

Privy Council Appeal No. 137 of 1919.

In the matter of part cargo ex Steamship "Prins der Nederlanden."

Schoeffler and Company - - - - - *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 15TH JULY, 1920.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal by Schoeffler and Company, Merchants at Amsterdam, from a judgment of Lord Sterndale when President of the Probate, Divorce and Admiralty Division, sitting in Prize, whereby he condemned as lawful prize 7,780 bags of cocoa claimed by the appellants.

The cocoa had been part of the cargo of the German steamship "Assuan," shipped on her at Guayaquil in June, 1914. On the outbreak of war, the "Assuan" took refuge at Las Palmas, and there her cargo of cocoa remained for many months either on board or in warehouse. The cocoa had been shipped by one Lautaro Aspiazu, and is said to have been consigned, at any rate as to part of it, to a German firm, Hesse Neumann and Company, of Hamburg, who are alleged to have been agents for the sale of it for Aspiazu. The bills of lading, however, set out in the record are to order or assigns, and appear to be indorsed in blank, so that there is no documentary evidence of the consignment being to Hesse Neumann and Company. Part of the cocoa which had been on the "Assuan" was in March, 1915, shipped at Las Palmas on the Dutch steamer "Rijn," bound for Rotterdam, which was captured by a British cruiser, and her cargo formally seized as prize on the 6th April, 1915. That cocoa was claimed by a Dutch firm, P. Onnes and Zoon, but was condemned as lawful

prize by the late Sir Samuel Evans, and the condemnation was upheld on appeal by this Board. On the trial in the case of the cargo ex "Rijn" [1917], P. 145, Sir Samuel Evans found as a fact that the cocoa then in question was at the date of seizure the property of one G. O. Embden, of Hamburg, and in substance that finding was acted on by this Board in a judgment to be hereafter referred to.

The claimants in the present case, Messrs. Schoeffer and Company, carry on business at Amsterdam and at Rotterdam. There are two partners in the firm, J. S. A. Rouff, who was German born but became a naturalised Dutchman, and was at one time German Consul at Rotterdam, and C. A. Schoeffer, who seems to have been Dutch by birth, but is said in Mr. Greenwood's affidavit to have been naturalised as a German, and, although he has in an affidavit denied several allegations in Mr. Greenwood's affidavit, he has not denied that. The claimants allege that in March, 1915, they bought 2,804 bags of cocoa then at Las Palmas, which was part of the cargo of the "Assuan," and they say that the contract was made verbally at Amsterdam by them with G. O. Embden above mentioned, who, they say, was representing Hesse Neumann and Company as agents for Aspiazu. They say that that sale was confirmed in writing by a broker's note dated the 10th March, 1915, signed by one Peter Paulsen, of the firm of Petersen and Paulsen. It was not shown how Petersen and Paulsen came on the scene or in what capacity they acted. The contract note describes the quality of the cocoa, and states the price of sale. The delivery was to be at Las Palmas, the cost of transshipment from the "Assuan" to export steamer was provided for. The quality was to be according to Hamburg arbitration on a sample to be drawn at port of arrival. Payment was to be "wholly or partly cash, less 1 per cent. discount or three months' first-class bank acceptance against delivery of documents," and as to insurance, "Policies to be handed over just as they stand." This appears to mean that the original documents (bills of lading and policies) relating to the original shipment on the "Assuan" were to be handed over in exchange for the cash or acceptance.

The cocoa so bought was paid for in a few days in a somewhat peculiar manner. A letter dated the 19th March, 1915, from the claimants, Schoeffer and Company, to the Deutsche Bank, Hamburg, is put in evidence by which they requested the bank to "pay to Hesse Neumann and Company, Hamburg (on account of the credit opened in their favour) marks 277,317.60 to the credit of the firm of Lautaro Aspiazu, Guayaquil, and we request you to favour us with your confirmation."

