## PRIZE COURT.

*Before Jenkins Co.,*

1914

Dec. 8.

### *Re* CARGO *ex* S. S. RAPPENFELS.*

*Confiscation—Cargo—Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants, (in one instance to British merchant)—Destination (Enemy Port)—Contracts C.i.F.—Moneys advanced by British Banks against documents of title—Property in goods at time of capture.*

On August 4th 1914, war was declared between Great Britain and Germany. Before the declaration of war H. S. N. C. & Co., British subjects, had shipped some bales of jute by a German ship, the *S. S. Rappenfels* of the Hansa Line, and had consigned the goods to D. C. & Co., British merchants. G. & Co. and G. W. & Co. had also shipped goods by the same ship but had consigned the goods to German merchants.

The *Rappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo. The *Rappenfels* was sent to Calcutta to have the liability of the cargo to condemnation determined by the High Court at Fort William in Bengal.

Messrs. H. S. N. C. & Co., G. & Co. and G. W. & Co., submitted claims for the release of their goods. These claims were disputed by the Crown :—

*Held*, (i) that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—"To whom did the goods belong at the time of capture"? (ii) That the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract; and, (iii) that in the circumstances the property in the goods was in the sellers, and they were not liable to be confiscated.

WAR was declared between Great Britain and Germany on the 4th August 1914. Before the declaration of war, among other British subjects, Messrs. Hari

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Singh Nihal Chand had shipped on board the S. S. *Rappenfels*, a German ship, some bales of jute and had consigned the goods to Messrs. Duncan Campbell & Company, British merchants, a firm carrying on business in London, but the destination of the goods was Hamburg, a German port. Messrs. Grossman & Company and Gladstone Wyllie & Company had also shipped goods by the same ship, but the consignees were German merchants, and are therefore since the declaration of war on 4th August 1914 enemy subjects.

The contracts were C. I. F. contracts; in accordance with the custom of the trade, the consignors received advances of money against the documents of title from Banks carrying on business in Calcutta, whose agents in London would, in the ordinary course of business, have realised the moneys due on the contracts from the consignees and then have made over to the consignees the documents of title to enable them to obtain delivery of the goods. The Banks recovered the advances from the consignors.

The *S. S. Rappenfels* (David Gardner Brown, master) sailed from Calcutta before the declaration of war and was captured on the high seas and taken to Colombo, where she was condemned as good and lawful prize. The *Rappenfels* was subsequently brought back to Calcutta in order that the question of the liability of the cargo to confiscation should be determined here. The Crown claimed the condemnation of the cargo.

*The Advocate-General* (*Mr. G. H. B. Kenrick*, K.C.), for the Crown. The property in the goods had passed, the goods are therefore enemy property. The test is the answer to the question—"On whom does the loss fall"? Capture is equivalent to delivery: see *The*

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*Copenhagen* (1); the loss therefore falls on the enemy subject. I adopt the arguments of the Attorney-General (Sir John Simon, K. C.) in the case of *The Miramichi* (The Times, November 3rd 1914).

[JENKINS C.J. The view put forward by the Attorney-General as reported in the Times of November 3rd, in his argument, does not agree with the views expressed by Bramwell and Cotton L.JJ. in the case of *Mirabita* v. *The Imperial Ottoman Bank* (2).]

The following cases were referred to: *The Packet de Bilboa* (3), *The Sally* (4), *The Atlas* (5), and *The Exchange* (6).

The character of goods on enemy ships depends upon the enemy character of their owner: *see* articles 58 and 59 of the Declaration of London; Lord Halsbury's Laws of England, Vol. XXV, page 188, paragraph 331; Westlake, part II, page 151, and to the case of *The Jonge Klassina* (7) mentioned by Westlake.

