

IN THE COLONIAL COURT OF ADMIRALTY OF THE ISLAND  
OF CEYLON IN PRIZE.

1916.

*Present:* The Hon. Mr. W. S. Shaw (A.C.J.),  
President of the Prize Court.

THE SS. " DANDOLO " AND THE SS. " CABOTO. "

*Cause No. 3.*

*Enemy goods brought by neutral ships—Seizure as prize in Customs warehouse.*

Enemy goods were brought into the port of Colombo by two neutral ships, and were seized as prizes in a bonded warehouse in the port.

*Held*, that the seizure was good, although the goods were not seized afloat but after landing.

*Held, further*, that the protection of the neutral flag can only extend to enemy goods when actually under that flag, and if they have been freely parted with by the neutral ship, and are afterwards seized, either afloat or ashore, on the high seas or in an English port, they are liable to condemnation as prize.

THE facts are fully set out in the judgment.

*Hayley*, for the claimants.

*Bertram, K.C., A. G.* (with him *Akbar* and *Fernando*), for the Crown.

*Cur. adv. vult.*

October 11, 1916. SHAW A.C.J. and P.

The Attorney-General, on behalf of the Crown, asks for the condemnation as prize of certain cases of towels, alleged to be enemy property, brought into the port of Colombo by two neutral ships, the " Dandolo " and the " Caboto," and seized in a bonded warehouse in the port, after having been transhipped from the vessels into lighters and landed placed in the warehouse.

The initial question for my determination is one of fact, namely, whether or no the goods are enemy property. The claimants, Messrs. Brandon & Co., a firm of merchants carrying on business in Amsterdam, allege, that the goods are their property, bought from an Italian firm of Lubbe & Hasche, and shipped to Colombo invoiced to a firm of K. R. M. T. T. Arunachalam Chetty & Bros., to be delivered to them on their meeting drafts for the price.

The Chetty firm had, for some time before the outbreak of war between England and Germany, been placing considerable orders for goods with Joh. Jantzen and E. G. Kistonmaaker & Co., two German firms carrying on business at Hamburg.

1916.  
SHAW A.C.J.  
and P.

The ss.  
"Dandolo"  
and the ss.  
"Laboto"

At the time war broke out they had several orders outstanding with these firms, including indents 133-139 with Joh. Jantzen for 1,500 dozen towels and indents 031-044 and 067-071 with E. G. Kistonmaaker for camboys and sarongs.

In the autumn of 1914 the following letter addressed to the Chetty firm from Brandon & Co. was stopped by the Censor:—

" Messrs. K. R. M. T. T. Arunachalam Chetty & Bros.,  
36 and 37, Sea street, Colombo.

" Amsterdam, October 22, 1914.

" Dear Sirs,—Our mutual Hamburg friends, Messrs. E. G. K. & Co., have made arrangements with us that we are handling now their business in neutral goods only to English colonies. We have therefore obtained knowledge of your following indents: 031-044 sarongs and camboys, and Dutch make 067-074 sarongs and camboys, which, owing to the outbreak of the European war, could not be made ready for shipment in time as contracted. This you will very well understand. Our mutual forenamed friends are very anxious now to find ways and possibilities in order that you may at least get some of the goods, if not all, as very soon as possible. Perhaps it can be managed that some quantities can be shipped by neutral steamers, but in any case we would have to insure the goods against war risk, for which the premium rate would at least be 4 per cent. We request you to let us know whether we shall ship such goods which we can get hold of, and by first available steamer. We would not ship larger quantities at one time than those stipulated against each separate indent. Although there are increased rates of freight at present, we would not charge you for this difference. However, as regards the premium for war risk, this we would be compelled to charge in the invoice in case of shipment.

" Please cable us in case you agree to the aforesaid the word 'agree' to our address 'Andon,' Amsterdam, or if you are not allowed to make use of this address indicator, then you may use the address 'Brandon,' Keizersgracht, 197, Amsterdam, and the best in your interest will then be done.

" We may still point out to you that this business will entirely be handled in our name, *i.e.*, L. J. Brandon & Co., so that it is a Dutch business now in neutral goods, and not a German business. We could invoice you the goods; documents to be handed to you by our bank against payment, this being the only way possible under the circumstances.

" Awaiting your good news,

" We remain, &c.,

" (Signed) pp. L. J. BRANDON & Co. " (illegible).

