Privy Council Appeal No 15 *of* 1918.

In the matter of Part Cargo *ex* Steamship "Kronprinzessin Victoria."

Dahlen and Wahlstedt - - - - *Appellants*

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 13TH NOVEMBER, 1918.

Present at the Hearing:

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

[*Delivered by* LORD SUMNER.]

In this case the late Sir Samuel Evans condemned 250 bags of coffee, conditional contraband of war, shipped by Nordskog and Co., on the Swedish steamship "Kronprinzessin Victoria" at Rio de Janeiro for delivery at Sundsvall, in Sweden, to the appellants, who were claimants below, an incorporated Swedish company trading as wholesale grocers under the name of Aktiebolaget Dahlen and Wahlstedt. The appellants swore that this coffee was part of a large quantity, which they had previously bought of Nordskog and Co.; that they had declared before shipment that none of it was imported from or would be sent to an ulterior enemy destination, and that this declaration was true. The purchase contract and documentary evidence of payment for the coffee were forthcoming and their genuineness was not denied. The Crown put in evidence of a statistical character of the changes both in the general imports of coffee into Sweden and in the exports of coffee from Sweden since the

beginning of the war. This showed changes both in quantity and in destination, and also an increase in the appellants' imports in particular. There was also evi ence, the sufficiency of which was admitted, that if the ulterior destination of this coffee was Germany, it would be imported into Germany for the use of the German Government and forces. No evidence was put in to contradict that of the Crown.

The appellants, whose declaration before shipment had stated that the coffee was intended for internal consumption in Sweden, made it part of their case at the trial, that they were considerable exporters of coffee to Finland, as well as dealers in coffee in the Swedish province of Norrland, and in support of this vouched two certificates by M. Censta Ohrn, and M. Ernst Yssarsson, signing respectively as "British Pro-Consul" and as "Acting British Pro-Consul" at Sundsvall, purporting to give the result of an examination of the appellants' sale notes and books. The learned President, justly impressed with the unquestioned fact among others, that the appellants had multiplied their imports of coffee at least six times over since the war began, that the town, in which they traded, with only 17,000 inhabitants contained a score of other coffee importers, five of whom alone imported over 70,000 bags, while the appellants were importing 30,000, and that the two provinces of Jemtland and Vesternorrland, whose "commercial centre," Sundsvall, only contains 375,000 inhabitants in all, thought that the nature of the appellants' export trade required further evidence. The bags are 60 kilog. bags and an import of a quantity into Sundsvall sufficient to supply every man, woman, and child within its internal trading area with a third of a hundredweight of coffee for the year suggested a large export trade, nor was the proximity of Sundsvall to Finland inconsistent with that town's partaking in the extensive and lucrative trade with Germany, which undoubtedly went on. Accordingly he offered to adjourn the hearing, in order that the claimants might have the opportunity of sending over for examination in Court the books relating to their export trade, some entries in which had been submitted to the inspection of the British vice-consulate at Sundsvall. Their counsel accepted the adjournment, in order that his clients might consider what course they should take, but upon consideration they refused to avail themselves of the opportunity. Thereupon the learned President condemned the coffee, concluding his judgment with these words:—

> "They have failed to satisfy me of the truth of their case. From the evidence adduced and from all the circumstances of the case, including the conduct of the claimants, I draw the inference that the coffee seized was not bought by them for the purpose of consumption in Sweden or in order to become part of the common stock of that country or for the purpose of re-sale to any neutral

country, but was shipped to and received by them to be forwarded through Sundsvall to Hamburg."

Three questions have been raised before their Lordships: (1) Whether this was a finding that the appellants were not really the consignees of the coffee but only figured as such fictitiously, in order to disguise the importation of the coffee into Germany by a Hamburg firm viâ Sundsvall; (2) whether, if so, or if it was a finding that the appellants were the true consignees importing the coffee but with an ulterior destination in Germany beyond Sundsvall, it was competent to the learned President so to find on the materials before him; and (3) if the finding was to the latter effect, whether it was material or warranted the condemnation of the goods in view of the destination of the ship, the tenor of the ship's papers, and the language of the Declaration of London, No. 2, Order in Council, dated the 29th October, 1914.

