

In the matter of part cargoes ex steamship "Annie Johnson" and other vessels.

G. Larue and Company - - - - - *Appellants*

v.

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

FROM

**THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY
DIVISION (IN PRIZE).**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1921.**

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

These appeals relate to four shipments of hides and leather,
viz. :—

- (a) Sixty-eight rollers sole leather shipped at Rio de Janeiro by the appellants on the 20th September, 1915, on board the Swedish steamer "Annie Johnson," consigned to the Svenska Aktiebolaget, Stockholm, Sweden (hereinafter called the Svenska), and seized on the 30th October, 1915.
- (b) 600 dry hides and 300 rollers sole leather shipped by the appellants at Rio de Janeiro on board the Swedish steamer "Kronprinsessan Margareta" on the 22nd October, 1915, and consigned to the Svenska, and seized the 6th December, 1915.

- (c) 300 rollers sole leather shipped by the appellants at Rio de Janeiro on the 9th May, 1916, on board the Swedish steamer "Kronprins Gustav Adolf," consigned to the Malmo Laderfabrik, Malmo, Sweden, and seized the 9th June, 1916.
- (d) 3,660 dry hides shipped by the appellants at Rio de Janeiro on board the Swedish steamer "Kronprinsessan Margareta" on the 6th May, 1916, consigned to the Malmo Laderfabrik, and seized on the 16th June, 1916.

At all material times hides and leather were absolute contraband, having been so declared by proclamation of the 11th March, 1915. The appellants are G. Larue & Co., of Rio de Janeiro, Brazil, a firm consisting of two partners, Georges Larue and Ernest Durisch. The main question in the appeal is whether the learned President was right in holding that the goods had an enemy destination. There was, however, a preliminary question, raised at the hearing, whether the suit ought not to be dismissed, either on the ground that there was a concluded agreement, upon which the claimants could rely as a bar to the claim for condemnation, or on the plea of *res judicata*. It appears to have been admitted in the proceedings of the Prize Court that there was no agreement in this case under which the claim of the respondent could be barred. Assuming, however, the point is one which the appellants are entitled to raise, their Lordships can find no evidence of any estoppel, such as would be necessary to bar a claim. On the plea of *res judicata* it is said that on the 16th September, 1916, a letter was sent from the Procurator-General to E. G. Svanstrom, the managing director of the Import Department of the Transmarina Kompaniet Aktiebolag of Stockholm, to which, on the 1st July, 1916, the trade of the Svenska with South America had been transferred, informing him that consent had been given to an order being made for the release of the goods to him, upon presentation of the bill of lading in respect of each consignment to the collector of customs, and on payment of any expenditure incurred in connection with the detention of the goods. It was also stated that it would be necessary for him to obtain a licence from the War Trade Department to export goods to Archangel, and that that Department is being notified of the release. The necessary licences were obtained, but E. G. Svanstrom was unable to obtain shipping space for shipment of the goods to Archangel. The delivery of the goods was not in fact taken by the said E. G. Svanstrom, and on the 12th September, 1918, a letter was written from the Procurator-General informing E. G. Svanstrom that, on consideration, he was not prepared to consent to an order for release of goods, and that the case must therefore proceed in the Prize Court. Their Lordships do not doubt that the plea of *res judicata* is available in prize, if the necessary conditions exist, but there has been no act of the Court in this instance which takes away its jurisdiction to deal with goods still in the custody

of the Marshal. The rules contained in the Prize Court procedure, relating to release, do not appear to have been followed, and no application has been made on behalf of the appellants to ascertain whether an order for release has ever been made judicially. The counsel for the appellants argued that the procedure in this case was the procedure ordinarily followed in a great number of cases. Their Lordships do not know whether this is the case or not, but the plea of *res judicata* cannot be entertained unless the record of the act of the Court on which it was founded is forthcoming, or some valid reason is given why it cannot be produced. The appellants therefore fail on the preliminary question.

The appellants were a firm of merchants dealing in hides, leather, horns, timber and cereals, who had for many years prior to the outbreak of the war exported their goods to Havre, mainly for sale in Eastern Europe. It was not possible to carry on the trade of the appellants through Havre after the outbreak of the war. The appellants therefore sought a new outlet for their trade, and in the early part of 1915 made arrangements with Holmberg, Bech & Co., of Rio de Janeiro, to ship goods to be sold on their behalf in Sweden by the Svenska, for whom Holmberg, Bech & Co. acted as agents in Rio de Janeiro. At the date of all the shipments in question in the appeal, hides had been declared absolute contraband, and consequently, to escape liability to seizure, it was necessary to take such precautions as would be effective to reasonably insure that their destination, or the destination of such products made from them, as military boots, was not an enemy country. The appellants accordingly before shipping any hides did obtain a guarantee that these hides would be used in Sweden, although not obtaining an assurance that manufactured products, if in themselves contraband, such as military boots, would not be exported after being manufactured. The export of hides and leather from Sweden had been prohibited since the 19th November, 1914, but the Swedish Government, as they were fully entitled, had refused to prohibit the export of products manufactured from hides and leather. On the 12th October, 1915, the Svenska did make a declaration in the following terms, p. 68: -

"We, the undersigned, who are consignees of 68 rolls of sole leather (about 1,000 half-hides) shipped by the Brazilian firm G. Larue & Co., of Rio, in steamship 'Annie Johnson,' from Rio de Janeiro to Gothenburg, hereby certify and bind ourselves that no part of said parcel shall by us or by other person be re-exported in their present condition, nor in any future state or form be exported to countries at war with Great Britain. The goods, which are still unsold, will be sold by us on arrival only against similar guarantees of the buyers, as our above, *i.e.*, that no part of the goods shall either directly by them or by any other person be re-exported in their present condition, nor be exported to countries at war with Great Britain in any future state or form."