No statement appears anywhere in the evidence as to how or by whom the credit drawn upon had been opened. It would be far more convincing if the documents by which the credit with the Hamburg bank had been opened had been put in evidence, instead of the documents by which it was operated on. If Schoeffer and Company had opened the credit with their own money, and if the story of the purchase is true, that credit must have been opened within a few days before it was drawn on, and there

could be no difficulty in setting out the documents. There is nothing in the evidence except an allegation in general terms in one of Schoeffers' affidavits that they had paid for the cocoa which in any way even suggests, much less proves, that they had paid for it with their own money, and all the documents put in evidence are consistent with the credit operated on for the payment having been opened by Embden or someone else engaged, as he was, in getting goods through to Germany. There was great delay in getting the cocoa shipped from Las Palmas. Eventually it started on the "Prins der Nederlanden" on or about the 6th October, 1915, consigned to the order of the Netherlands Oversea Trust at Amsterdam. The delay of so many months after the purchase was doubtless owing to ineffectual efforts to get it shipped without consigning it to the Netherlands Oversea Trust. The ship was stopped on the 15th October by a British cruiser, but was allowed to proceed to Amsterdam on an undertaking that the cocoa should be returned to London, which was accordingly done, and there it was formally seized as prize on the 4th December.

There is some doubt whether the claimants signed the usual guarantee to the Netherlands Oversea Trust before the seizure, but the claimants have always said that they did return the document sent to them on the 4th September, and their Lordships do not attach much weight to this doubt. It would have been quite futile to deny their obligation not to export further, even if they had omitted to sign the formal document.

The case for the Crown mainly depended on Mr. Greenwood's affidavit as to the history of the parties concerned, and on intercepted letters and telegrams, and the claimants rely principally as their answer to the suspicions raised by the case for the Crown on the fact that the consignment was to the Netherlands Oversea Trust. The facts are set out fully in the judgment of the learned President, and it is unnecessary to repeat them in detail. Of the intercepted letters the most important are a letter dated the 12th May, 1915, from one Perl, who describes himself as "the Imperial Ambassador," and who was German envoy at Port au Prince, and is said to have been at one time in charge of the German Consulate at Rotterdam, and another letter dated the 24th July, 1915, from G. O. Embden, apparently to the firm of W. Borch and Company, in which he was a partner, or to some other German to whom he could write confidentially. Each letter discusses the difficulty of getting goods through to Germany and the best way of doing it, and gives directions to the correspondents to whom the letters are addressed. Perl's letter seems to have been a circular addressed to many firms. The difficulty arising from a consignment through the Netherlands Oversea Trust is recognised, and advice is given never to consign in that way if any other way can be devised. Perl in his letter says, however, "In spite of all this, it does not appear to be quite impossible to supply Germany with a number of goods from here which she requires." Inducements to do so are held out, and the letter proceeds: "The shipment should be made by neutral

ships and to one of the following Rotterdam firms, of nearly all of whom I have personal and favourable knowledge." Then the first-named in the list of the firms is that of the present claimants, Schoeffler and Company.

Embden in his letter, after discussing the difficulty, also advises shipment to "my friends, Schoeffler and Company, in Amsterdam. Shipment to Rotterdam is no more necessary, as it is found that the objection to Amsterdam as a fortified place no longer exists." It is suggested for the claimants that neither Perl nor Embden had authority to state that they were willing to undertake business of this character, but not only is the coincidence significant, as the President remarks, but, as Embden's letter was dated in July, and in the previous March Embden had himself made with the claimants the arrangements now in question, the inference is almost inevitable that he was writing of what Schoeffler and Company would be willing to do from his actual knowledge of what they had already agreed with him in the previous March to do.

