THE COLONIAL COURT OF ADMIRALTY IN PRIZE. 1916.

Present : Wood Renton C.J. and P.

THE " AUSTRALIA " (CARGO *ex*).

Cause No. 7

In the case of all claims to cargo on an enemy ship, the burden of proof lies on the claimant.

Where an enemy shipper pledges goods with a bank on terms that the documents are to be delivered to the consignee against payment or acceptance, and the bank posts the document direct to the consignee without taking measures to secure payment or acceptance, the property does not pass on the posting of the documents.

The bank, in such a case, is the bailee of the documents, and has no authority to transmit the documents, or to dispose of the goods which they represent, except in accordance with the contract of bailment, and any special arrangement, course of business between the bank and the consignee, to which the shipper is not a party, does not affect the passing of the property.

The effect of contracts *f.o.b.* and *c.i.f.*, and the legal position of commission agents in a foreign country, considered and explained.

The captor's right to freight is not affected by any private arrangement between the owners of the ship and the consignees, as agents of the owners, by virtue of which amounts due in respect of freight are to be credited in an account current.

THE facts are set out in the judgment.

Elliott, instructed by *Tonks* and *Alvis*, for the respective claimants.

Attorney-General (*Sir Anton Bertram*, *Kt.*, *K.C.*), *Fernando*, *C.C.*, with him, for the Crown.

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The steamship *Australia*, a vessel belonging to the Deutsche Australische Dampfschiffs Gesellschaft, which sailed from Germany prior to, but reached Colombo after, the outbreak of the present war, was seized by His Majesty's ship *Fox* on August 10, and was condemned as good and lawful prize by an order of this Court on October 5, 1914. The questions that now await adjudication arise out of—

(1) Claims made by Messrs. Ford, Rhodes, Thornton, & Company, who, by an order of the District Court of Colombo dated October 24, 1914, and an amending order of March 22, 1915, were appointed controllers of the business of Messrs. Freudenberg & Company, a German firm, the members of which were, subsequently to the commencement of war, interned as alien enemies, and were enabled to institute, carry on, or defend any legal proceedings on their behalf, to the proceeds which had been deposited in Court, of the sale of certain portions of the cargo; (2) several independent claims; and (3) a motion by the Crown that a sum of Rs. 4,165.31, deposited in Court by Messrs. Freudenberg & Company's solicitors on September 28, 1914, to abide the order of this Court, should be declared freight due for the transportation of the steamship *Australia's* cargo.

As in *Mirabita v. Imperial Ottoman Bank*,[1] both sides agreed that the case must be disposed of " on the footing that the law of England or a like law is applicable." The translations from the original German of the various documents that were put in evidence were also accepted as substantially correct. I have, however, had these originals before me, and have looked at them myself whenever it seemed necessary to do so.

The first point that has to be decided is the question whether, so far as the claims are concerned, the burden of proof rests on the controllers or on the Crown. The answer to this question must, in my opinion, be that the *onus probandi* lies upon the former. I should have come to this conclusion, apart from authority, on the ground that the condemnation of the steamship *Australia* as good and lawful prize attached a *primâ facie* enemy character to her cargo. But this view is, I think, supported by the ruling of Sir Samuel Evans in the case of *The Roland*.[2] In that case the German vessel *Roland* sailed from New Orleans for German ports with a cargo of tobacco prior to the declaration of war by Great Britain upon Germany. She was captured after the war began, brought into Plymouth, and condemned as prize. Appearances were

[1] *(1878) L. R. 3, Exch. Div. 164. See at page 168.*

[2] *(1915) British and Colonial Prize Cases, Part 2, page 188.*

entered by Wessels, Kulenkampff & Company of New York, Trinidad. and Jamaica, claiming to be the neutral owners of three hundred any forty-two hogsheads of the tobacco. The commercial domicil of this firm was American. One partner was a British subject resident in Jamaica, and taking charge of the business transacted there. The others, although they resided in New York, were German subjects. It was argued for the Crown that, in the absence of proof of the neutral character of goods found in an enemy vessel, the presumption was that they were enemy goods. In support of this contention reference was made to Article 59 of the Declaration of London, that " in the absence of proof of a neutral character of goods found on board an enemy vessel they are presumed to be enemy goods." For the claimants it was urged that the presumption that goods on an enemy ship were enemy property applied only to goods shipped after the outbreak of war. Sir Samuel Evans disposed of the point under consideration in the following terms:—" I think it is abundantly clear, according to Prize law, that property upon an enemy ship consigned to an enemy port is *primâ facie* enemy property, and it is for the claimants, who allege that the property belongs to them as neutrals, to make out their case, and to make it out clearly. No authority is required for that, though several authorities have been referred to in the course of the arguments. I am content to say that that is, and ought to be, the presumption in cases of this description."

Counsel for the controllers argued that the ruling was inapplicable to the present case, inasmuch as here the cargo was not consigned to an enemy port. I do not think, however, that Sir Samuel Evans intended to engraft any such limitation upon the principle that he was affirming. He was merely touching upon a circumstance disclosed by the particular facts with which he had at the moment to deal. The arguments of counsel on both sides in the case of *The Roland* [1] support this view, which is corroborated also by the commentary of the International Naval Conference on Article 59 of the Declaration of London:—" Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the *onus*, of proving his title."

' I proceed now to ascertain, in the first place, the facts as to each of the heads of the controllers' claims, and, in the next place, the law applicable to the subject.

We begin with a claim relating to twenty cases of laundry blue (A). On October 30, 1913, Messrs. Freudenberg & Company wrote to the Deutsche Bank, Berlin, whose agents in Colombo they were stated by counsel at the argument in have been, opening a series

[1] (*1915*) *British and Colonial Prize Cases, Part 2, page 188.*

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of credit accounts which were to be in force for the following year. "The credits described as current," they stipulated, "are to be understood in such a way that our labilities to you with regard to the respective firms do not at any time exceed the amounts mentioned." One of the firms so mentioned was the Vereinigte Ultramarinfabriken Aktien Gesellschaft, Cologne, and the amount of the credit was £500.

