking them up or getting possession. In all probability a clerk from the bank kept them all the time, but attended when Eicholz & Loeser went to the sub-purchasers in order to exhibit the bills, ready to be delivered. They never were delivered. He took them back to the bank and so, with the endorsement obliterated, they were sent back by the bank to New York. The whole tenor of the letters is quite consistent with the bills of lading never having been delivered to Eicholz & Loeser, in spite of the endorsement, and such is their Lordships' view.

Again it is wholly improbable that the documents were ever taken by the National City Bank of New York except by way of discount and security. Such would be the natural course o business, and as the transaction, by which the documents were transferred to them, was completed not only before the outbreak of war but even before its imminence became obvious, there was no reason for departing from the natural course. It is plain that when the claimant handed over the documents to the bank, he meant his contract of sale to Eicholz & Loeser to be completed by delivery to them of the bills of lading for the wheat. It is plain that all that the bank would get out of the transaction would be eight or nine dollars for discount. They cannot have meant to buy the wheat out and out, and whether their statement that the wheat was their property was really believed by them or not, it is no doubt due to the uncertainty, which may well have existed before the decisions in the *Miramichi* [1915] P. 71, and the *Odessa* [1916] 1 A.C. 145, as to the kind of ownership which is required to support a claim as owner in prize. As to the expression in the brokers' contract that the draft (not the wheat) was "sold," that is an intelligible, if inaccurate, expression for an exchange transaction, which would commonly be referred to as a sale of reichsmarks and a purchase of dollars.

There remains the above quoted evidence of the claimant, as to which the respondent's argument was that he could not go back from his own evidence, but must be taken at his word. Their Lordships will say nothing to encourage the idea that claiments in prize can be allowed to deal uncandidly with the Court or to modify in their own favour inconvenient admissions

made by or binding upon themselves. It is, however, in fairness always necessary to ascertain what the evidence really means, and in this case the strongest light is thrown on the meaning by the familiar character of this type of transaction. In the vast majority of such cases the shipper does " say good-bye " to the transaction when he parts with the documents and receives the proceeds of the discount of the draft. In substance the documents are absolutely parted with, if not truly sold, for they are never likely to come back. Yet all the time the drawer remains " back of " the documents, even when he has " sold " and endorsed them. Their Lordships think that the claimant, with some transatlantic locutions, was intending to describe the usual transaction, in which he would retain the general property and transfer to the bank only a special property by way of security, and that his language should not be further pressed against him. Nor can his case be prejudiced by the ambiguous conduct of the bank in the proceedings, or by their vacillation in asserting against him their claim to recourse on the draft. What rights and remedies may still be outstanding between the claimant and the bank their Lordships do not know and need not inquire. They are of opinion that the wheat never ceased to be the claimant's wheat, till it was sold in the course of the proceedings in prize; that he is the owner of the proceeds which represent the wheat, free from any enemy interest; that he is entitled to have the decree of condemnation set aside and the proceeds of the wheat released to him; to have his appeal allowed with costs here and below, and to have returned to him in full his security lodged in the Prize Court. They will humbly advise His Majesty accordingly.

In the Privy Council.

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E. F. NEWING

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HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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