

*Privy Council Appeals Nos. 124 and 125 of 1920.*

*In the matter of part cargo ex Steamship " Frederick VIII."*

*In the matter of part cargo ex Steamship " Oscar II."*

Jens Toft - - - - - *Appellant*

*v.*

H.M. Procurator-General - - - - - *Respondent.*

*(Consolidated Appeals.)*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND  
ADMIRALTY DIVISION (IN PRIZE).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY, 1921.

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*Present at the Hearing :*

LORD SUMNER.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

*[Delivered by SIR ARTHUR CHANNELL.]*

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The appellant in this case, Jens Toft, is a Danish subject carrying on business as a merchant at Copenhagen. In the Prize Court he claimed to have released to him as owner the proceeds of the sale made by order of the Court, of 1,500 bags of cocoa beans, which when laden as to part on the S.S. " Frederick VIII " and as to part on the S.S. " Oscar II," had been seized as prize. Lord Sterndale by a decree dated 25th July, 1919, dismissed the claim and pronounced the cocoa beans to have been lawful prize as conditional contraband destined to an enemy base of supply. From that decree the present appeal is brought. The case for the Crown was in the main what is known as a statistical case. It was shown by the affidavit of Mr. Fuller Smith that there was an enormous increase after the outbreak of war in the amount of cocoa beans imported into all the Scandinavian countries. In the case of Denmark it was in the year 1915 about ten times as much as the yearly average of the three years prior to the war. It was further shown that the appellant, Jens Toft, had himself imported into Denmark in his own name no less than 1,109 tons of cocoa beans in the last six months of 1915, being in the six months nearly half

of the total annual pre-war consumption of the whole of Denmark. There were also significant figures as to the re-exports to Germany, and as to the imports and exports of all the Scandinavian countries both of cocoa beans and coffee. At the time of the hearing of the case now under appeal these facts had become well known in this country and particularly in the Prize Court. There was also evidence by Mr. Greenwood of the activities of many persons whose names appear in the various intercepted and other documents put in evidence in this case. In particular J. Aron and Company, through whom the appellant claims title to the two parcels of goods now in question, in one case by direct purchase from them, in the other by sub-purchase, are shown to have shipped in 1915 very large quantities of coffee and cocoa beans to Scandinavian countries, and to have sent one T. White to Copenhagen as their agent to arrange for forwarding to Germany the goods so sent. The Revisions Banken is a bank whose interests are stated to have been confined to the business of exportations to Germany, and apparently Wilhelm Schulstad is a director of the bank (see page 115 of the record, where, however, the name is spelt Schukstad). Paulsen and Company is a firm with a branch in Hamburg, and since the outbreak of war had been engaged in trading regularly with Germany.

Passing to the details of the transactions now in question, the first thing in order of date is that on the 9th November, 1915, the appellant is said to have bought from Wilhelm Schulstad 1,000 bags of cocoa beans at a price of 20½ ore f.o.b. New York for shipment by passenger boat, at latest by the "Oscar II," advertised for departure on 4th December. A letter is exhibited from W. Schulstad to the claimant stating the purchase to be "from my firm in New York—Collin and Berry;" stating further that the goods are to be shipped to Copenhagen in Schulstad's name, who is to insure them, and that the appellant was to pay all expenses as if the goods had been shipped in his name; and on the documents appearing through the Revisions Banken in Copenhagen the appellant was to pay the price regardless whether in the meantime "the goods have been bought up or have been imposed clauses of any description." This seems to mean regardless of whether the goods had been captured or had been put under any restrictions as to the manner in which they should be dealt with. There is a letter in reply to this in which the appellant agrees to the terms. The goods, or rather 989 of the 1,000 bags, were shipped on the "Oscar II" under bills of lading dated the 2nd December. The copies of the bills of lading as printed in the record are unintelligible and are evidently misprinted, but the originals have been produced to their Lordships and the consignors are Aron and Company, not Collin and Berry, and the consignee is W. Schulstad. The "Oscar II" was stopped at Kirkwall on the 16th December, and was allowed to proceed on the terms of this cocoa being returned. On these facts it is clear that the ship's papers did not show the real consignee. If the suggestion of the Crown that the names used

were mere covers for the transaction of Aron of course they did not, and also if the alleged purchase on the 9th of November was a genuine transaction, the position was to be as if the goods had been shipped to the appellant so that he became the real consignee. The 11 bags making up the 1,000 appear to have been crowded out of the "Oscar II," and came forward by the "Frederick VIII," sailing two days later. It was agreed below and before this Board that the 11 bags stood in precisely the same position as the 989, and that the decision should be the same as to each lot. This being so it lies on the appellant to show that the destination of the 1,000 bags was innocent. In the case of each ship there was a difficulty in obtaining shipping for the return of the goods, and ultimately it being found that the goods would cease to be fit for human consumption if they were stored longer, they were sold in Copenhagen under an order of the Court with the consent of the Procurator-General, and the proceeds of sale were remitted to the Marshal.