On February 6, 1913, Messrs. Freudenberg & Company had given this German company an indent for twenty cases of their laundry blue, to be shipped every four weeks until countermanded. On June 20, 1914, the German company forwarded to Messrs. Freudenberg & Company an advice note of the shipping *f.o.b.* of the laundry blue by the steamship *Australia*. This was the sixteenth delivery under the order of February 6, 1913. The advice note contained the following conditions:—"Value against our thirty days' sight draft. Delivery of documents through the Deutsche Bank, Berlin, against acceptance of draft."

On July 21, 1914, the Vereinigte Ultramarin Company drew a bill of exchange at thirty days after sight on Messrs. Freudenberg & Company, payable to the order of the Deutsche Bank. The amount due on this bill was paid to the Vereinigte Ultramarin Company by the Deutsche Bank, under the credit of October 30, 1913, and on July 22 the bank forwarded the draft to Messrs. Freudenberg & Company, including the bills of lading in duplicate, an insurance policy, and an invoice. In their letter of July 22 the bank stated that they "await the favour" of Messrs. Freudenberg & Company's "remittances." The bill of lading was endorsed to the order of the shippers, the Vereinigte Ultramarin Company. The steamship *Australia* sailed from Hamburg in July, 1914, and was captured after the outbreak of the war. The transaction was completed in accordance with a practice explained in the affidavits of Mr. Cramer, the wharf clerk of the import department of Messrs. Freudenberg & Company, of Mr. Schulsze, an assistant in the firm, and of Mr. Tonks, the proctor for the controllers.

As the case for the controllers in regard to all their heads of claim depends to a considerable extent on the tenor of this practice, it may be desirable to set out the material portions of these affidavits *in extenso* at this point:—

"In the course of my duties," says Mr. Cramer, "I have to clear at the Customs all goods for the import department arriving for the said firm, and in connection with this work the bills of lading and invoices are handed over to me. I then make up my import entry and proceed to the Customs, and hand the same to the Customs authorities, together with the bills of lading. I then pay the amount due to the Customs and obtain a delivery order for the goods, and clear and take possession of the same, and they are then either handed over to the indentors or taken to the firm's stores.

I carry out the above work directly the steamer bringing the goods arrives in Colombo."

"As regards the various bills," says Mr. Schulsze, "made out by the banking department to the import department, the custom followed by the said firm in connection with goods imported is as follows:—Directly the said firm receive the bills of exchange and shipping papers from Europe they are handed over to the banking department. The banking department thereupon hand over all the shipping papers and the bill of exchange to the import department to check the amount of the draft with the invoices, and, if correct, the import department initials the draft and returns it to the banking department. The import department then forthwith clears the goods and takes delivery of the same, and either hand the goods over to the indentors or has them sent to the firm's godowns. When the banking department receives back the draft, duly initialled by the import department, the former department makes out a bill for the amount of the said import, calculating at the ruling rate of exchange, and forwards it to the import department, who make the necessary entries in their books."

"From information I have been able to obtain," says Mr. Tonks, "from the staff of Messrs. Freudenberg & Company, under the control of Messrs. Ford, Rhodes, Thornton, & Company, controllers, to the best of my knowledge, information, and belief, the methods of business adopted by Messrs. Freudenberg & Company in connection with the said goods obtained from Europe is as follows:—Each year Messrs. Freudenberg & Company arrange with various banks in Europe for credits for the current year, to be operated on by certain named firms and individuals acting as their agents. From time to time, when they require goods, they forward indents to the agents, who purchase the goods on their orders. The agents obtain all the shipping papers, attend to the insurance, and ship the goods. They then draw a bill of exchange on Messrs. Freudenberg & Company in favour of the bank. The bank negotiates the bill, and the agents thereupon hand the shipping papers, draft, invoice, and insurance papers to the bank, and with the proceeds pay for the goods. The bank then forwards all the said papers, including bills of lading and draft, to Messrs. Freudenberg & Company direct in Colombo, who clear and take delivery of the said goods. Messrs. Freudenberg & Company then draw a cheque on the London branch of the said bank, to avoid difference of exchange for the amount of the bill of exchange, and forward it to the bank in question. Besides this import business, Messrs. Freudenberg & Company carried on a large export business, and were in the habit of forwarding to the various banks drafts in their (Messrs. Freudenberg & Company's) favour, and all shipping papers in connection with the said exports, to be collected and dealt with by the said banks in Europe. The proceeds of these export drafts were credited to

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Messrs. Freudenberg & Company's account by the said banks, and set against the value of the import bills of exchange forwarded by them (the banks) to Messrs. Freudenberg & Company.

"To the best of my knowledge, information, and belief no restricton or lien was placed on the said import goods by the banks, and there was no question of acceptance by Messrs. Freudenberg & Company of the said bills of exchange before they could deal with the said goods, and they always cleared and took possession of the goods as soon as possible after the receipt of the necessary shipping papers."

Mr. Tonks's affidavit is corroborated by the evidence of Mr. E. H. Lawrence, the manager of the National Bank of India, Colombo, with whose company Messrs. Freudenberg & Company transacted a great deal of business, that when goods were imported by the firm in large quantities, while there may have been rare cases in which bills of exchange were sent to the bank, the general practice had been to send the shipping documents direct to Messrs. Freudenberg & Company with drafts. Messrs. Freudenberg & Company, in fact, paid the value of the draft in connection with the laundry blue order by a cheque on the London branch of the Deutsche Bank on August 27, 1914.