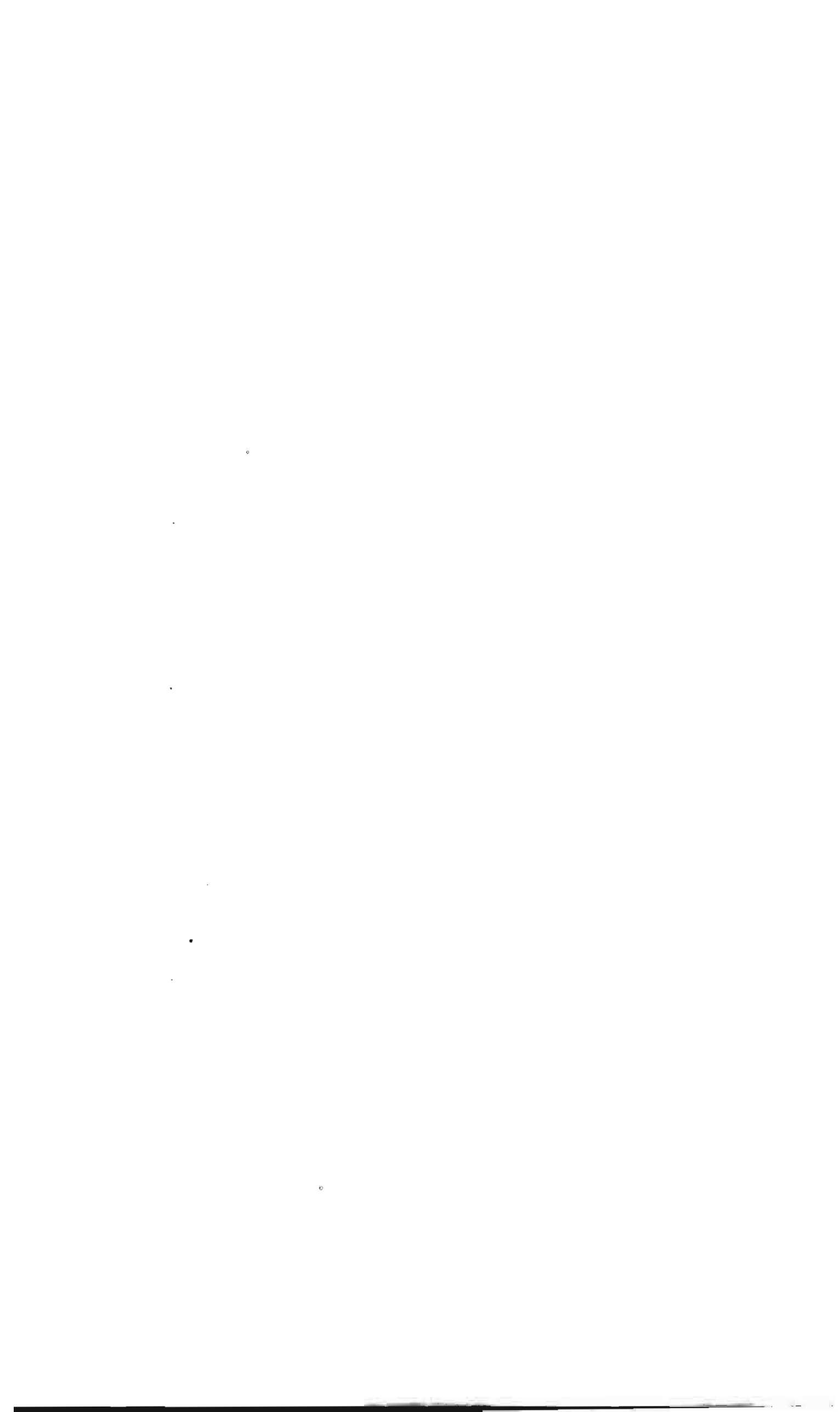
The facts of this case are singularly like those in the case of the "Rijn" [1919], A.C. 546, already referred to, where also letters had been intercepted. In the judgment of this Board delivered by Lord Parmoor, the matter is summed up by saying :—

"Such a letter is only consistent with the position of the appellants being such that they were acting merely as instruments of Embden and subject to his directions, and that the appellants, in concert with Embden, were concerned in an attempt to get the goods through to Germany, and that they were not neutral purchasers on their own account."

The same may be said of the letters in the present case, with at least as much force, as in the present case there is, in addition, the significant omission to prove, or even to state, who opened the credit out of which the goods were paid for. Doubtless it was Embden or those acting in concert with him, as in the case of the "Rijn." It has been held in other cases that the mere fact of the consignment being to the Netherlands Oversea Trust is not enough of itself to negative German destination. It of course creates a difficulty in getting the goods to that destination, but difficulties may be overcome by ingenuity and unscrupulousness, and where the intention to overcome them, if possible, is obvious, the destination is still proved, notwithstanding the possibility or even probability that the intention may be frustrated.

In this case, as in the case of the "Rijn," the destination to Germany was clearly to Hamburg, which was an enemy base of supply. The goods, therefore, as conditional contraband, were liable to condemnation, even if the property was in the claimants, of which there is no satisfactory proof.

The learned President in this case has come to the conclusion that there was such ground for suspicion as to shift the onus on to the claimants, and also that they have failed to satisfy that onus. This is quite safe ground. Their Lordships are of opinion that on the facts proved it is impossible for them to differ from either of those conclusions, and they will therefore humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

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HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY SIR ARTHUR CHANNELL,

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