Privy Council Appeal No. 8 *of* 1919.

In the Matter of Part Cargoes ex *Steamship "Bravo" and other Vessels.*

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

v.

Catz Brothers - - - - - - - *Respondents*

Catz Brothers - - - - - - - *Appellants*

v.

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

(*Seventeen Consolidated Appeals*)

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 29TH JULY, 1919.

Present at the Hearing:

LORD PARMOOR.
LORD WRENBURY.
LORD STERNDALE
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

In this case there are cross-appeals. The appeal by His Majesty's Procurator-General is brought against decrees which ordered restitution to the claimants of cargoes of dried fruits shipped in the Dutch Steamships:—S.S. "Rijndam," S.S. "Noorderijk," S.S. "Oosterdijk," S.S. "Rotterdam," S.S. "Rijndam," S.S. "Nieuw Amsterdam," S.S. "Noordam," and of 25 barrels of honey shipped on the S.S. "Leda." All the above consignments, other than the honey, were shipped by Lunham & Moore, forwarding agents of New York, consigned to the N.O.T., for

the claimants. The honey was shipped by Laflaquiere & Co., Bordeaux, and consigned to the claimants. It is not necessary to make any further reference to this shipment, which is of small value, and in itself of no importance. The case for the Crown was based on facts which undoubtedly called for an answer from the claimants, and the question is whether such answer is sufficient.

The claimants are fruit merchants carrying on business at Rotterdam, Amsterdam, and Groningen, in Holland. The firm was established in the year 1884, and carried on a business of sale in Holland, as well as a foreign and export business. There was evidence that the export of American fruits by the claimants from Holland into Germany in the year 1915 largely exceeded in value their exports in the years 1913 and 1914, and similar evidence was given as to exports by the claimants from Holland into Austria-Hungary. In addition there was evidence that imports of dried fruits into the Netherlands in 1915 were 36,820 tons above the average of the years 1911 to 1913. The claimants, moreover, were in default in not allowing discovery of their books to take place in accordance with the order of the Prize Court, and their Lordships agree in the opinion expressed by the late President, that claimants who fail to comply with an order of discovery cannot complain if an inference is made adversely to their claim. There is a further factor in the case which throws suspicion on the whole case of the claimants. The late President found that, in reference to the goods on the " Noordam " consigned to the N.O.T. for C. L. Bulsing & Co., the claimants were engaged in a transaction with Bulsing & Co. to mislead the N.O.T., and against these goods made an order of condemnation. No appeal has been entered against this portion of the judgment. The late President, however, came to the conclusion after hearing the explanation put forward on behalf of the claimants that the Crown had not established a case of condemnation, and their Lordships are not prepared to differ from this conclusion.

The answer of the claimants to the case made against them is that the goods, shipped on the Dutch steamships, were, at the time of seizure, being carried on board a neutral ship, from one neutral port to another, for delivery and consumption there, and not for an enemy destination, under contract with the N.O.T. The fact that the goods were consigned to the N.O.T. is by no means conclusive of the innocency of the destination, but it is an important factor, and the first matter to be determined is whether the claimants established their case that the goods were so consigned. The first of the contracts with the N.O.T. is dated the 21st July, 1915, with permission to ship goods in September, but the shipment, alleged to have been made under this permission, was not in fact made until November. The second of these contracts with the N.O.T. was dated the 28th July, 1915, with permission to ship in August and September, but the shipment was not made until November. The third of the contracts with the N.O.T. was dated the 31st July, 1915, with permission to ship in October, but the shipment was not made until December. The fourth

of the contracts with the N.O.T. was dated the 31st July, 1915, with permission to ship in September, but shipments were not in fact made until January and February, 1916. It was argued on behalf of the appellant that these delays were sufficient to throw such doubt on the statement of the claimants, as to the shipment of the goods under contract with the N.O.T., that such statement should not be accepted. Their Lordships, however, do not think that these delays are in themselves sufficient to negative the case made under this head by the claimants, since it is notorious that delays in shipment were common under the circumstances which prevailed at the material dates. In addition, evidence was given on behalf of the claimants that the arrangements for shipment of their goods were delayed by the closing of the Panama Canal, as stated in a letter of Messrs. O'Malley, Collins & Co., who were acting at the time as purchasing agents in America for the claimants. The claimants further alleged that all the goods shipped on the "Rijndam," 1,053, the "Noorderdijk," "Oosterdijk" and "Rotterdam" had been sold for delivery on arrival to retail dealers or customers of the claimants in Holland. In all essential features the evidence is the same in the case of each vessel. The sale notes are for cash crop 1915, to be delivered between August and October, provided they do arrive; but the objection was taken that none of these notes contained any reference identifying the goods sold with the goods seized, and that there was nothing in these documents to show that the sales to the sub-purchasers were of the specific goods which are the subject-matter of the claim. In the case of the "Rijndam," 1,056, the goods were unsold, but an affidavit was made on behalf of the claimants that they were intended to be sold to customers of the claimants, all of whom carried on business as merchants and manufacturers in such goods in Holland for consumption in Holland, and none for exportation. A similar affidavit was made covering the goods carried in the "Nieuw Amsterdam" and the "Noordam." On this evidence the late President held that it was a case of doubt, and that he was not satisfied that it had been established that the goods shipped on these Dutch ships were intended for Germany, and that as a German destination had not been proved, these goods or the proceeds of such of them as had been sold must be released to the claimants. It is sufficient to say that their Lordships, although sharing in the doubts expressed by the late President, are not prepared to differ from the conclusion at which he arrived.