On these facts the question arises whether the property in the cargo, with which we are here concerned, passed from the Vereinigte Ultramarin Company to Messrs. Freudenberg & Company on shipment, or on the negotiation of the draft of July 21, 1914; or whether it was still in the shippers on the outbreak of war between Great Britain and Germany. The answer to this question must, I think, be that the property was still in the shippers when the war began.

There is no need now to refer to the earlier authorities as to the general position of bankers who negotiate drafts of the character with which we have here to do. The point is settled by the recent decision of the Privy Council in the case of *The Cargo ex Odessa*.[1] The material facts in that case were as follows:—Messrs. Schroder & Company, a firm of bankers carrying on business in London, had in March, 1914, agreed with a German company in Hamburg (the Rhederei Aktien Gesellschaft) to accept the drafts of Weber & Company, a firm carrying on its business in Chili, for the price of a quantity of nitrate of soda, to be sold and shipped by Weber & Company to the German company. The drafts were to be drawn at ninety days' sight, and Schroder & Company, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. For this accommodation the German company was to pay to Schroder & Company a commission of a quarter per cent. Weber & Company shipped a cargo of nitrate on board the *Odessa*, a sailing vessel

[1] *November 11, 1915.*

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belonging to the German company, and took from the captain a bill of lading, dated March 8, 1914, in which the voyage was described as from Mejillones—the port of shipment in Chili—to "the channel for orders," and by which the cargo was made deliverable to Schroder & Company or their assigns. Under the bill of lading the freight was payable upon delivery of the cargo. Drafts for the full price of the cargo were drawn by Weber & Company upon Schroder & Company, and accepted by the latter on June 9, 1914, in exchange for the bill of lading. On the outbreak of the war the *Odessa* was on her way to the Channel. On August 19, 1914, she was captured on the high seas, and brought into Bantry Bay. On September 10 the drafts of Weber & Company fell due, and were paid by Schroder & Company. The *Odessa* was duly condemned, and no question arose as to the propriety of her condemnation. But Schroder & Company intervened in respect of the cargo, setting up title to it as holders for full value of the bill of lading, and alleging that, as British property, it was not liable to condemnation. Sir Samuel Evans condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that Schroder & Company were merely pledges, and, as such, were not entitled to any preference over the Crown. Schroder & Company appealed to the Privy Council. The appeal was dismissed. "Their Lordships," said Lord Mersey, who delivered the judgment of the Board, "are of opinion that the President was right in the inferences which he drew from the facts, namely, that the general property in the cargo was in the German company, and that the appellant were merely pledgees thereof at the date of seizure. This, indeed, is hardly disputable, having regard to the case of *Sewell v. Burdick*.[1] The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading." With the further important question involved in *The Cargo ex Odessa*,[2] as to whether the rights of Schroder & Company as pledgees were not entitled to recognition in the Prize Court, we are not here concerned. The decision of the Privy Council makes it clear that no title to the subject-matter of the head of claim now under consideration, other than the rights of pledgees, was vested in the Deutsche Bank by reason of their negotiation of the Vereinigte Ultramarin Company's draft. How, then, does the matter stand as between the German company on the one hand and Messrs. Freudenberg & Company on the other? The affidavits of Mr. McCallum, the Manager of the Hong Kong and Shanghai Banking Corporation, and of Mr. MacVicar, the manager of the Chartered Bank of India, Australia, and China, in Colombo, and the evidence of Mr. Lawrence, clearly show that up to a certain point the transaction in regard to the purchase of the laundry blue was of

[1] *(1884) 10 Appeal Cases 74.*

[2] *November 11, 1915.*

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an ordinary commercial character. The opening of a credit with the bank for the negotiation of the drafts of certain specified traders, and the negotiation of such drafts from time to time by the bank, are incidents in business of this description with which every one is familiar.

The general practice of bankers in regard to the negotiation of drafts admittedly is as follows:—When a shipper of goods draws on the consignee for the value, and negotiates the draft through a bank, and it is stated on the face of the draft that it is drawn against the goods, and that the documents are attached against payment, the bank is not entitled to deliver the documents to the consignee except upon payment of the draft. The effect is the same where it is simply stated that the draft is drawn against the goods, and that the documents are attached, unless the shipper instructs the bank that the documents are to be delivered against acceptance, in which case the bank is not entitled to deliver the documents to the consignees save upon acceptance of the draft. If no instructions are contained on the face of the draft, the terms on which the bank takes the documents depend upon the instructions otherwise received from the drawer. If there are no such instructions, the documents are to be considered as being received to be delivered on payment. A statement on the invoice that the documents were to be delivered on acceptance would not of itself be acted upon without confirmation. But the points that have to be considered here are, in the first place, whether the shipment of the cargo *f.o.b.* passed title at once from the Vereinigte Ultramarin Company to Messrs. Freudenberg & Company; and, in the next place, where the manner in which the German company's draft was dealt with by the Deutsche Bank and Messrs. Freudenberg & Company shows that it was the intention of all parties to the transaction, including the shippers, that the goods should become the property of Messrs. Freudenberg & Company on shipment or on the negotiation of the draft.