As to the 500 bags claimed by the appellant which, as well as the 11, came by the "Frederick VIII," the case put forward is somewhat different. The appellant alleges that he bought this parcel from Paulsen and Company by a conversation on the telephone on the 1st December, 1915, confirmed by a letter of even date to him from Paulsen which is exhibited. This states that they have telegraphed an order to Aron and Company, of New York, for 500 Fair Bahia cocoa beans at 20 $\frac{3}{4}$  cents, shipment by the "Frederick VIII," and that the appellant was to open a credit with the Hanover National Bank, New York, for reimbursement. The letter does not state that the price is to include freight to Copenhagen, but a letter purporting to be an order by the appellant to the Revisions Banken for opening the credit with the Hanover Bank states the price as cost and freight to Copenhagen, and the invoice subsequently handed over with the bills of lading is in accordance with this. There are intercepted wireless messages referring to this transaction. From these it appears that the communication of Jens Toft's name to Aron was made, not by Paulsen, but by White under his assumed name of Seitz. This message seems to have been handed in on the 1st, although not despatched until the 3rd. On the 1st Aron had handed in at New York a wireless message to Seitz that he had large bookings for the "Frederick VIII" and wanted offers. This had not apparently been despatched until the 4th, so that the sending of Jens Toft's name by Seitz could not have been an answer to it, nevertheless having regard to what White and Aron were doing, it seems to show that there was a considerable quantity of cocoa beans for Germany coming by the "Frederick VIII," and that names were wanted as consignees to cover the transaction. There are three intercepted wireless messages on the 6th, 8th and 10th, on which the appellant's counsel strongly relies, which state first that Toft's credit was missing and then that it had arrived. It is suggested that Aron's anxiety about the credit arriving is an indication that this at any rate was a genuine sale, but the money would doubtless be wanted from whomsoever it was expected. A large quantity of goods was being shipped and doubtless there

would be charges on them which would have to be paid before the goods could be cleared. As to this parcel the freight was to be prepaid, and it would probably be so as to all. The appellant states that on the 24th December he paid for the goods to the Revisions Banken and took up the documents from them. This was after the seizure of the "Frederick VIII," which had apparently sailed from New York on the 8th, and was stopped at Kirkwall on the 18th. The President has treated this payment as the date at which the property would have passed, and it is not very surprising that he should have done so, as the claimant's affidavit gives it as the date of payment, and this is repeated in the appellant's case on appeal, paragraph 3. Further, the appellant in his affidavit of 30th January, 1919, page 88 of the record, calls Schulstad the formal owner at the date of seizure. It is, however, argued that both the Revisions Banken, and the Hanover Bank were the claimant's agents, and that the property would pass to him when the Hanover Bank took up the documents, even although it was with borrowed money. If the property was in Aron at the date of seizure, the doctrine of infection would apply as he owned other contraband on board which was condemned. If the transaction was a genuine one, and the money to take up the documents was really provided by the Revisions Banken on the claimant's credit, that is was lent to him by them, the claimant, who was the consignee named in the bill of lading, would be a real consignee and the Order in Council would apply in his favour.

The question as to the parcel of 500 bags is therefore solely whether the evidence of the claimant ought to have satisfied the Judge of the Prize Court that the transaction was a genuine one. He was in fact not so satisfied, but thought that the claimant's name, like so many others, was merely used as a cover for the transactions of Aron and White. It becomes necessary on this to consider the explanation which the claimant offers of the enormous amount of his importations of cocoa beans and coffee. He says that he never sold any to Germany and he produces a certificate of accountants that his books do not show that he did. Affidavits and certificates of this kind are often more significant for what they do not say than for what they do. If the claimant's name only was used the purchase of the goods would probably not pass through his books, or if it did it is hardly likely that a German destination would be entered in his books. What has become of the 1,109 tons of cocoa beans imported by the claimant into Denmark in the latter half of 1915? It practically equals a normal six months' consumption by Denmark. He says that his business had increased, but however much it had increased he could not have been the only merchant to supply all Denmark. He says that he employed a Swede as a traveller and sold some to Sweden. He does not state the actual quantity and it may be assumed not to be very large—in fact in one affidavit he states that it was coffee only which he sent to Sweden. He says that fearing supplies would be entirely stopped by England he imported as much as he could and in consequence he had in the beginning of

1916 "such a stock as would at any previous time have taken him many years to sell, that is to say about 32,000 bags of coffee and about 9,600 bags of cocoa beans, of which, however, about 4,300 bags of coffee and 3,600 bags of cocoa beans were in England." This 6,000 bags of cocoa beans which he admits having in stock in Denmark early in 1916 is less than one-third of the quantity shown by Mr. Greenwood's figures to have been imported by him into Denmark in the last half of 1915—1,109 tons represents about 18,800 bags. What has become of the 12,800 bags? It is something like four months' consumption for the whole of Denmark, and it is more than double the quantity which he admits that it would have taken him many years to sell, and, as shown by the necessity for selling the consignments now in question, cocoa beans are a commodity which after a time become unfit for human food. It is of course probable that Mr. Greenwood's figures include consignments which were seized as prize and never reached Denmark, but as there has been no appeal on these, the fact, if it is so, hardly helps the appellant and is not very consistent with the character he gives to himself. The money which was to pay for them all came from the Revisions Banken, probably therefore from German sources. The claimant offers no proof except his own statement that he was financed by banks or as to the source from which he obtained the very large sums he would have required if his alleged transactions were genuine. All the persons through whom he claims the parcels now in question are shown to be concerned in getting goods through to Germany, and they are all dealing with Hamburg as a base of supply.

The only possible inference from all the facts appears to their Lordships to be that the appellant's name was used to cover the importation of goods which went through to Germany, and never came into the appellant's stock even if his story that he only sells that stock for home consumption is true. The learned President has not accepted the claimant's story, and their Lordships see no reason to differ from the result at which he has arrived. They will therefore humbly advise his Majesty that the appeal should be dismissed with costs.

In the Privy Council.

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*In the matter of part cargo ex Steamship  
"Frederick VIII."  
In the matter of part cargo ex Steamship "Oscar II."*

*v.*  
JENS TOFT

H.M. PROCURATOR GENERAL.

*(Consolidated Appeals.)*

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DELIVERED BY SIR ARTHUR CHANNELL.

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