Their Lordships are of opinion that the learned President did not find that the claimants were only colourable and sham consignees of this coffee. There are circumstances in the case suggesting such a conclusion, connected with the banking transactions by means of which payment was made for the coffee, and with the part played in it by Nordskog and Co., of Rio de Janeiro, and Santos in Brazil, and of 1/3 Readhusgatan, Christiania, by Carl B. Prösch, also of Christiania, and by Eugen Urban and Co., coffee importers, of Hamburg. There are also observations made during the hearing and passages in the judgment of the learned President, which seem to refer to such a suggested conclusion, but their Lordships are satisfied, that this was not the case presented by the Crown in the Prize Court, and they think that this was not the finding at which he arrived. Even if the materials would have warranted such a conclusion, as to which no opinion need be expressed, their Lordships would not be prepared to allow the captors to succeed on appeal by raising a case on the facts, which they never presented for the determination of the Court below.

Their Lordships are of opinion that the materials before him warranted the learned President in finding the ulterior German destination, which they conceive to be the true effect of his judgment. The admissibility of what is called a statistical case has already been recognised. Not only was this case pointed to the general contrast between the overseas trade of Swedish merchants before and after the outbreak of war, but particular and precise evidence was given of the remarkable expansion of the appellants' own operations; and this was reinforced by evidence of their credit and associations. Their Lordships do not say that less might not have sufficed: the question is one of the evidence actually given. There is further the fact that the appellants declined to produce their books in Court. Here again, be it observed, the President did not order them to embark on an enquiry, which they had not opened, or order that

proof of a particular branch of the case should be given in one way only. The appellants had vouched in their own favour on one aspect of the case their own record of certain selected transactions; they had the opportunity of completing that aspect of the case from materials of the same class in their own possession by way of rebuttal of the captors' evidence, and to make that opportunity fruitful were informed how best, in view of the President's great experience of these cases, they could present such evidence so as to bring conviction to his mind. It is nothing to the point to urge that they had engaged in a trade, which to them was lawful though pursued at their peril, or to say, as they did say, that their trading books were required in Sweden, and that Swedish law placed a limit on the extent to which they could give "discovery throwing light upon our case." They claimed the coffee in the Prize Court here, and if the evidence, by which their case might have been cogently supported, was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage. Their Lordships fully appreciate the learned President's view, that an offer of inspection of the books in Sweden "by a notary public or otherwise" was in the circumstances almost illusory. As to the reference to the law of Sweden, the matter has been dealt with in other cases. Though loath to credit that Swedish law, truly understood, does restrict the right of a Swedish subject to support a case, which he is concerned to prove, by the best evidence of his own transactions, and while recognising that, if it be so, this is not a matter for their criticism or animadversion, but solely one for the judgment of the Government and Legislature of the Kingdom of Sweden, their Lordships must observe, as they have observed before, that it is impossible for a Court of Prize, an international tribunal, to allow its investigation of the truth of the matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties to the proceedings before it. Their Lordships cannot hold that a captor's evidence is not to prove, whatever it is capable of proving, merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it.

The remaining question turns upon the construction of paragraph 1 (iii) of the Declaration of London, No. 2, Order in Council. This Order, which declares, *inter alia*, under what modifications His Majesty will recognise Article 35 of the Declaration of London, so long as the Order is in force, operates, as has been already decided, as a waiver of the belligerent rights of the Crown in favour of neutrals, to which a Court of Prize will give effect as against captors. His Majesty, who was pleased to announce such a waiver, is entitled to modify or to recall it, as he may be advised, and in fact the Order in Council of the 7th July, 1916, did in terms revoke the Order in Council of the 29th October, 1914, and proceeded to deal with the same

matters otherwise. It was, however, argued by the Solicitor-General that there had been a prior restriction or revocation o that waiver, namely by the Order in Council of the 11th March 1915, and the date of the shipment of the coffee and voyage of the "Kronprinzessin Victoria" was in fact such that the latter Order would cover that period, though the Order of the 7th July, 1916, would not. The argument shortly was that, the object of the Order in Council of the 11th March, 1915, being, in the words of the recital, "to prevent commodities of any kind from reaching or leaving Germany," and the substantive provision of paragraph (iii) being that goods with an enemy destination carried in a ship bound for a port other than a German port shall be discharged in a British or allied port, and subsequently be restored on terms, "unless they are contraband of war," it would be unreasonable to hold that, if they are contraband of war, they may be released unconditionally, for that would expressly defeat the object of the Order in Council itself. Hence, it was said, that to avoid so unsatisfactory a result, the Order in Council of 1915 must be deemed to have revoked by implication the concessions made under the Order in Council of the 29th October, 1914. The point is novel. It might have been taken, but was not, in the "Louisiana" ([1918] A.C., 461). The contrary was assumed to be the case, though it is true there had been no argument, by their Lordships' Board in the "Proton" ([1918] A.C., 578, p. 580) It was not taken by the Crown before the learned President in the present case, nor is a contention plausible which involves the proposition that an order directing goods to be restored, "unless they are contraband," is an order condemning them if they are, all other Orders in Council notwithstanding. The words "unless they are contraband of war" naturally mean that the Order in question does not apply to such goods for which there are other legal provisions.