The effect of the shipment of goods *f.o.b.* is undoubtedly, as a general rule, to transfer the risk of the loss of the property from the buyer to the purchaser, and to put an end to the right of stoppage *in transitu*[1] But such a shipment is not in all cases conclusive of the question whether the goods had become the purchaser's property. In *Cowasje v. Thompson*,[1] Lord Brougham, who delivered the decision of the Privy Council, pointed out that in every such case the issue had to be determined whether anything remained to be done between the buyer and the seller. In *Brown v. Hare*,[1] Pollock C.B., who delivered the judgment of the majority of the Court, indicated that, in spite of the presence of an *f.o.b.* clause, the shippers might have intended to continue their ownership of the cargo, and might have taken the bill of lading in terms which would enable

[1] *Cowasjee v. Thompson, (1845) 5 Moore P. C. 165; Brown v. Hare, (1858) 27 L. J., Exchequer 372; and Inglis v. Stock, (1885) 10 A. C. 263.*

them to do so. The Court of Exchequer Chamber adopted the same line of reasoning on appeal.[1] "The real question," said Erle J., "has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract." In *Inglis v. Stock*[2] the question was whether, after a shipment *f.o.b.*, the purchaser had an insurable interest in the property which would support a policy of marine insurance. There is a passage in the judgment of Lord Blackburn which supports the view that a shipment *f.o.b.* may not be conclusive of the question of title to the property:—"I have no doubt that in order to recover against an underwriter the assured must show that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shows that he had at the time of the loss the whole legal property in the goods which were lost he undoubtedly does show it. But I do not agree that this is the only way in which he can show an insurable interest in goods, or that any relation to goods, such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as insurable."

It appears to me that in the present case the Vereinigte Ultramarin Company did intend to retain dominion over the cases of laundry blue. Under the bill of lading the cargo was deliverable to their order. In their advice note of June 20, 1914, to Messrs. Freudenberg & Company they distinctly stated that the delivery of the documents would be made against acceptance of their draft. For reasons which may be more appropriately stated when I come to deal immediately with the second argument in support of the controllers' claim to the proceeds of the sale of the laundry blue, I do not think that the title of the German company to the property was divested, or in any way prejudicially affected, by the course of business between the Deutsche Bank and Messrs. Freudenberg & Company in Colombo.

The point made by counsel for the controllers in this connection was that the Deutsche Bank were really the purchasers of the Vereinigte Ultramarin Company's draft, and that it was the intention of all parties that the property in the laundry blue should pass to Messrs. Freudenberg & Company whenever that draft was so purchased. There is, however, nothing in the documentary evidence before me to show that the Vereinigte Ultramarin Company had ever sanctioned, or were even aware of, the course of business between the Deutsche Bank and Messrs. Freudenberg & Company in relations to the shipping documents. The Deutsche Bank, as I have already pointed out, were merely the pledgees of the shipping documents. Their instructions from the shippers were that the

[1] *(1859) 29 L. J. Ex. 6.*

[2] *(1885) 10 A. C. 263.*

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documents were to be delivered against "acceptance of the draft," instructions which, as Mr. Lawrence stated in his evidence, indicated that they at least expected that the draft would be accepted before the shipping documents were delivered over. Their omission to comply with the requirements of the draft itself may well have been due to the fact that Messrs. Freudenberg & Company appear to have been their own agents, and were admittedly a firm of very high financial repute; that Messrs. Freudenberg & Company had in their business a banking department as well as an import department; and that the payment of the amount due on the draft was effected between those two departments, just as if the former had been an independent bank dealing with the latter as ordinary consignees of cargo shipped under a bill of lading. I am by no means satisfied that, however lax their practice in this matter may have been, the Deutsche Bank did intend that the property in the goods should pass to Messrs. Freudenberg & Company until the amount on the face of the draft had been met. It will be observed that in their letter to Messrs. Freudenberg & Company of July 22, 1914, enclosing the Vereinigte Ultramarin Company's draft and the shipping documents, they state that they are awaiting the favour of Messrs. Freudenberg & Company's remittances. But even if the fact had been otherwise, the Deutsche Bank were, *quoad* the Vereinigte Ultramarin Company, merely the bailees of the property, and they had no right to part with the property in the goods on terms which their own authority from the bailors must be taken to have prohibited. No letter from the Vereinigte Ultramarin Company forwarding their draft to the Deutsche Bank has been put in evidence. But the draft itself has appended to it a note that it is "payable at the current rate of exchange for bankers' demand drafts on London, in addition to six per cent. interest from date of bill of exchange until the approximate date of arrival of remittance on Europe," a clause which distinctly contemplates the completion of the transaction in the ordinary business way; and the German company, in their letter of July 21, 1914, to Messrs. Freudenberg & Company, are careful to state, as we have already seen, that the delivery of the shipping documents is to be against acceptance of the draft.

The controllers' claim under head (A) must be dismissed, and the cargo to which it relates condemned as having been good and lawful prize.

The next head (B) of the controllers' claim consists of consignments of twenty-five, fifty, and one hundred cases of biscuits, respectively. The transaction was carried out under a letter of credit dated November 6, 1913, from Messrs. Freudenberg & Company to the Dresdner Bank, similar in terms to that of October 30, 1913, in favour of the Deutsche Bank, under which the sale of

the laundry blue was effected. One of the traders specified in the statement enclosed in the letter of credit was Dietrich Hermsen, Hamburg. The amount of the credit opened in his favour was £5,000. The biscuits in question were ordered under three separate indents. The consignment of twenty-five cases was included in indent No. 9,567, dated February 19, 1914. The consignment of one hundred cases was covered by indent No. 9,704, dated March 26, 1914, for nine hundred cases. The consignment of fifty cases was made under indent No. 9,837, dated April 23, 1914, for two hundred and fifty cases. These goods were shipped by the steamship *Australia* on July 18, 1914. In the bills of lading the Deutsche Australische Dampfschiffs Gesellschaft are described as shippers; the consignments are made deliverable to their order, and the bills are duly endorsed by them. No explanation of this procedure is furnished by the evidence. Counsel for the controllers suggested that it was probably due to considerations of rebate. But the point is really immaterial, because Hermsen, in his advice note dated July 22, 1914, to Messrs. Freudenberg & Company, discloses himself as shipper, and he endorsed the bills of lading immediately below the endorsement of the German steamship company. In his booking particulars of even date as to this transaction, Hermsen states that the documents are deliverable through the Dresdner Bank, and debits Messrs. Freudenberg & Company with his own commission on the sales. Hermsen drew in Hamburg on July 18, 1914, a bill of exchange to the order of the Dresdner Bank for the full amount due by Messrs. Freudenberg & Company in respect of the consignments. No letter accompanying this draft has been produced. But the draft purports to be payable at the drawing rate for demand drafts on London, with interest at six per cent. per annum from its date to the approximate due date of arrival of the remittances in London, against the shipments in question, and the documents are said to be attached. The Dresdner Bank paid the amount of the draft under Messrs. Freudenberg & Company's letter of credit, and on July 20, 1914, forwarded the draft, with the accompanying shipping documents, to Messrs. Freudenberg & Company in Colombo. At the close of their covering letter they say "Please send us the value of the draft, as usual." The draft had been endorsed by the Dresdner Bank to their own order and that of Messrs. Freudenberg & Company. The transaction was, on August 27, 1914, completed by Messrs. Freudenberg & Company in accordance with the practice explained above.