*Mr. Pugh*, for the claimants Messrs. Hari Singh Nihal Chand. This is a contract for goods to arrive. If goods do not arrive, buyers have no liability. The English law for the construction of contracts applies. Section 19 of the Sale of Goods Act covers this case; the property has not passed. The declaration of London, 1909, is quite clear: *see* Tiverton; Benjamin on Sale, 4th Edition, Chapter VI, page 345, on the rules for the determination of passing of property. Here before tender of documents there seems nothing to prevent sellers from diverting goods and appropriating

(1) (1799) 1 C. Rob. 288; 1 Eng. Pr. Cases 138.
(2) (1878) 3 Exch. D. 164 C. A.
(3) (1799) 2 C. Rob. 133; 1 Eng. Pr. Cases 209.
(4) (1795) 3 C. Rob. 300; 1 Eng. Pr. Cases. 28.
(5) (1801) 3 C. Rob. 299; 1 Eng. Pr. Cases 31.
(6) (1808) Edw. 39; 2 Eng. Pr. Cases 13.
(7) (1804) 5 C. Rob. 297; 1 Eng. Pr. Cases 485.

others; *see* cases cited by Benjamin, particularly to *Shepherd* v. *Harrison* (1); also to Scrutton on Charter Parties, 6th Edition, page 163. There is nothing in the Sale of Goods Act which contemplates risk being the test of property passing. The Declaration of London applies only to a state of war and policy towards neutrals. A subject's position must be as good as, if not better than, that of a neutral. *The Sally* (2) is in favour of the claimants; it is an authority that there is no right to condemn in a case like this, where the contract was made in time of peace or without contemplation of war.

*The Advocate-General*, in reply, contended that if Mr. Pugh's argument was right, there could never be any condemnation.

[In the other two cases the arguments were, *mutatis mutandis*, on similar lines.]

*Cur. adv. vult.*

JENKINS C.J. The *Rappenfels*, a German merchantship, was captured after the outbreak of hostilities by one of His Majesty's ships of war, and was in due course condemned as good and lawful prize by the Prize Court in Ceylon. The cargo however was released, not absolutely, but merely in order that its liability to condemnation might be considered and determined by this Court. This curious arrangement was the result of an understanding between claimants of the cargo and the authorities. With its wisdom I have no concern, nor do I propose to discuss its propriety, for the cargo is now within the limits of this Court's jurisdiction and no one has questioned the Court's competence to deal with it. On the contrary, an adjudication by the Court has been

(1) (1871) 5 E. & I. App. 116.

(2) (1795) 3 C. Rob. 300; 1 Eng. Pr. Cases 28.

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invited by all concerned. The *Rappenfels* sailed from Calcutta on the 2nd of August last, having on board the goods which are now the subject of adjudication. War had not then been declared, and it is conceded on behalf of the Crown that the ship sailed and the material contracts relating to these goods were made without any contemplation of war; and that nothing has been left undone that should have been done by the claimants. The ship's destination was Hamburg. The goods it carried belong to a number of persons, and the position of the several claimants is not in all cases identical. Certain typical claims have accordingly been selected as probably governing all or most of the rest. It is with these that I now propose to deal.

(i) *The claims of Messrs. Hari Singh Nihal Chand.*

These claimants carry on business in Calcutta, and have been treated for the purposes of this case as British subjects. Five lots of jute were shipped by them for Hamburg in performance of five contracts for sale. The terms of these contracts are set out in five separate notes each of which record that Messrs. Campbell & Co. of St. Mary Axe bought of the present claimants the jute described in the note upon the terms and conditions of the London Jute Association Contract C. I. F.

The contract is for jute "to arrive", and one of the terms is that the contract is to be considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes, but to be valid for any portion that may be shipped or transhipped on sellers' account and arrive by any other vessel [clause 6 *(d)*].

The bill of lading was made out to the order of the consignors, the present claimants, and was endorsed by them in blank. With regard to three consignments the claimants drew bills of exchange. These, in

accordance with the usual course of business in Calcutta, they discounted with the Mercantile Bank transferring to the Bank at the same time the bills of lading as security for payment of the bills of exchange. The bills were forwarded to London. There they were not accepted but were returned with the result that the claimants have repaid the Bank. The bills of exchange with the bills of lading in respect of the remaining two consignments were passed through the Mercantile Bank for collection, but were not accepted. The result then is that the goods have not arrived and their price has not been paid, and the bills of lading are held by the claimants. Policies of insurance were taken out by the claimants but nothing turns on their terms or conditions.

