Privy Council Appeal No. 96 of 1920.

In the matter of the steamship "Norne" and other vessels.

H. K. Schrevel's Import and Export Company (on behalf of Enrique Rubio) - - - - - - - - - *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 16TH MARCH, 1921.

Present at the Hearing:
LORD SUMNER.
LORD PARMOOR.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

The appellants are an import and export company claiming on behalf of Enrique Rubio, who was the shipper and consignor of certain boxes of Valentia oranges seized on the Norwegian S.S. "Norne," "Grove" and "Hardanger," during December 1915, while on voyages from Valentia, in Spain, to Rotterdam, in Holland. The amount involved is not considerable, but it was stated that the case had been selected as a test case which would govern a number of other cases.

The first point raised on behalf of the appellants is that the ship's papers in each case disclose a consignee who has the real control of the goods, and that therefore the seizure comes within the protective provisions of the Order in Council of the 29th October, 1914. If this contention can be maintained the appellants would succeed. The consignee named in the bill of lading covering the oranges, shipped on the "Norne" was J. de Graaf, and the consignee named in the other two bills of lading, covering the oranges shipped on the "Grove" and "Hardanger," was Van Hoeckel. Both consignees were members of a syndicate composed of dealers at Rotterdam with the intention of importing fruit direct from Spain. The operations of this syndicate were controlled by an agreement of September, 1915, but in the view of their Lordships

it is not necessary to express any opinion on the relationship created by the agreement between the syndicate, and the constituent members, whose names were inserted as consignees in the bills of lading. In any event the syndicate is not the consignee named in the bills of lading, and therefore cannot be regarded as the consignee within the Order in Council of the 29th October, 1914. The true position of the parties appears to be accurately stated in the affidavit of Rubio sworn on the 13th July, 1918. He states that Schrevel and Company were to arrange freight, space and insurance, and that the fruit shipped by him was to be sold on his behalf at Rotterdam by Schrevel and Company on a commission of 5 per cent., that the bills of lading were signed by Enberg and Company, duly representing the captain of each ship, and that, by indication of Manuel Mas, who at that date was acting as agent for the syndicate in Valentia, they were endorsed to order of de Graaf and Van Hoeckel, genuine Dutch fruit firms associated with Schrevel and Company for selling fruit on his account, and that all fruit shipped in the three steamers was the property of the Spanish fruit exporters, no cases being sold to any body, but being consigned on their account to be sold by auction at Rotterdam. The effect of this statement is that the boxes of oranges in question were consigned to sale agents in Rotterdam, whose authority—apart from any special provision —was revocable at any time by the consignor and shipper. Sale agents, whose authority is revocable by the consignor, are not consignees who have a real control of the goods consigned within the terms of the Order in Council of the 29th October, 1914 (*Urna* 1920, A.C. 899). The result is that the contention of the appellants under the first head cannot be maintained.

At the date of the seizure the oranges had been declared conditional contraband. It is therefore for the appellants to prove that they were not destined for an enemy government or an enemy base of supply. The question to be determined is whether they have satisfactorily discharged the burden which rests upon them.

It was suggested in the affidavit filed on behalf of the respondent that Enrique Rubio was not in reality a fruit dealer or exporter, but a shipping clerk in the branch house of a German firm. In his affidavit in reply of the 24th November, 1919, Enrique Rubio swears that he is not and never has been a shipping clerk, or employed as such, but that he had carried on business as a fruit merchant at Sagunto, in the Province of Valentia, since 1908. The learned President was satisfied that Enrique Rubio was a fruit grower and dealer, or a fruit grower only, and that there was a mistake in the suggestion that he was a mere pretended or invented owner of fruit who had come out of some mercantile office in order to figure as a consignor. There appears to be no ground to differ from this finding, and the respondent on the hearing of the appeal did not allege that Enrique Rubio was a pretended or invented owner of fruit.

It is not sufficient for the appellants to establish that Enrique

Rubio was a Spanish fruit exporter who had no intention of sending his goods either to an enemy government or to an enemy base of supply. The voyage is not limited to that which a shipper of goods sets in motion. Whether goods in any particular instance are contraband, by application of the doctrine of continuous voyage, is a question of fact. Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent. When an exporter ships goods under such conditions, that he does not retain control of their disposal after arrival at the port of delivery, and the control but for their interception and seizure would have passed into the hands of some other persons, who had the intention either to sell them to an enemy government or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband. The case for the respondent is that the cases of oranges on arrival at Rotterdam would have passed under the control of Lutten and Sohn, of Hamburg, whose intention it was to send them to the enemy base of supply at Hamburg. The next question therefore to consider is whether this contention is established.