On these facts counsel for the controllers contended that Hermsen was merely an agent for Messrs. Freudenberg & Company; that neither the original sellers of the goods to him, nor Hermsen himself, nor the Dresdner Bank had retained any right of disposition over the property, and that by the course of business between the Dresdner Bank and Messrs. Freudenberg & Company no delivery of

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the shipping documents to the latter only against an acceptance of Hermsen's draft was required. In my opinion these arguments are not entitled to prevail. There is no indication in the correspondence that Messrs. Freudenberg & Company were at any stage brought into direct contact with the sellers to Hermsen. He was, I think, in this transaction, merely a commission merchant purchasing goods for Messrs. Freudenberg & Company from other merchants, between whom and his own vendees in Colombo no privity of contract existed. The case appears to me to come within the well-known rule laid down by Lord Blackburn in *Ireland v. Livingston*[1]:—"The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the persons supplying the goods to the commission merchant and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant ..... The legal effect of the transaction between the commission merchant and consignee, who has given him ownership, is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*."

In the same connection I may refer to the cases of *Armstrong v. Stokes*,[2] *Cassaboglou v. Gibb*,[3] *Ex parte Miles*,[4] *and Ex parte Banner*.[5] In the case of *Flinn & Co. v. Hoyle*,[6] to which counsel for the controllers referred me, the general rule as to the position of commission merchants and their foreign principals was recognized, but was held to be inapplicable, because the facts showed that the foreign principals had contracted directly with the correspondents of the commission merchants. If this reasoning be sound, Hermsen had a *jus disponendi* over the tins of biscuits as commission merchant. That right was not displaced by the shipment *f.o.b.* if the evidence proved that, in spite of that shipment, he intended to retain it. That he had this intention is, I think, established both by the terms of his bill of exchange, and in particular by the insertion therein of the words "documents attached," and by the similar clause "documents through the Dresdner Bank" in the shipping particulars forwarded by him to Messrs. Freudenberg & Company.

[1] *(1872) L. R. 5 Eng. & Irr. App. 395, at page 408.*
[2] *(1872) 41 L. J. Q. B. 253.*
[3] *(1883) 11 Q. B. D. 797, at page 804.*
[4] *(1885) 15 Q. B. D. 39, at pages 42 and 43.*
[5] *(1876) 2 Chancery Division 278, at page 287.*
[6] *(1893) 63 L. J. Q. B. 1.*

There is nothing to show that Hermsen was aware of any course of business between the Dresdner Bank and Messrs. Freudenberg & Company, by which the former would part with the shipping documents to the latter otherwise than upon an acceptance of the bill of exchange. The Dresdner Bank had no title to the property. In their relation to Hermsen they were merely bailees of shipping documents, and had no right to part with them except on the terms indicated in Hermsen's draft. From their own standpoint of having negotiated that draft, they were pledgees of the shipping documents, and for reasons similar to those that I have already given in the case of the Deutsche Bank, and particularly from the request "Please send us the value of the draft, as usual," in their letter of July 20, 1914, to Messrs. Freudenberg & Company, I am not disposed to think that, in spite of their failure to require an acceptance of the draft, they had any intention of abandoning their rights in that capacity. But the point is immaterial, inasmuch as the real issue is whether the property had passed from Hermsen to Messrs. Freudenberg & Company.

The controllers' claim under head (B) must be dismissed, and the cargo to which it relates condemned as having been good and lawful prize.

The next head of claim consists of a large number of bundles of steel and iron bars (C). This transaction was carried out under the same letter of credit (November 6, 1913) from Messrs. Freudenberg & Company to the Dresdner Bank, Berlin, in favour of Hermsen, as that under which the consignments of the cases of biscuits (B) were effected. On July 24, 1914, Hermsen writes to Messrs. Freudenberg & Company that he had shipped the goods in question by the steamship *Australia*, and that the invoices of the shipment, which had been made out by the Deutsche Australische Dampfschiffs Gesellschaft, were being forwarded to them with the booking statements. On July 22 Hermsen had drawn a bill of exchange to the order of the Dresdner Bank on Messrs. Freudenberg & Company, in Colombo, for the price of the cargo. By the terms of the bill the amount was payable at the drawing rate for demand drafts on London, with interest at six per cent. per annum, from the date thereof to the approximate due date of the arrival of the remittance in London, against the shipment of the cargo, and with documents attached. The Dresdner Bank endorsed this bill to their own order and that of Messrs. Freudenberg & Company. No copy of any letter sent by them to Messrs. Freudenberg & Company with the bill of exchange and the shipping documents has been produced. But the bill, as I have just stated, was endorsed by the Dresdner Bank, and it may be presumed that the covering letter has merely gone amissing. In the bills of lading the German shipping company again appear as shippers, the goods are made out deliverable to

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their order, and the bills of lading are duly endorsed by them. I need not repeat in detail what has already been said in regard to this aspect of the transaction. Hermsen, in his letter of July 24, 1914, to Messrs. Freudenberg & Company, speaks of himself as the shipper of the cargo, although he mentions that the invoices have been made out in the shipping company's name. He endorsed the bill of lading immediately below the endorsement of the shipping company, and, although there is no reference to the mode of payment in his letter itself, the booking statement to which it refers shows that the transaction was to be completed through the Dresdner Bank. As in the case of the other consignments which have so far been considered, the matter was settled by Messrs. Freudenburg & Company on August 27, 1914.