In these circumstances, the Advocate-General contends that the goods were shipped at the consignee's risk, and on this assumption maintains, in accordance with instructions emanating from the Secretary of State, that they are liable to confiscation even though the British vendor is unpaid. His proposition is that risk, not property, is the test of liability to confiscation.

Even if this test be accepted, it is difficult to see how it can justify condemnation in this case, for the dealings with the goods only disclose sellers and buyers both of whom are British; and though under a C. I. F. contract, risk is ordinarily on the buyer, this is qualified in this case by the provision which makes arrival of the goods an essential term. The risk during the voyage was thus on the sellers to the extent indicated by this qualification and, in the events which have happened, has actually fallen on them. This conclusion would entitle the claimants to urge that even on the Advocate-General's own showing no case for condemnation has been made.

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But as some of the other claims may require a decision as to whether property or risk is to be regarded for the purpose in hand, it will be better to deal with that problem at this point.

Whatever may have been the view in former times, International Law now (apart from exceptional cases) regards property as the test of liability to confiscation in the case of neutrals and this finds direct expression in the 3rd Article of the Declaration of Paris where it is said, "*La marchandise neutre, a l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi.*"

At the the same time the Declaration of London (Article 58) declares, "*Le caractere neutre ou ennemi des marchandises trouvées á bord d'un navire ennemi est determine par le caractere neutre ou ennemi de leur proprietaire.*"

Why then should the goods of a British subject shipped before war was even contemplated, be in a worse plight? No reason has been disclosed in the course of the argument.

It is true that these International Declarations deal only with enemy and neutral goods, and the treatment by a State of its subject's property is a concern not of International but of Municipal Law. But the position of a subject's goods has been considered and determined in a British Prize Court. Thus in *The Packet de Bilboa* (1), claim was successfully made by a British merchant for goods shipped on an enemy ship before the outbreak of hostilities with Spain.

Sir W. Scott, as he then was, said, "the question is, in whom is the legal title? Because if I should find that the interest was in the Spanish consignee I must then condemn, and leave the British party to

(1) (1799) 2 C. Rob 133; 1 Eng. Pr. Cases 209.

apply to the Crown for that grace and favour which it is always ready to show." Later he said "under these circumstances, in whom does the property reside?" It no doubt is the case that reference is made to the incidence of risk, but as being a test of property and not as being in itself the occasion of confiscation or exemption.

That this is so, is, I think, apparent from the concluding portion of the judgment where it is said, "I must consider the property to reside still in the English merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain, and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper."

There may be cases in which the goods of a subject are in greater peril than those of a neutral, but that is where the Municipal Law sanctions the confiscation of the property of a subject for his illegal acts, as where he contravenes the law which forbids to a subject commercial intercourse with the enemy. But no such ground of confiscation is suggested here.

The conclusion then to which I come is that in determining the question of liability to confiscation even in the case of a subject I must have regard to the property in the goods and not the risk except so far as it may assist me in determining where the property is. To whom then did the goods belong at the time of capture?

They were no doubt sold under a C. I. F. contract, but it was a contract "to arrive" and it was an

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express term that it should be "considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes."

So, even if risk be regarded as a valuable clue to property, in this case the risk during the voyage was on the seller to the extent indicated by this qualification.

But what appears to me to be decisive of this case, in view of the well-known mercantile usage that prevails in Calcutta, is the mode in which the sellers dealt with the bills of lading. They were taken to their own order and after the dealings I have already described, still are in the seller's possession.

The fair presumption in the circumstances of this case is that the sellers intended to retain and in fact did retain the property in the goods. This was a necessary reservation for the purpose of securing that method of commercial finance commonly employed by Calcutta shippers.