Their Lordships, however, hold, for two reasons of a somewhat more general character, that the Order in Council of the 29th October, 1914, was not in this particular affected by the Order in Council of the 11th March, 1915. The whole tenor of the Order of the 7th July, 1916, the recitals, the repeal and the re-enactment, are consistent only with the view that the Order of the 29th October, 1914, had up to that date remained in full force and unaffected. Further, though no form of words and no formal instrument can be prescribed to the Crown, by which to revoke its former grant or to resume the full belligerent rights, which had previously been waived, it is at least necessary that the intention to revoke and the intimation of the resumption should be unambiguous and clear. It would ill become the dignity of the Crown and be little congruous with its responsibility, alike towards its subjects and to neutrals, in exercising or forbearing to exercise belligerent rights, if concessions publicly and advisedly made were to be recalled by words of doubtful import or by nice implications from language

unquestionably employed *alio intuitu*. If this contention were to prevail it would follow that the decision of the Board in the "Louisiana" was a decision on the true construction of an Order, which was inapplicable because it had been revoked. It is true that there is nothing in that decision which would preclude the Board by authority from considering the contention, for the construction of an instrument and its applicability are different matters, but their Lordships cannot but feel confirmed in the opinion which they have formed by the fact that on the former occasion the Law Officers of the Crown either did not think of the point or deemed it better not to raise it.

The construction of the Declaration of London, No. 2, Order in Council, paragraph 1 sub-section iii, remains to be considered. Here again the judgment in the "Louisiana" does not conclude the matter, for the language there used dealt with the position of a neutral shipper anxious to know how far his shipment would be covered, when consigned to some actual named consignee in a country adjacent to Germany. It was there said that the neutral shipper would not suffer merely by reason of the intentions of that consignee. The claimants were the shippers, they claimed to be owners of the goods, and alleged, that the consignees named in the bills of lading were so named for convenience only and that no property passed to them. Here the claimants are the named consignees and, upon the case made in the Prize Court, they were consignees to whom the property had passed before seizure, in fact the day before. Not only so but they were consignees to whom the consignors had parted with the real control of the goods. Their intention, however, was to give the goods an ulterior enemy destination. Does this intention prevent them from being persons, the insertion of whose names in the bills of lading cause the ship's papers to "show who is the consignee of the goods?" On principle their Lordships think not. If the seizure had been two days earlier and the claims had been made by Nordskog and Co., the language employed in the "Louisiana" would have applied. The present is a different case, and whether the date of the passing of the property be or be not crucial, it cannot be said on the present facts, that the appellants were not the consignees. It is not even shown that they had an arrangement with Nordskog and Co. or with some other parties under which they had engaged to forward the coffee to Germany, though what difference that would have made, being a personal obligation only, need not be decided. All that is shown is that they had an intention. This appears to be precisely the case or one of the cases, in which, under the Order in Council in question, the ship's destination and the form of the ship's papers covered the goods. To extend the qualities which may be predicated of the consignee, whom the ship's papers are to show, to qualities connected with his general trade or with particular contracts, independent of the contract of carriage, would be to protect the goods only when the ship's papers show something,

which in maritime practice they never do and rarely could show. The coffee was accordingly in this case immune from condemnation, its ulterior enemy destination notwithstanding.

The Order in Council of the 11th March, 1915, article 3, provided for the discharge of the goods in the present case and proceeded :—

> " Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court and unless they are contraband of war shall, if not requisitioned for the use of His Majesty, be restored by order of the Court upon such terms as the Court may in the circumstances deem to be just."

These words determine the mode in which these goods are to be dealt with after having been placed in the custody of the Marshal. It is for the President in his discretion to decide upon what terms they shall be restored. Presumably they have been requisitioned or sold and are no longer in specie ; if so, the proceeds or their money value will represent the goods and be the subject of his order. The decree of condemnation must be set aside and the case must be remitted to the Prize Court, to settle the terms of restoration, but as the point on which the appeal succeeds is one which was never properly urged upon Sir Samuel Evans, there can be no costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

In the matter of Part Cargo ex "Kronprinzessin Victoria."

DAHLEN AND WAHLSTEDT

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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

1918.