For the reasons given above under head (B), I am of opinion that the property in the consignments here in question had not passed from Hermsen to Messrs. Freudenberg & Company prior to the outbreak of war between Great Britain and Germany. The controllers' claim under this head must be rejected, and the cargo to which it relates condemned as having been good and lawful prize.

Under head (D) the controllers claim 1,500 kegs of gunpowder supplied by Hermsen under the credit for £5,000 opened by Messrs. Freudenberg & Company in his favour in their letter of November 6, 1913, to the Dresdner Bank in Berlin. The consignment was made under two indents dated May 21, 1914: one, No. 9,969 for 900, and the other, No. 9,970 for 600 kegs of gunpowder. On July 22, 1914, Hermsen writes to Messrs. Freudenberg & Company advising them of the shipment of the gunpowder by the steamship *Australia* on July 17. On the latter date he had drawn the usual bill of exchange on Messrs. Freudenberg & Company for the price, to the order of the Dresdner Bank, against the shipment of cargo, with documents attached. On July 18 the Dresdner Bank send on to Messrs. Freudenberg & Company Hermsen's draft, which had been negotiated by their branch in Hamburg, with the shipping documents, and conclude the letter with the following request:— "Please send us the value of the draft, as usual." Hermsen's draft on Messrs. Freudenberg & Company was, as before, endorsed by the Dresdner Bank. The bill of lading was taken out in the name of the Deutsche Australische Dampfschiffs Gesellschaft, and endorsed first by them and afterwards by Hermsen himself.

For the reasons that I have given in dealing with claims (B) and (C), I hold that the property in the gunpowder had not passed from Hermsen to Messrs. Freudenberg & Company at the date of the outbreak of the present war, that the controllers' claim to this portion of the cargo of the steamship *Australia* must be dismissed, and that the gunpowder must be declared to have been good and lawful prize.

The next head of claim (E) relates to two cases of motor omnibuses and three cases of motor lorries. The transaction commences with a letter dated November 6, 1913, in which Messrs. Freudenberg & Company request the Direction der Disconto Gesellschaft, Berlin, to instruct the Norddeutsche Bank in Hamburg to buy Hermsen's thirty days' sight drafts on them during the year 1914 to the amount of £5,000 on their account. The Direction der Disconto Gesellschaft replied, in their letter dated November 26, 1913, that the requisite instruction to the Norddeutsche Bank to negotiate the drafts had been given. On March 5 and April 23, 1914 Messrs. Freudenberg & Company forwarded to Hermsen indents Nos. 9,646 and 9,842, for the motor omnibuses and lorries in question, respectively. On July 24 Hermsen advises Messrs. Freudenberg & Company of the shipment of the cargo from Antwerp, and promises particulars by the following mail. On July 27 he drew a bill on Messrs. Freudenberg & Company to the order of the Direction der Disconto Gesellschaft for the value of the consignment, against shipment per steamship *Australia*, and with "documents attached against payment." On July 28 the Direction der Disconto Gesellschaft wrote to Messrs. Freudenberg & Company that the Norddeutsche Bank in Hamburg had negotiated Hermsen's drafts against the shipping documents. On September 8 Hermsen writes to Messrs. Freudenberg & Company that his mail of July 31 had been returned by the post office, and that it contained some information about various shipments. He proceeds to refer to the indents for the motor omnibuses and the lorries, and notes the shipments as having in each case been made *c.i.f.* This transaction was not dealt with by Messrs. Freudenberg & Company till the following October.

Counsel for the controllers felt the difficulty created in regard to this head of claim by the express provision in the bill of exchange that the documents were attached against payment, and applied for a postponement of the hearing in regard to it for at least two months, in order that he might communicate with one or other of the partners in the firm of Messrs. Freudenberg & Company, who were interned as alien enemies in Australia. The Attorney-General opposed this application, and I disallowed it. All the documents in relation to this transaction have been in the hands of Messrs. Freudenberg & Company or their legal advisers from the very commencement of the war. They must have known, and, in any event, they ought to have known, that, in so far as their claim to this portion of the cargo of the *Australia* was concerned, the Crown would rely in support of its title on the language of the bill of exchange, and no good reason was shown for their failure to furnish themselves with any explanation of that language which the firm of Messrs. Freudenberg & Company might be in a position to offer. The observations which I have already made in dealing with the previous

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claims by the controllers are applicable here with even greater force. It remains only to say a word as to the effect of the shipment of the cargo *c.i.f.* The leading authority on this question is now the decision of the House of Lords in the case of *Biddel Bros. v. E. Clemans Horst Co.*,[1] in which the judgment of the majority of the Court of Appeal [2] was set aside, and the dissenting judgment of Kennedy L.J. was accepted as a complete and accurate statement of the law. After pointing out that by a shipment *c.i.f.* the goods are appropriated by the vendor to the fulfilment of the contract under section 18 of the Sale of Goods Act, 1893, and that, by virtue of section 32 of the same statute, the delivery of the goods to the carrier, whether named by the purchaser or not, is *primâ facie* to be deemed to be a delivery of the goods to the purchaser, the learned Lord Justice proceeded as follows:—"Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his *c.i.f.* contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use if the goods are lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative (see the judgments of Bramwell L.J. and Cotton L.J. in *Mirabita v. Imperial Ottoman Bank* [3]). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignees."