This letter does not relate to the goods ordered from Jantzen, which are the subject of the present suit, and I refer to it only as

showing the kind of work being undertaken by Brandon & Co. for the German merchants.

This was followed by another letter of November 26, 1914, from Brandon & Co. to the Chetty firm, likewise stopped by the Censor:—

“ L. J. Brandon & Co., Amsterdam, Soerabaya, Manchester, to Messrs. K. R. M. T. T. Arunachalam Chetty & Bros., Colombo.

“ Amsterdam, November 26, 1914.

“ Dear Sirs,—We beg to inform you that we have arranged with our mutual friend, Mr. J. J., for the shipments of your indents Nos. 133-139 for Italian made ‘cotton towels’. The first lot of 8 cases has already gone forward, and we have much pleasure in sending you herewith our invoice for the goods shipped per ss. ‘Tranquebar’ from Genoa to Colombo.

“ Documents will be handed to you, through the Ned. Ind. Commercial Bank, against payment of amount of invoice. Interest at bank rate from now till date of settlement here to be added.

“ Mr. J. J. takes, of course, the full responsibility, and guarantees for this shipment as well as for the others.

“ The insurance has been covered with ‘la federale’ in Zurich, including war risk. The premium for war risk is  $3\frac{1}{2}$  per cent., which has not been charged in the invoice, as Mr. J. J. wishes to settle that with you later on.

“ Shipment samples have been sent you by registered sample post.

“ With regard to the further lots of these indents for towels of neutral make, we would like to have your distinct authorization to effect the shipments to you, which, of course, would be done likewise under J. J.’s full responsibility. But kindly note that the premium for war risk, ranging from about  $\frac{3}{5}$  per cent., would have to be charged in the invoice.

“ To avoid delay we beg you to cable us your authorization at once as per following code words:—

“ ‘Ship soonest.’ You may ship the total balance still undelivered in one or more lots, but not later than end of January.

“ ‘Ship towels.’ You may ship the total balance still undelivered in one or more lots, but not later than middle of February.

“ ‘Ship February.’ You may ship the total balance still undelivered in one or more lots, but not later than end of February.

“ In case the shipments should not be very urgent, of course you may send us your instruction by letter.

“ In case you have to send any fresh orders for Holland or Italian goods, Mr. J. J. asks you to send such orders to our care, and the same would have immediate careful attention. Likewise under full responsibility and guarantee of our mutual friend. Meanwhile,

“ We remain, &c.,

“ (Signed) pp. L. J. BRANDON & Co. (two illegible signatures).

“ Invoice enclosed. Ref. samples separate registered. ”

1916.

SHAW A.C.J.  
and P.

The ss.  
“Dandolo”  
and the ss.  
“Caboto”

1916.

SHAW A.C.J.  
and P.*The ss.*  
"Dandolo"  
and the *ss.*  
"Caboto".

It will be noticed that this letter, like the previous one referring to goods ordered from E. G. Kistonmaaker & Co., contains no suggestion that Brandon & Co. have taken over, or desire to take over, the contract between the vendors and the Chetty firm. Jantzen remains liable under the contract, and it is he who has to settle with the Chetty firm, "later on," as to the premium for war risk, and it is to Jantzen to whom future orders are to be sent to the care of Brandon & Co., and it is he who is to undertake full responsibility for and to guarantee any further orders. It is impossible, in my view, to read this letter except as intending to convey to the Chetty firm that Brandon & Co. are merely acting as agents for the vendor Jantzen, and, as in the case of the goods ordered from E. G. Kistonmaaker & Co., they were only "handling now their business in neutral goods" under the name of Brandon & Co., to avoid trouble in respect of enemy trading.

These letters, having been stopped by the Censor, were not received by the Chetty firm, consequently no reply was sent to Brandon & Co. Notwithstanding this, the first consignment of the towels ordered from Jantzen were despatched, and arrived in Ceylon by the *ss.* "Tranquebar," and on January 4, 1915, the National Bank of India wrote informing the Chetty firm of the arrival of the shipping documents, which they would be glad to deliver to the Chetty firm against payment of the amount of the invoice enclosed.