It will not be inappropriate to quote in support of this view certain remarks of Mr. Benjamin to be found in Chapter VI, Book II, of his Treatise on Sale of Goods (4th Edition, p. 345):

"If A, in New York, orders goods from B, in Liverpool, without sending the money for them there are two modes usually resorted to among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods. Or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of goods on A, and sell the bill to a Liverpool banker, transferring to the banker

the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

So here, I think, it is impossible to infer that the sellers had the least idea of passing the property to the buyers at the time of appropriating the goods to the contract, and, were I sitting in the High Court's ordinary jurisdiction, I should hold without doubt that the property remained in the sellers.

Is there then any reason why I should not come to the same conclusion sitting in Prize? For I recognize that this question of property may be viewed differently in Prize from what it would be in a Court sitting in its ordinary jurisdiction and that any disposition or reservation of property made *flagrante bello* which would defeat the ordinary rules of Prize Law is disregarded : *The Abo* (1).

But here all arrangements were made in time of peace and without any contemplation of war, and there is no suggestion of any fraud on the Prize Law. There is ample authority to support this distinction in favour of transactions concluded in time of peace.

(1) (1854) Spinks 42 ; 2 Eng. Pr. Cases 285.

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Thus in *The Sally* (1), the Commissioners of Appeal said. "It has always been the rule of the Prize Courts that property going to be delivered in the enemy's country and under a contract to become the property of the enemy immediately on arrival if taken *in transitu* is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of war no such rule exists."

The cases of *The Vrow Margaretha* (2), *The Packet de Bilboa* (3), and *The Vrow Anna Catharina* (4), may also be cited to the same effect.

I therefore hold, in the circumstances of this case, that the property in the goods is in the sellers, and it follows, in the absence of any illegality, that they are not liable to be confiscated.

I accordingly decline to condemn the goods and direct them to be restored for the use of the owner's thereof.

(ii) *Messrs. Grossman & Co.*

This claimant is a British India Company and its claim is in respect of goods shipped under four bills of lading.

The purchaser in each case was J. C. Gustav Schmidt, and the destination of the goods was Hamburg.

The bills of lading were in each case made out to the order of and retained by the company in accordance with the commercial usage of Calcutta, to which I have already alluded. For the reasons I have explained in dealing with the first claim, I hold that the property remained in the seller, and as all the material transactions were prior to the contemplation

(1) (1795) 3 C. Rob. 300 ; 1 Eng. Pr. Cases 28.
(2) (1799) 1 C. Rob. 336 ; 1 Eng. Pr. Cases 149.
(3) (1799) 2 C. Rob. 133 ; 1 Eng. Pr. Cases 209.
(4) (1805) 5 C. Rob. 15 ; 1 Eng. Pr. Cases 412.

of war, I decline to condemn the goods and direct restoration.

(iii) *Messrs. Gladstone Wyllie & Co.*

This claim is in respect of jute shipped on the *Rappenfels* in pursuance of three orders. The first of these orders was from Luther & Seyfert of Bremen for the shipment of goods from Calcutta in through-freight to Messrs. Luther & Seyfert Ld., Accra; the 2nd was from Carl Tessman of Hamburg for the shipment of goods from Calcutta in through-freight to Lagos; and the 3rd was from Carl Tressman for the shipment of goods from Calcutta to Hamburg.

In each case the bill of lading was made out to the order of Messrs. Gladstone Wyllie & Co. It is proved in this case that the bills of lading were retained by these claimants and are still in their possession as the Banks refused to discount bills.

For the reasons I have stated at length in dealing with Messrs. Hari Singh Nihal Chand's claim, I hold the property in the goods is in Messrs. Gladstone Wyllie & Co. and, as in this case too, all the transactions relating to the goods were prior to the contemplation of war, I decline to condemn the goods and direct their restoration.

The order of restoration will in each case be subject to the payment of proper charges, if any.

W. M. C.

Attorney for the Crown: *C. H. Kesteven.*