In the present case the bills of lading, although made out in the name of the German shipping company, were, as we have already seen, so made out only for some incidental purpose, and were really at the disposal of Hermsen. The language of his draft shows beyond all doubt that no unconditional transfer of the property from himself to Messrs. Freudenberg & Company under the *c.i.f.* contract was intended.

I am of opinion that the contollers' claim fails under this head also, and that the property to which it relates must be declared to have been good and lawful prize.

The last item in this group of claims is one case of motor trailers (F). The transaction differs in one respect from those which have already been discussed. Except in the case of the order for the laundry blue (A), Messrs. Freudenberg & Company have not, so far, been brought into any kind of direct contact with the actual sellers. In their indents for the biscuits (B), they indicate the manufactory from which the purchase is to be made, but the

[1] *(1912) A. C. 18.*

[2] *(1911) 1 K. B. 934.*

[3] *(1878) L. R. 3, Exch. Div. 164.*

See at page 168.

invoices are made out by the sellers to the German shipping company, who, as we have seen, were the nominal shippers, and the whole transaction is completed by Hermsen and the Dresdner Bank. In the case of the steel and iron bars (C), the indents indicate that the purchases are to be made from "any good supplier," and the invoices are made out by the German shipping company. In the orders for the gunpowder (D) and the motor lorries (E), the names of the suppliers are mentioned, but in the case of the former order the invoice is made out by the German shipping company, while in that of the latter no invoice, either by the actual sellers or the German shipping company, has been produced. In the consignment, however, with which we are now concerned, (F), not only are the names of the suppliers mentioned in the indent, but the invoice is made out by them in the name of Messrs. Freudenberg & Company. At the foot of this invoice we find the words "payment against delivery of documents." It appears to me that the mere circumstance of the invoice for this consignment having been drawn up by the sellers to Hermsen in the name of Messrs. Freudenberg & Company is not sufficient to displace the fact that the bill of exchange is drawn by Hermsen on Messrs. Freudenberg & Company to the order of the Direction der Disconto Gesellschaft against the shipment, and with "documents attached against payment," and that the bill of lading is made payable to the order of the German shipping company, and is endorsed first by that company, and, as usual, by Hermsen himself. Moreover, even if this were a direct transaction between the original sellers in Germany and Messrs. Freudenberg & Company in Colombo, the controllers would have the same difficulty to face, namely, that the shipping documents were to be delivered only against payment.

I am, therefore, of opinion that this head of claim fails also, and that the cargo in question must be declared to have been good and lawful prize.

We come now to a group of independent claims in respect of certain consignments of chemicals, namely, 1,500 bags of sulphate of potash, 650 bags of superphosphate, and 600 bags of sulphate of ammonia. The Attorney-General has admitted the first of these claims on the grounds that it was a direct transaction between Messrs. Freudenberg & Company and the German sellers, Messrs. Mendelssohn & Company, Berlin; that the former not merely opened a credit account in favour of the latter, but sent them a cheque to the credit of that account; that the consignment was paid for by Messrs. Mendelssohn & Company; that they forwarded the shipping documents to Messrs. Freudenberg & Company without any draft; and that the circumstances, therefore, disclose an out-and-out sale, in which the property passed at once to the purchasers. This claim must therefore be upheld.

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The transaction as to the 650 bags of superphosphate and the 600 bags of sulphate of ammonia were carried out under the letter of credit dated November 6, 1913, by Messrs. Freudenberg & Company to the Dresdner Bank in favour of Hermsen up to the amount of £5,000. The course of business is explained by Mr. Schulsze in his affidavit, and is similar to that already described in connection with the other claims. On July 17 Hermsen writes to Messrs. Freudenberg & Company enclosing the seller's invoice for 650 bags of superphosphate shipped by the *Australia*, and adds "to balance this transaction I have drawn a draft ..... on Dresdner Bank, which please honour on presentation." On July 16 the Dresdner Bank had written to Messrs. Freudenberg & Company enclosing Hermsen's draft, which had been negotiated by their branch in Hamburg, "with documents attached in exchange." "Please send us," they say, "the value in the usual manner." The bill of lading was made out to the order of the sellers to Hermsen as shippers, and was endorsed first by them and afterwards by Hermsen himself. There is nothing to show that there was any privity of contract between Messrs. Freudenberg & Company and the sellers.

On these facts I am not prepared to hold that the claim has been established. Hermsen's letter of July 17 shows that he expected his draft to be presented and honoured on presentation, and the letter from the Dresdner Bank themselves indicates that delivery was contemplated against the documents attached. Even if the case were one of a direct contract between the German sellers and Messrs. Freudenberg & Company, it has not been shown that the former intended the property to pass upon any other condition. This claim must be rejected, and the consignment of 650 bags of superphosphate declared to have been good and lawful prize.

The purchase of the 600 bags of sulphate of ammonia was equally effected under the letter of credit of November 6, 1913. On July 24, 1914, Hermsen writes to Messrs. Freudenberg & Company enclosing the invoices for this consignment, and stating, as before, "to balance this transaction I have drawn a draft ..... on the Dresdner Bank, which please honour on presentation." The letter of the Dresdner Bank forwarding Hermsen's draft is not forthcoming, but we have the bill of lading made out, as in some of the former cases, in the name of the German shipping company, by whom also, as Hermsen stated in his letter of July 24, the invoice had been prepared. The bill of lading is made out to the order of the German shipping company, and is endorsed first by them and afterwards by Hermsen.

