Privy Council Appeal No. 139 *of* 1920.

In the matter of proceeds of part cargoes ex steamships "Vesta," "Castor" and "Titan," ex steamship "Naxos."

N.V. Chemische Fabriek Kampen - - - - - *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 16TH MARCH, 1921.

Present at the Hearing:

LORD SUMNER.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

About the middle of July, 1914, the S.S. "Naxos," a German vessel belonging to the Deutsche Levante Linie, sailed from Lefkandi and Limni, ports in Eubœa, with a cargo of about 1,000 tons of raw magnesite, shipped by the Internationale Magnesiet Werken of Rotterdam and made deliverable to order at Rotterdam. These shippers own magnesite mines in Greece, and the finding of the President, that they were of enemy character though formally a Dutch incorporation, is not now contested. The "Naxos" was still on passage when war broke out, and to avoid the risk of capture took refuge in Lisbon and there remained. An enemy ship cannot thus defeat belligerent rights exercisable so long as the original *transitus* is deemed to continue. Even transhipment would not have this effect. It is not a question of abandoning the adventure for insurance or other contractual purposes. What is done by an enemy in consequence only of the peril of capture, which is imposed by the opposite Power, is not for prize purposes a voluntary abandonment at all.

Early in 1916 the appellants, the Naamlooze Vennootschap Chemische Fabriek Kampen, a Dutch company who manufacture magnesia out of magnesite at their works at Kampen, in Holland, were in great need of the raw material necessary for

their business. On the other hand, the owners of the cargo on the " Naxos " were very willing to sell it, as it was lying useless on their hands at Lisbon, without waiting indefinitely for peace to terminate the risk of capture. The parties came together, and by an agreement dated the 4th February, 1916, the appellants bought the cargo, and arranged for its transhipment and carriage to Amsterdam by neutral vessels, the " Vesta," " Castor " and " Titan." These ships were detained *en route* and the magnesite was captured by British captors. The case for condemnation was that the original transit of the magnesite was still in course of execution at the time of seizure ; that it was not in the power of the enemy vendors or of the enemy shipowners to abandon the voyage by the " Naxos " to Rotterdam, so as to create a new voyage in neutral ships to the detriment of belligerent rights ; and that, even if the agreement of purchase was a genuine and not a merely colourable transaction, no title was acquired by the appellants which could be asserted in a Court of Prize so as to defeat a British capture of enemy goods.

The case of enemy ships laden with enemy cargo taking shelter from the risk of capture in neutral ports frequently occurred in the early stages of the recent war, as in older wars, and the question has then arisen how far and under what circumstances the belligerents' rights can be defeated, if the first physical step of successfully eluding capture is followed up by mercantile transactions intended to transfer the ownership of the goods to neutrals. Sir William Scott, in the *Vrow Margareta* (1 C. Rob. 336), thus states the general rule, applicable alike to ships captured at sea and to goods captured at sea after transfer from ships which have taken refuge in a neutral port : " In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery ; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He goes on to give as a reason for the rule what is rather a maxim of prudence than a consideration of law, viz., the risk of protection being given to the enemy goods by transfers to neutrals, the true character of which it might be impracticable to expose. (See, too, the *Jan Frederick*, 5 C. Rob. at p. 131.) The *Vrow Margareta*, however, was a case where the transfer to the neutral took place both in good faith and before actual or anticipated outbreak of war.

In the *Baltica* (11 Moore, 141) the question came before the Judicial Committee in the form of a transfer made in contemplation of outbreak of war, and the Committee applied the rule as stated in the *Vrow Margareta*, and also by Storey, J. (Pratt's Storey, p. 64), " the same distinction is applied to purchases by neutrals of property *in transitu* ; if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid and the property is deemed to continue as it was at the time of shipment until the actual delivery." Accordingly the property having been not merely bought by but

delivered to the neutral buyer before seizure in good faith and without any reservation to the seller, the transaction was held to be protected. The actual words of Mr. Pemberton Leigh (p. 150) should be quoted :—

> "At this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus*, in the sense in which for this purpose the word is used, had ceased."

