

Privy Council Appeal No. 26 of 1918.

In the matter of proceeds of Cargo ex Steamship "Hellig Olav,"
The Vendsyssel Packing Company - - - - - *Appellants*

v.

H.M. 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 3RD DECEMBER, 1918.

Present at the Hearing:

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

[*Delivered by* LORD PARMOOR.]

The appellants are a Danish Company carrying on business at Copenhagen in fresh and pickled salmon. They have branches in America, which, in the ordinary course of business, buy the salmon direct from the fisheries. It is only in exceptional cases that they buy from other firms. The salmon is sent to New York and shipped thence to Copenhagen, for sale mainly in Denmark, but also in other countries, including Germany. In Germany the sales were generally, though not entirely, made through branches of the appellants' firm in Berlin and Schlutup, near Lübeck. The branch in Berlin was established in 1907. The last lot of salmon, comprising eight barrels, was sent to Berlin on 19th January, 1916. The branch at Schlutup, near Lübeck, was established in 1909. The last lot of salmon, comprising eight barrels, was sent to Schlutup on the 19th December, 1915. The appellants on the 22nd December, 1915, wired to Hansen, their representative at Seattle, to ship a carload of Columbia River Salmon, and, on the 8th January, 1916, sent a further message, to ask whether the salmon had been shipped. On the

21st January, 1916, they sent a wireless message in the name of Rollo Export Company to Tyee Fisheries, asking whether the Columbia River and Alaska Salmon had been shipped, and received a reply that it had been shipped by steamer on the 3rd February. It is clear, therefore, that, when the first message was sent in reference to the shipment of the salmon in question, the last lot of salmon had only two days previously been sent to Schlutup, and that the last lot of salmon was not sent to Berlin until nearly a month later.

A consignment of 52 tierces of pickled salmon for refrigerator was shipped on the Steamship "Hellig Olav," to be carried under the terms of a Bill of Lading dated the 4th February, 1916. The appellants were the shippers and consignors, and the goods were to be delivered at Copenhagen to the appellants or their assigns. Under the terms, therefore, of the Bill of Lading there was no consignee as distinct from the consignor, the control of the goods remained at the disposal of the shipper and consignor, and there was no independent outside interest in any other party. In effect the Bill of Lading left the disposal of the goods at the order of the consignors, and the ultimate destination in their discretion. At the time of shipment the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild.

The steamship "Hellig Olav" called at Kirkwall on or about the 15th February, 1916, when the tierces of salmon were ordered to be detained, but allowed to proceed upon an undertaking given to H.M. Government to store the goods in Copenhagen until the close of the present war, or to return them to England for the purpose of Prize proceedings. It was not until they had become aware that the seizure had been made, that the appellants obtained a guarantee in the usual form from the Merchants' Guild of Copenhagen. A correspondence followed between the appellants and the British Legation at Copenhagen and the British Foreign Office, and, finally, on the 25th November, 1916, the sum of £2,019, representing the insured value of the tierces of salmon, was paid into the Prize Court, for the purpose of obtaining a judicial decision on the legality of the seizure. Evidence was filed on behalf of the claimants, but the respondent, the Procurator-General, filed no evidence, relying on the admissions contained in, and deductions to be drawn from, the appellants' affidavit and documents and the correspondence between the appellants and the Procurator-General, the British Legation at Copenhagen, and the British Foreign Office. The case was heard by the learned President, who, on the 23rd February, 1917, pronounced the tierces of salmon to be contraband of war liable to confiscation, and he condemned the same for the sum of £2,019 then in Court. It was argued on behalf of the appellants that it was not competent for the Prize Court to condemn the goods for the sum of £2,019 in place of the condemnation of the goods themselves. Their Lordships are of opinion that, having regard

to the terms of the agreement made on the 25th November, 1916, namely, that the sum of, £2,019 should be disposed of in accordance with the order of the Prize Court, this objection cannot be maintained.