In my opinion this claim must be disallowed. There is nothing to show, and, indeed, the available evidence points in a contrary direction, that either the sellers to Hermsen, if they are to be

regarded as contracting parties so far as Messrs. Freudenberg & Company were concerned, or Hermsen himself, ever intended that the property in the bags of sulphate of ammonia should pass to Messrs. Freudenberg & Company otherwise than in the ordinary course of business. In this connection it may be convenient to notice an argument on which counsel in support of the claims placed some reliance, namely, that the fact that in the printed particulars in Messrs. Freudenberg & Company's indents Hermsen was described as "agents" shows his real position in this transaction. A circumstance of this kind is, no doubt, entitled to consideration, but it is very far from being conclusive (see *Kronprinzessin Cecilie*[1]), and in the present case it is, I think, entirely outweighed by the facts taken as a whole. The bags in question must be declared to have been good and lawful prize.

The motion of the Crown for the freight due by Messrs. Freudenberg & Company to the owners of the steamship *Australia* rests upon a well-known rule of Prize law, which was recently stated by Sir Samuel Evans in *The Roland*[2] in these terms:—"Whenever a captor brought goods to the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract has been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage."

In the present case the *Australia* was brought on capture to her port of destination, namely, Colombo, and, *primâ facie*, the claim to freight is good. The owners of the steamship *Australia* themselves, in their correspondence with Messrs. Freudenberg & Company, asked the latter firm to credit them with the freight, which Mr. Schulsze in his affidavit admits "had accordingly to be paid by Messrs. Freudenberg & Company in Colombo." Counsel for the controllers contended, however, that they are entitled to set up, as against the claim of the captors for the freight so due, a running account between the steamship company and Messrs. Freudenberg & Company, not as consignees, but as the shipping company's Colombo agents. The freight, he argued, would ordinarily have been paid at Hamburg. According to the terms, however, of the running account, Messrs. Freudenberg & Company merely placed amounts due by way of freight to the company's credit. No authority was cited for the proposition that a captor's right to freight can be effected by any private arrangement of this kind between shipping owners and the consignees in the capacity of the shipping owners' agents, and in the absence of such authority I am not prepared to accept it. The motion of the Crown must be allowed.

[1] *(1915) 23 Times L. R. 139.*

[2] *(1915) British and Colonial Prize Cases, Part 2, p. 188.*

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I have carefully considered the question whether the Crown is entitled to costs. With the exception of the claim for 1,500 bags of sulphate of potash, as to which there was no contest, all the claims that I have had to deal with have been rejected. The Crown has succeeded also on the question of freight. The case of the steamship *Australia* was disposed of under the old Prize Rules, 1898. The subject of costs is dealt with by Rule 221, according to which "the costs of and incident to all prize proceedings shall be in the discretion of the Judge; provided that a captor shall not be condemned in costs unless the captor was made without probable cause, or the captors have been guilty of misconduct in relation to the ship or goods captured, or in relation to any person or thing on board or belonging to the captured ship."

Under Order 18, Rule 1, of the Prize Court Rules, 1914, it is provided that "the costs of and incident to all prize proceedings shall, except when otherwise provided by any agreement, or by statute, be in the discretion of the Judge." The proviso in Rule 221 of the Rules of 1898, as to the circumstances in which a captor may not be cast in costs, is omitted from the new rule. I have gone carefully through the official shorthand reports, which have been forwarded to this Court from London, of the prize cases in England, with a view to seeing the course now adopted by the Admiralty Division in its Prize jurisdiction in this matter. The question was raised in the case of *The Marie Glaeser*,[1] and Sir Samuel Evans observed that all questions of costs were left to the Prize Court under the new Rules, but he did not order any of the claimants to pay costs. In the subsequent case of *The Cargo ex Miramichi*,[2] after citing Order 18, Rule 1, the learned President said that "assuming that he had power to order the captors to pay the costs, he would not exercise it on the facts before him," and went on to observe that, if there were an appeal to the Privy Council, he should be very glad to have the assistance of that tribunal upon the question. The Attorney-General replied that, on the hearing of the appeal, he would take the opportunity of inviting the attention of the Privy Council to the point. In the cases of *The Steamships Antares, Norheim, Francisco Toronto, and Idaho*,[3] Sir Samuel Evans indicated that he would not give costs against the Crown, and the Attorney-General interposed with the interlocutory observation, "We never get them against the subject." I have found no report of an appeal, if there was one, to the Privy Council in *The Cargo ex Miramichi*,[2] but in the case of *The Cargo ex Roumanian*[4] the Judicial Committee said that they had carefully considered the judgment of the President of the Admiralty Division in *The Cargo ex Miramichi*,[2] and entirely agreed with it. I am struck with the fact, however, that neither in *The Cargo ex Roumanian*,[4] nor in *The Cargo ex*

[1] *September 16, 1914.*
[2] *November 23, 1914.*
[3] *March 8, 1915.*
[4] *November 10, 1915*

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Odessa,[1] nor in *The Cargo ex Woolston*, did the Privy Council award costs to the Crown, although in each case the decision of the Prize Court upholding the title of the captors was affirmed. Nor have I found in any of the available records any case in which costs have been given either to or against the Crown. It is unnecessary for me, however, to decide the question as to the right of the Prize Court of this Colony in this matter under Rule 221 of the Prize Rules of 1898. The Attorney-General, at the commencement of the argument, stated that counsel and the proctor for the controllers and the controllers themselves had done everything in their power to facilitate a satisfactory decision on the claims now put forward. In these circumstances, I should not be prepared to award costs to the Crown, even if I had the power to do so.

I direct decree to be entered up, rejecting all the claims with which I have dealt, except the claim admitted by the Crown for the 1,500 bags of sulphate of potash, which is accordingly allowed, declaring the proceeds of the sale of all the property, the claims to which have been so dismissed, to be good and lawful prize, and allowing the motion of the Crown for freight. There will be no order as to costs.