Except in this declaration no guarantee was brought to the notice of their Lordships which covered the manufactured products as well as the raw material. The 68 rollers shipped on the "Annie Johnson," according to the evidence of Mr. Rooke, who was appointed as a chartered accountant to inspect the books of the Transmarina Company, Stockholm, had been sold prior to seizure to the Stockholm Skofabrik. There may be some doubt whether this sale took place before or after seizure, but the actual date is not of great importance. There is no doubt that the Skofabrik Stockholm did manufacture for export to enemy destination a large number of military boots, and that the rollers in question were suitable raw material for use in such manufacture. There is no evidence that the Svenska required from them any guarantee except against the export of the hides and leather. The question therefore which arises is whether, at the date of seizure, it was probable that military boots made out of the hides and leather seized would, but for such seizure, have had an enemy destination. It cannot be doubted that there was such a probability as would throw on the appellants the burden of proving affirmatively that the destination of any boots manufactured from the hides and leather was in itself innocent. It is said that it is difficult for a neutral trader to discharge the onus thus placed upon him. It would be competent for him to show that the raw material, if it had not been seized, would either have gone to manufacturers who did not export military boots from Sweden; or, if it had gone to manufacturers making military boots for export, to prove that the hides and leathers sold by them had been exclusively used in the manufacture of boots for home use. In the opinion of their Lordships the appellants have not adduced any sufficient evidence to discharge the onus placed upon them. The principles involved are to be found in the *Louisiana* [1918], A.C. 461, but this case has been so often followed that further reference to it is not necessary.

According to the evidence of Mr. Rooke, no part of the goods of any other of the above ships had been sold either by the appellants or the Svenska, or at all at the date of seizure. The goods shipped by the "Kronprins Gustav Adolf" and the "Kronprinsessan Margareta" (second voyage) were consigned to the Malmo Laderfabrik, a Swedish firm which is stated in the affidavit of Mr. Rooke to have carried on business at Malmo as manufacturers of boots, and to have manufactured during the war military boots for the Austrian Government. There does not appear, however, to be any corroboration of this statement, and Mr. Svanstrom states that the firm was chosen because it was one of the biggest tanneries, financially sound, and there was reason to believe that its standing with the British authorities was good. The arrangement made was that the Malmo Laderfabrik should be consignees, on the understanding that they were to have the right to buy the lots after arrival and inspection. It is said, on behalf of the appellants, that the Transmarina

obtained a guarantee from the Malmo Laderfabrik, including not only the hides and leather, but also the goods manufactured from them. No doubt this form of extensive guarantee was mentioned in a letter from Stockholm of the 13th May, 1916. The declarations of the Malmo Laderfabrik contained in the evidence do not, however, cover the manufactured products, but only the imported merchandise, and are in the following form :—

“ We, the undersigned, hereby declare that 300 rollers sole leather shipped about the 10th May, 1916, from Rio de Janeiro on the motor ship ‘ Kronprins Adolf ’ to Malmo, and consigned to us, are exclusively intended for consumption in Sweden, and that the said merchandise will not be re-exported.”

Mr. Svanstrom, in his evidence, states that for all sales made by the Svenska or Transmarina Company guarantees were obtained, saying that goods were exclusively intended for consumption in Sweden. If the guarantees given by the Malmo Laderfabrik had extended to goods manufactured from the imported hides and leather, such guarantees would not in themselves have discharged the burden placed upon the appellants without some evidence that the guarantees, so given, had in fact been complied with. But the conclusion is that the guarantees were limited to imported merchandise. If the guarantees had been intended to cover the manufactured products they would not have been enforceable in Sweden, seeing that the Swedish Government, within its undoubted rights of sovereignty, had refused to prohibit exportation of manufactured products. The result is that the appellants have not in the case of any shipment discharged the onus of proof incumbent on them.

During the hearing in the Prize Court allegations were made affecting the conduct and good faith of the appellants and the Svenska. Sir Malcolm Macnaghten referred at length to the evidence, the letters, and other documents, on which these allegations were founded. In the opinion of their Lordships, it is not necessary for the purpose of determining whether, at the time of seizure, the appellants had discharged the burden of proving that the destination of the goods or of manufactured products made from them was not an enemy country, to determine whether the neutral traders mentioned had rendered themselves liable to the allegations of bad conduct and bad faith made against them. A neutral trader has the right to carry on his trade with an enemy, or to consign his goods to an enemy destination, subject always to the risks and liabilities which international law may impose. In the present case the appellants transferred all control over the goods to be exported to Sweden to the consignees or their representatives, taking guarantees which, whatever they may have thought as to their adequacy, were in their operation not effective. It is fair, however, to say that, in the opinion of their Lordships, the counsel for the respondent exercised a proper discretion in stating

that he did not rely on the allegations made against the appellants as any part of his case, and that he did not propose to challenge the explanations given by Sir Malcolm Macnaghten as to the conduct and good faith of the appellants

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.



In the Privy Council.

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G. LARUE AND COMPANY

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD PARMOOR.

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