The learned President has found as a fact that Lutten and Sohn, of Hamburg, had a substantial part in the control of the business which was being carried on and a substantial interest in the transactions involved, which went beyond a mere commission of 10 cents per case upon oranges which might be forwarded, but the issue remains to be determined whether this interest was sufficient to give them control over the disposal of the cases of oranges and to determine Hamburg as the place of destination.

There seems to be no reason for not accepting the evidence, given on behalf of the appellants, as to the conditions under which the syndicate, referred to in the case as Schrevel and Company, was started. In 1913 a ring of fruit dealers interested in the fruit trade between Valentia and Rotterdam had a contract with the Royal Nederlands Steam Navigation Company, under which the ring were entitled to all the space for fruit on the ships of that company, which owned the only direct line by which perishable goods could be carried direct from Spain to Holland. The syndicate, composed of fruit growers, was formed in February, 1913, to fight the ring, and with the intention of breaking the monopoly of the ring. In 1914 the syndicate endeavoured to import oranges into Rotterdam via London, but, owing to the perishable character of the fruit, it was not successful, and the syndicate ceased to operate in January, 1915. In the summer of 1915 the syndicate was reformed with the intention of importing fruit direct from Spain to Holland, and the operations of the syndicate were regulated under articles of partnership signed at Rotterdam on the 13th September, 1915. As early as August, 1915, the S.S. "Norne" had been chartered for the purposes of the syndicate, and it is material to observe that this charter was

arranged some time before Lutten took any part in the business. After the formation of the syndicate, Van Ronnen was sent out as agent of the syndicate to Spain. Subsequently this agency was terminated, and Manuel Mas was appointed in his place, who had acted for many years as agent for Lutten. There are a number of cablegrams which show that Van Ronnen objected to the transfer of the agency to Manuel Mas, but finally the matter was arranged. In September, 1915, Lutten had an interview with Hechterman at the town of Bentheim, in Germany. Manuel Mas was also present. No document containing any record of the meeting was found, but Mr. Lutten, on behalf of Lutten and Sohn, made proposals with regard to fruit import from Spain to Holland, and to the chartering for this purpose of a series of ships. The learned President accepts the statement of Mr. Hechterman that he did not bind himself at this interview to Mr. Lutten, and that whatever expectation Mr. Lutten may have formed, Mr. Hechterman kept himself free. At this time there were negotiations with the British Government on behalf of the syndicate that the vessels chartered by them and carrying fruit should be allowed to proceed direct to Holland with their cargoes. In October, the British Government refused this request, and negotiations were resumed between Mr. Hechterman and Mr. Lutten. When Mr. Lutten was unable to import into Hamburg, owing to the war, he had a valuable connection in Valentia. The case of the appellants is that he sold his goodwill and agencies to the syndicate for a consideration, and that there was no arrangement which placed the oranges in the control of Mr. Lutten at Rotterdam so as to enable him to direct that they should be forwarded to Hamburg. The facts are stated in the second affidavit of Mr. Hechterman sworn on the 18th July, 1919. He says that one of his company's German relations, Messrs. Lutten and Sohn, of Hamburg, were large importers of oranges, &c., but that owing to the war their business had been entirely brought to a standstill, and that their interest was to prevent their competitors from getting hold of their relations such as agents, growers, &c. On the other hand he states that it was to the advantage of the company to obtain control of a well-founded organisation as this would place them in a position to oppose the ring with greater success, that accordingly an agreement was arrived at between the company and Lutten and Sohn that so long as the latter would be unable to resume business, his company should take over their agents on its own account and employ them for its own business, that in this way his company established relations in Spain and that those persons who had previously been in the employment of Lutten and Sohn became the employees of his company, and have since 1915 been working as agents of his company. Mr. Hechterman further states that under this agreement, Manuel Mas became the agent of his company, and that telegrams and letters exhibited to his former affidavit sworn herein on the 4th December, 1918, relate to his employment, and that it was the business of Mas to find persons willing to consign their goods to his company. No doubt the

exact nature of the arrangement may not be capable of accurate ascertainment, and, owing to the capture, there is no evidence how the arrangement would have been carried through had the oranges arrived at the port of Rotterdam in the ordinary course of business. It is sufficient to say that their Lordships can find no evidence to support affirmatively the contention that Lutten and Sohn would have had the control of the destination of the oranges after their arrival at Rotterdam or that it would have been within their competency to order that the oranges should be sent from Rotterdam to Hamburg.