The cross-appeal is brought by the claimants against that portion of the judgment which ordered the condemnation as good and lawful prize of dried fruits and similar cargo shipped on the Norwegian ships "Bravo," "Stanton" and "Stavn," on the Danish ships "Arkansas" and "Olav," and on the Swedish ships "Jemtland" and "Carolina." These ships all left American ports between the 29th September and the 15th December, 1915, and the goods seized, other than those on the S.S. "Bravo," were shipped by Lunham & Moore, forwarding agents in New York. The goods on the "Bravo" were shipped under the names

of the merchants, Rosenberg Bros. & Co., Armsby & Co., from whom they had been bought. It was not contested that the claimants were the owners of these goods, but they were consigned to various firms in Stockholm, Malmö, Gothenburg and Copenhagen, some of whose names had been mentioned to Lunham & Moore by the claimants as addressees to whom they could ship "our" goods. The firms named in the bills of lading were prepared to endorse the bills of lading as directed by Catz Bros., but were not in the position of independent consignees, not having control of the destination of the goods.

The evidence on behalf of the Crown consisted of statistical tables giving the amount of imports of dried apples and other dried fruits into Sweden in the year 1915, the imports into Sweden, Norway and Denmark for the first six months of 1916, the average annual imports of the said goods into these countries for the years 1911 to 1913, and the year's import of dried fruit into Germany for the year 1913. These figures show that there had been a considerable increase in the imports into Sweden, Norway and Denmark in the war periods mentioned, as compared with the average annual imports of the goods in the pre-war period. There is further the affidavit of Mr. Spencer, a chartered accountant who was instructed to make an examination of the claimants' business books, but, as has been stated in the case of the Dutch shipments, he was not allowed by the claimants to carry out the order of the Court. Mr. Spencer states that he attended at the claimants' offices in January and February, 1917, and that, after he had made a brief examination, the claimants refused to allow him to continue. He further states that the claimants did not deny that they had sold goods in large quantities to Germany during the war, and that many of these had been imported there through the Scandinavian agents, and that they made a further admission as to the enemy destination of some of the goods claimed; that the brief examination of the claimants' books showed that they had made large shipments of all kinds of colonial goods to Germany and Austria, and to Scandinavia, and that some of the Scandinavian goods were destined for Hamburg, but that it was not stated whether these shipments were during the war or not. In answer to this statement an affidavit was made by Simon Herman Catz on behalf of the claimants protesting against the declaration, "that the senior of my firm would have said to him, that when the goods in question would not have been captured their destination would have been Germany"; but this statement is no answer to the evidence of Mr. Spencer, and their Lordships do not entertain any doubt as to the accuracy of his statement. There is further an affidavit of Mr. R. M. Greenwood, which after giving information as to the claimants, and as to the consignees of some of the goods claimed, produces a letter dated the 28th February, 1917, contained in an envelope addressed by Mr. J. B. Catz, New York, and posted in Holland. This letter contains the passage, "Law suit still not heard of. Objection to inspection will doubtless

result in confiscation, then the insurance people will get the worst of it. If on those grounds they will risk anything further remains to be seen. Insurance agents no doubt understand that we do not care entirely to disclose our business." Their Lordships do not attach great importance to this letter, but it is in accord with all the indications derived from other sources as to the probable enemy destination of the goods in question.

There can be no doubt that the evidence, filed on behalf of the Crown, raises a strong case of suspicion against the claimants, and their Lordships are of opinion that the late President was right in his finding that the claimants did not give any sufficient explanation of the case made against them. The goods in question were not consigned under contract with the N.O.T., and there was no evidence of sub-sales to purchasers for consumption in either of the Scandinavian countries. The absence of such evidence is in itself a matter of grave suspicion, especially as evidence of this character was produced in the case of the Dutch shipments, and there would have been no difficulty as to the production of similar evidence in the case of the Scandinavian shipments, if the goods had really been intended for consumption in the Scandinavian countries and not for an ultimate enemy destination. The only possible conclusion is that the goods carried to the Scandinavian ports were imported for an enemy destination without any anticipation of their sale to neutral purchasers. In the course of his exhaustive argument Sir Erle Richards called the attention of their Lordships to a number of letters to which the late President referred in his judgment. Their Lordships do not think it necessary to review again this correspondence, but desire to express their entire concurrence in the detailed analysis made by the late President. There can be no doubt that a large portion of the goods seized would have gone to Germany through the Scandinavian ports for transit to enemy naval bases and bases of supply, and if a portion of them was really intended for consumption in Scandinavia, the claimants have themselves to blame for withholding any evidence from the Court, which would enable a differentiation to be made. The case is one which presents no difficulties, and the appeal must be dismissed.

Their Lordships will humbly advise His Majesty that the appeal and the cross-appeal should be dismissed without costs in either case.

In the Privy Council.

In the Matter of Part Cargoes ex *Steamship "Bravo" and other Vessels.*

HIS MAJESTY'S PROCURATOR-GENERAL

v.

CATZ BROTHERS.

CATZ BROTHERS

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

(*Seventeen Consolidated Appeals.*)

DELIVERED BY LORD PARMOOR.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.