In the recent war, the same principle has been recognised in cases where the alleged transfer has taken place not merely while war is imminent, but after it has actually broken out ; but until the present case it has not been necessary to decide on the validity of the transaction, because either the purported sale has not been *bonâ fide* or the cargo was contraband with an ulterior enemy destination (the *Rijn*, 1917, P. 145, 1919 A.C. 546 ; the *Jeanne*, 1917 P. 8 ; the *Bawean*, 1918, P 58), or the matter has rested in contract only without actual delivery to the buyer before the time of the seizure (the *United States*, 1917, P. 30). It was, however, observed in the *Bawean* by Sir Samuel Evans, P., that actual possession by the neutral buyer is essential. Mere removal of goods from the enemy vessel, which is in shelter, to a neutral vessel which can carry them on, will not serve, even though constructively the possession of the captain of the neutral vessel is that of a bailee for a buyer who will be liable for the freight. Upon this point it is not necessary for their Lordships to pronounce any opinion. They, however, do not agree that as long as the original voyage of the enemy vessel, on which the goods were loaded, is incomplete, there always remains an indefeasible right to capture. Though in the *Baltica* the ship had actually completed her voyage to Copenhagen when the new owner took possession of her, the passage above quoted from the judgment shows that the taking possession was itself a determination of the transit, and the observations of Sir W. Scott in the *Danckebaar Africaan* (1 C. Rob. 107) and the *Carl Walter* (4 C. Rob. 207) bear this out.

It is worth while to consider the object and operation of the agreement of purchase in this case before passing to its terms. No doubt the enemy vendors wished to avert the loss which capture of their cargo would involve ; and, if they could do this by means which did not merely shift the loss to the shoulders of the neutral buyers, they would in effect by saving themselves defeat the belligerent enemy right of capture. Such a result would cause them no regrets, but there is no reason to suppose that their object was not principally the mercantile one of turning their goods into cash, or that, if the price was satisfactory as it apparently was, they had any concern in recovering the goods for any purpose or in any event.

The appellants, on the other hand, knew the position of the cargo. They equally obviously had no mind to see the ore captured and condemned ; and if the transaction in the

result extricated the cargo from the possible risk of capture and placed it in ultimate safety, incidentally they intended to defeat the rights of belligerents. Though on both sides the primary object was purely commercial, the operation in fact involved the secondary result of finally avoiding capture.

There was a further consequence involved. The ore was bound for Holland, where it would be adjacent to Germany. In Lisbon it was isolated and remote. If by any means, legitimate or illegitimate but successful, it could be conveyed to Holland and there in one way or other again fell into the hands of its original shippers, they would have successfully performed their original importation, the risks of war notwithstanding, and could, if so minded, send the ore on into Germany. How far ultimate transport to Germany was ever in the sellers' minds does not appear and need not further be considered. As regards the buyers it must be remembered that the Internationale Magnesiet Company was on its face a Dutch company and that, even if the appellants had been shown to be aware of the ownership of the shares and the control of the business which invested it with enemy character in time of war, they might still, on the state of the decisions at the time in question, have supposed that its Dutch incorporation availed to make it for all purposes a neutral *persona.*

The materiality of these considerations is that they show the importance in this and in all similar cases of a close and vigilant scrutiny of the whole transaction, for the purpose of seeing whether it truly is what it purports to be—an out and out and genuine sale without reservation of any interest in or to the seller in the goods—or whether it merely cloaks under the form of a sale an operation for transporting the seller's goods to the destination from which risk of capture at sea excludes him.

In the present case it has been found by the President, and is not now contested, that the appellants acted in complete good faith; that they were in great need of raw material; that they intended to consume it in their own works in Holland; and that, except in so far as the true construction of the agreement of sale may involve another conclusion, they were buying out and out for themselves, and were not designedly reserving to the sellers any interest in the goods for their benefit. Accordingly the matter now turns on the construction and effect of the agreement, for, if that be plain, the mere fact that under other circumstances it might have been put to illicit uses cannot affect its meaning.

It was an agreement "regarding the sale and purchase of 1,000 tons of raw magnesite lying in the S.S. 'Naxos,'" and it declared that "the magnesite is purchased lying in the S.S. 'Naxos,' and all the expenses arising through the release, delivery, transloading and transport of the goods . . . . shall be borne by the buyer." The price was 25 florins per kilo, payable in two instalments, half payable as soon as the seller should produce evidence that the goods would be released by the Portuguese Customs and no objections were raised by the ship-

owners, the other half payable as soon as the goods have arrived. The agreement proceeded :—

> and, in case of superficial approval by the buyer or in case the ship or cargo is lost or is declared forfeited by one of the belligerent parties, immediately after this has become known, but not later than two months after the payment of the first instalment, irrespective of whether all the goods have been shipped or not.
>
> "The transloading, shipment, etc., shall take place in the sellers' name for the account and risk of the buyer.
>
> "If the goods when being manufactured are found to be unsuitable for buyers' industry, the buyers shall have the right to refuse to accept the parcel, and the sellers shall be bound to take back the magnesite and to repay the amount of the purchase price already paid, increased with the sea freight from Lisbon, to a maximum of thirty shillings per ton."