The question still remains whether having regard to all the facts the appellants have discharged the onus which the Order in Council places upon them of establishing that, at the time when the oranges were intercepted, and seized, their destination was not an enemy base of supply. The contention of the appellants is that the destination of the voyage was Rotterdam, and that if the voyage had been carried through without interruption the oranges would in the ordinary course of business have been offered to local dealers at public auction, thereby becoming part of the common stock of a neutral country, to whatever consumers they might ultimately be sold. It was said that if this contention is not accepted, and it is held that the anticipation that a large proportion of the oranges may go for consumption in Germany is sufficient to make them contraband, the consequence is that goods within the category of conditional contraband would be liable to seizure and condemnation wherever there was anticipation that they might be largely sold to enemy customers. The answer is that the anticipation of a large sale to enemy customers is not sufficient to make goods liable as articles of contraband, but that there must be anticipation of sale either to an enemy government, or an enemy base of supply. For instance, in the present case, there must be anticipation that a large number of oranges sold would find their way to Hamburg, which has already been held in many cases to be an enemy base of supply. Whether the appellants have negatived the suggestion that the destination of the voyage was Hamburg must be determined on the documents and oral evidence produced at the trial. Their Lordships are unable to hold that the mere fact that goods will be offered for sale by auction at the port of arrival is in itself conclusive of the innocency of their destination. It would appear to them to be too wide a generalisation that whatever the special conditions may be, the goods could never be condemned as contraband if once it is established that they would be offered at public auction in a neutral market. It is no doubt necessary to draw a distinction between a case of contraband which depends on destination to an enemy government, or enemy base of supply, and a case under the Reprisals Order in which a destination to an enemy country is sufficient. It appears from the judgment of the learned President that an argument was brought forward in the Prize Court that if the contention that the oranges were contraband could not be established, nevertheless it could be established that they were

destined for an enemy country, and were therefore goods which should be stopped under the Reprisals Order, to be dealt with at the expiration of the war. The learned President expressed the opinion that if the case of the respondent failed in Prize, they could not succeed under the Reprisals Order, and no alternative claim under that Order was brought before their Lordships on the appeal. It appears, however, to be evident in the present case that if the destination of the voyage was Germany, the place of destination was Hamburg, and oranges destined for Hamburg would undoubtedly be liable to condemnation as contraband.

The learned President, after examining the documentary evidence with great care, and after hearing the important oral evidence of Mr. Hechterman, found that Lutten and Sohn at Hamburg had a substantial interest in the business of importing oranges from Valentia, carried on through the syndicate under this interest, and that this interest went beyond their interest as agents in respect of which they were paid a commission of 10 cents per case of oranges forwarded. He further found that the interest of Lutten and Sohn was not to sell oranges in Holland, but to make the trade a part of the Hamburg trade, which they had carried on before the outbreak of the war. The learned President further found, on evidence which was sufficient to warrant such a finding, that a scheme was arrived at between Hechterman and Lutten, prospectively in September and definitively early in November, of which Mr. Hechterman gave him an inadequate and uncandid account. He thought it clear that the object of this scheme was to give Lutten an interest and a share in the business, such as would result from a common desire that the oranges should proceed to and reach Hamburg. It was for Mr. Hechterman to displace the possibility of any such destination being reconciled with the contemplated auction in Rotterdam, not for the Court to speculate by what means (of which there are obviously several) an auction might be made to play a part in the transmission of the cargo to a predetermined destination in Hamburg. The President held that Mr. Hechterman, whom he had seen and heard, had failed to discharge the burden of proof in this matter.

Their Lordships having examined the documentary and oral evidence, with the assistance of Counsel, are not prepared to differ from the learned President on these questions of fact, or to differ from him in the conclusion that the appellants have not discharged the onus placed upon them of proving that the oranges were not destined for an enemy base of supply. Moreover, the learned President has found that the appellant syndicate withheld from the Prize Court the fact of the existence of a substantial foreign interest which it was their duty to disclose, and for the non-disclosure of which they must accept all consequent liability. On the whole, their Lordships are of opinion that the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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v.

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