The main argument urged on behalf of the appellants was that the doctrine of continuous voyage did not apply, and that the shipment of salmon was not within the terms of the modification contained in 1 (iii) of the Declaration of London Order in Council No. 2, 1914. This modification provides that: "Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy." The construction of this modification was considered in the case of the "Louisiana" (1918 A.C. 461), and the judgment of their Lordships covers the present case. The question arose, in that case, whether the ship's papers show who is the consignee of the goods, if the shipper retains control, and can alter the destination of the goods according to his interest, and at his own discretion. It was pointed out that under these conditions the shipper would retain as full control of the goods as if the consignment had been to order, and that conditional contraband could be supplied to the enemy Government, through neutral ports, as freely as if Article 35 of the Declaration of London had been adopted without modification. The judgment proceeds: "In their Lordship's opinion the words 'the consignee of the goods,' must mean some person other than the consignor to whom the consignor parts with the real control of the goods." In the present case there is no person other than the consignor to whom the consignor parts with the real control of the goods, and it follows that the tierces of salmon are liable to capture as conditional contraband, although on board a vessel bound for a neutral port. It is not necessary to consider the further provisions of (iii), but their Lordships do not desire to throw any doubt on the finding of the President that the ship's papers did show a consignee of the goods in territory belonging to or occupied by the enemy. The next modification (iv) provides: "That in the cases covered by the preceding para. (iii), it shall lie upon the owners of the goods to prove that their destination was innocent." The effect of this provision is that in cases covered by para. (iii) the neutral trader has brought himself under suspicion, and that it is incumbent upon him to displace such suspicion by sufficient proof of the innocency of the destination of the goods which have been seized. The question therefore arises whether the appellants have discharged the obligation which this provision throws upon them. At the date of shipment, the tierces of salmon had not been declared

as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild. This omission is in itself a ground for grave suspicion. Their Lordships are not satisfied that any sufficient explanation has been given consistent with the innocency of the destination of the tierces of salmon. There appears to be no valid reason why this declaration should not have been made and the guarantee given in the usual course of business. On the other hand, the appellants had undoubtedly an inducement to endeavour to import salmon which could be sent forward to Berlin or Schlutup without the risk that they would be placed on the black list. When the first message was sent to Hansen at Seattle to ship a carload of Columbia River Salmon, the last lot of salmon had not been sent to Berlin, and the last lot had only been sent, a few days earlier, to Schlutup. There is no direct evidence when the branches at Berlin and Schlutup were actually closed, and the inference is that they had not been closed at the date of the shipment in the "Hellig Olav." At one time the appellants were placed on the black list, but subsequently removed on the explanation that the salmon sent to Germany had not been imported subject to declaration or guarantee. Their Lordships fully accept the accuracy of the explanation given by the appellants, but it shows the existence of a business under which salmon was imported for enemy destination when not subject to the restrictions which a declaration and guarantee would impose. Under these circumstances, it was clearly the duty of the appellants to make a full and free disclosure of all the conditions under which they were carrying on their business as importers of salmon. As a matter of fact, the only reference to Germany in the first statement made by the appellants is that, for a short time after the war, some imported goods had been sent to that destination, whereas it appears on further inquiry and in the second report of the accountants on the 3rd July, 1916, that eight barrels of salmon had been sent to Schlutup on 19th December, 1915, and eight barrels to Berlin so late as the 19th January, 1916. Their Lordships are unable to come to the conclusion that the appellants did at the outset make a full disclosure of all the relevant factors attaching to their business, and it has been pointed out in previous cases that it is incumbent upon neutral traders to make such a disclosure in cases where the liability is upon them to remove elements of suspicion which affect the destination of the seized cargo.

Their Lordships therefore find that in the present case the appellants have not discharged their obligation of proving that the destination of the salmon was innocent. During the hearing of the appeal a petition was presented to their Lordships on behalf of the appellants to admit fresh evidence not before the President at the hearing, but their Lordships were unable to entertain this petition for reasons stated during the hearing of the appeal. The appeal must be dismissed with costs, including the costs of the petition to admit fresh evidence. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

IN THE MATTER OF PROCEEDS OF CARGO EX
STEAMSHIP "HELLIG OLAV,"
THE VENDSYSEL PACKING COMPANY

v.

H.M. PROCURATOR-GENERAL.

DELIVERED BY LORD PARMEOR.

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