The agreement was made without first inspecting the magnesite, or drawing and testing samples, or forwarding a trial shipment for experiment in the works of the Chemische Fabriek at Kampen. It contemplated that the whole 1,000 tons would be sent forward to Holland and yet that, when they reached Holland, they might not suit the buyers' purposes. The reason probably is that the appellants had been buyers of Eubœan magnesite before the war and were generally well acquainted with its character. At any rate this circumstance, which might have excited a good deal of suspicion but for the admission of the appellants' good faith, is not now of any real significance.

The result is that the appellants agreed to buy specific and ascertained goods, as they lay in the "Naxos," undertaking all risk and expense thereafter arising, except general average and demurrage in connection with the vessel, and were bound to pay half of the price in advance of shipment and in certain events the other half also. Without saying anything as to the prudence of it, of which the parties were the best judges, the agreement so far seems clearly to intend that the sellers are to part with all interest in the ore as soon as it leaves the "Naxos," and to receive their price for the goods, lost or not lost, with considerable promptitude. There is no provision even for adjusting the price in case the quantity falls short of 1,000 tons, beyond anything that can be inferred from the fact that, while each moiety is named as one-half of 25,000 florins, the price itself is described as 25 florins per 1,000 kilos.

The Procurator-General contends, and the learned President held, that the effect of the clause, beginning "if the goods when being manufactured," is to reserve an interest in the enemy vendor, which prevented an effective transfer of them at Lisbon; that, in the language of Sir William Scott in the *Sechs Geschwistern* (4 C. Rob. 101), there was not "a sale divesting the enemy of all further interest," for "anything tending to continue his interest vitiates a contract of this description altogether." The President's view was that the sale was only to be complete on the fulfilment of a condition subsequent, namely, that the goods should be found suitable for the buyers' industry—in other words, that it was a sale on approbation, a delivery of the goods of the enemy company to

the neutral company on sale or return. The expression is relied on that " the buyer shall have the right to refuse to accept the parcel," as showing that the time for his acceptance and consequent acquisition of the property does not arrive until he has at least had a reasonable opportunity of testing the magnesite in his works at Kampen.

Their Lordships are unable to adopt this view. If the words " refuse to accept " stood alone, or if the scheme of the agreement was that the sellers should deliver at Kampen and there tender the ore to the buyers, much might be said for holding that the property had not previously passed. Prefaced, however, as they are by a whole series of expressions pointing to an earlier passing of property, and combined with provisions which disinterest the seller in the shipment and transport and the risks of the voyage, the words are susceptible of another interpretation. They form part of a clause, the remainder of which provides that the sellers shall be bound to " take back " the magnesite. Physically a person takes back something that he has brought to a place, but the sellers were not to bring this cargo to Kampen. The buyers were to do that. In connection with passing property a person " takes back " what had previously been but has ceased to be his ; by a repurchase he undoes part at least of the prior transaction. That the taking back is here a new transaction and not merely the failure of the old one is further indicated by the fact that the next provision is not simply one for undoing the payment for the goods, as it would undo the physical tender of them. The seller is not to repay all the buyer's outlay—the expenses at Lisbon, the expenses of discharge and the freight incurred, whatever it might be—but only the purchase price and " the sea freight from Lisbon to a maximum of thirty shillings per ton " ; that is to say, he is to pay a different and a smaller total consideration than had been paid by the buyer, and he gets the goods safely arrived in Holland in addition. It is further to be observed that what is expressed is the buyer's right and the seller's obligation if that right should be exercised. The words do not invest the seller with a corresponding right to have the goods back, if they are found unsuitable for the buyer's industry. Even if the sellers had such a right as that, in the event of the goods being found unsuitable, they could require a resale to themselves whether the buyers desired it or not, this would be a personal right, the breach of which would sound in damages only. There was not reserved to them any proprietary interest in the goods themselves. What is provided for is a liability on, not a right in, the seller, and none the less for the fact that, if that liability were enforced, he might find it mitigated by substantial advantages to himself. The buyers were at all times in a position to give a good title to third parties without the concurrence of the sellers. It is not as though the buyer's title was to be automatically divested in the happening of an event. It is divested only at his option, an option which indeed only becomes exercisable in a

certain event but remains his option still. Nor is a possibility that the seller may become owner again, if called upon to take the goods back, equivalent to the reservation of an interest under the original sale. No authority was forthcoming for the contention that it suffices for the preservation of a belligerent right of capture, if mere provision is made for the contingency of a new interest arising in the original enemy seller upon the happening of a condition subsequent, and their Lordships are not minded thus to extend a rule, which in itself may in some cases press hardly upon neutral trade. Their Lordships are accordingly of opinion that the agreement, truly construed, provides for a sale out and out to the buyers and a consequent passing of the property to them on delivery to them at Lisbon, with a supplementary option to the buyers in a certain event to require the sellers to buy back the goods at a price agreed.

It was laid down by their Lordships' Board in the *Ariel* (11 Moore 119) and in the *Baltica*, after full discussion, and more recently in the consolidated appeals of the *Kronprinsessan Margareta*, the *Parana* and the *Rena* (unreported at present), that a neutral can acquire the property in merchandise from an enemy owner, while the merchandise is afloat, if there is an out and out transfer, neither accompanied by elements of unreality nor by any reservation of property therein to the seller, provided that the buyer takes actual delivery and not a mere symbolical delivery by handing over mercantile documents.

The question therefore arises whether the appellants got actual delivery of the magnesite at Lisbon, and this comes to be the crucial question in the appeal as being the real test whether the *transitus* of the ore was truly determined. After the agreement for the sale of the magnesite had been entered into war broke out between Portugal and the German Empire, and the Portuguese Government took possession of the German ships lying in the Tagus, including the "Naxos," and hoisted on them the Portuguese flag. It is suggested that this in itself terminated the original *transitus* of the "Naxos," as no doubt in a physical sense it did, and thereby put an end to the rights of His Majesty, such as they might be, to seize the cargo of the "Naxos" if afterwards found at sea, no matter what the circumstances or nature of its transfer to new owners. It is a singular result of the entry into the war of a friendly Power in aid of His Majesty and his allies, and there is no reason why the exercise by the Portuguese Government of their right to requisition the ship should prejudice their allies as to the cargo. No authority for the proposition was forthcoming.

For some time no progress was made with the discharge of the magnesite, but eventually in September the appellants sent to Lisbon, as a special representative, their managing director, M. Barendrecht, and he obtained from the Portuguese Government permission for the discharge of the magnesite from the "Naxos." This was done, and for a time the ore was stored on

the quay, the costs of stevedoring and storage being paid by the appellants and the instructions for the work being given by M. Barendrecht, who was present, according to his affidavit, on their behalf. From the quay the ore was subsequently loaded on the three vessels, belonging to the Koninklyke Nederlandsche Stoomboot Maatshappij, which were detained by the British naval forces. The Internationale Magnesiet Werken endorsed the "Naxos" bills of lading to the appellants, M. Barendrecht handed them to the Netherlands consulate at Lisbon, and new bills of lading were given for the carriage by the ships in question to Amsterdam. It is true that these bills of lading described the Netherlands consul as shipper and as consignees the Netherlands Overseas Trust, but the former was acting on behalf of the appellants, to whom he was giving official assistance, and the consignment to the latter was in accordance with the general regulations of the Trust and for the purpose of effecting delivery to the appellants for consumption in Holland. Indeed, in the bills of lading there are express provisions that the ships' agents are to notify the appellants, and one at any rate of them is endorsed to the appellants by the Netherlands Overseas Trust. Their Lordships think it clear that, on delivery of the ore overside *ex* the "Naxos," the Internationale Magnesiet Werken washed their hands of it, and that, in accordance with the contract, the appellant company directed and were liable for whatever was done with it till it was reloaded on the forwarding steamers. It follows that the appellants took actual delivery at Lisbon. It is not a question of constructive possession by delivery to a carrier, who recognises by the form of his bill of lading his obligation to deliver to the consignee; it is as complete delivery as is possible to a company, which can only act by human agents.

Had the claimants failed to establish their title, an argument was to have been submitted to their Lordships, which was admitted before the President, that if the ore had not become neutral property it remained enemy property and was being carried under a neutral flag to a neutral country without ulterior destination of any kind. Accordingly the Declaration of Paris was to have been invoked. It appears to have been overlooked that the claimants could only use this argument after their own title to independent rights had been negatived. They never purported to have merely bought the enemy owners' right or chance of escape. They could not claim on behalf of the enemy owners, if the enemy owners could not claim for themselves, and if the enemy owners were competent to claim for themselves, they should have entered an appearance and have done so. Enemy claimants have been repeatedly recognised, to assert rights under international conventions (*e.g.*, the *Mowe*, 1 B. and C. Prize Cases, 60; the *Marie Glaeser*, 1914, P. 218) or to contest condemnation of their goods, if shipped or carried under circumstances which give immunity from capture (the *Roumanian*, 1916, 1 A.C. 124; the *Hakan*, 1918, A.C. at p. 150). Their Lordships have already decided that ownership claims on appeal must be

made by appellants who come before the Board as owners. It follows that, if this point had arisen for decision, the claimants would have failed upon the preliminary ground that it was not available to them.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and that the decree appealed against should be reversed and the goods or their proceeds should be released to the appellants.

In the Privy Council.

In the matter of proceeds of part cargoes ex steamships "Vesta," "Castor" and "Titan," ex steamship "Naxos."

N.V. CHEMISCHE FABRIEK KAMPEN

v.

H.M. PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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