This invoice is for part of the towels ordered from Jantzen on indents 133-139, and purports to come from L. J. Brandon & Co., Amsterdam. This invoice was the first intimation that the Chetty firm had received that Brandon & Co. had anything to do with the goods.

The Chetty firm paid the amount to the bank and obtained delivery of the goods, and on January 8 wrote to Brandon & Co. requesting them to keep on shipping the goods and to draw for their value through the Mercantile Bank. The Chetty firm evidently thought at the time that Brandon & Co. were the manufacturers from whom Jantzen had ordered the goods, as they ask at the end of their letter whether they were the makers of the goods ordered from Jantzen on certain other indents, "and if so, to please ship the goods of those indents also immediately."

This letter was answered by Brandon & Co. by letter of February 19. In this letter again Brandon & Co. give no explanation of their position in the transaction, but state with regard to the other indents that the Chetty firm had inquired about, "we are not the makers of these goods, but we hear from Mr. J. J. that these are English goods, and he has already a long time ago sent instructions to the maker to supply the goods direct to you." The letter again contains no intimation that they had taken over Jantzen's contract, and they evidently meant the Chetty firm to assume that they were the makers of the goods sent, from whom Jantzen had ordered them, and that they were merely being handled in their name.

On May 12, August 13, and September 10 further consignments of the towels arrived by ss. "Dandolo" and "Caboto," and were landed and placed in the Customs warehouse. Each shipment was ordered by the Customs to be detained immediately it was landed, and on October 18, when still in the Customs, the goods were formally seized as prize.

The invoices for these consignments sent through the Mercantile Bank are in similar form to that for the consignment cleared by the Chetty firm. They purport to be from Brandon & Co., and to be for the goods ordered by indents 133—139, and the shipping documents show that the goods were shipped at Venice by Brandon & Co., for transport to Colombo, deliverable to their order, and that the goods were of Italian origin.

Up to this point the facts and documents appear to me to raise an overwhelming presumption that the goods were still the property of Joh. Jantzen, from whom the Chetty firm had ordered them, and with whom alone they had any contract.

A claim to the goods is, however, set up by Brandon & Co., and certain correspondence has been sent out and produced through the Dutch Consul which passed between Joh. Jantzen of Hamburg, Brandon & Co. of Amsterdam, and Lubbe & Hasche of Milan, which is said to show that, in fact, Jantzen had ordered the goods from Lubbe & Hasche, and had transferred his contracts with them and with the Chetty firm in Colombo to Brandon & Co., who, thus, had become the owners of the goods. This correspondence is supplemented by an affidavit of one J. D. Westenburg, who purports to be the "procurator" of the firm of Brandon & Co., who had alone conducted the transaction on their behalf.

The correspondence commences with a letter from Jantzen to Brandon & Co., of September 18, 1914:—

" Messrs. L. J. Brandon & Co., Amsterdam.

" Hamburg, September 18, 1914.

" With to-day's opportunity I beg to make you the following offer:—

" I have still from the time before the war a contract running with the firm of K. R. M. T. T. Arunachalam Chetty, Colombo, for towels of Italian origin (manufactured).

" As under present circumstances it is not possible for me to carry out this contract, I beg to inquire whether you would be inclined to take over the contract for me. Sellers of the goods are the firm of Lubbe & Hasche, Milan, and the buyer is mentioned above.

" In case you are inclined to agree to my proposal, I would request you to approach my suppliers, Lubbe & Hasche, and to agree terms with them.

" I hope you will agree to my proposal, and sign,

" Yours, &c.,

" JOH. JANTZEN."

1916.

SHAW A.C.J.  
and P.

The ss.  
"Dandolo"  
and the ss.  
"Caboto"

1916.

SHAW A.C.J.  
and P.The ss.  
"Dandolo"  
and the ss.  
"Caboto"

For the Crown it was contended that the words "ich habe aus der zeit vor dem Kriege noch einen kontrakt" used in the second paragraph of the letter should be translated "I have from the time before the war another contract," showing that there had been some previous correspondence with regard to Brandon & Co. carrying out Jantzen's contracts. In view, however, of the evidence given by Mr. Weber and Mr. Frei, commercial gentlemen with very great experience of German correspondence, I must accept the translation as set out above as substantially correct. I do not, however, attach very much importance to the translation of the words, because I think that however they are to be construed there must have been some previous correspondence as to the terms on which Brandon & Co. were to carry out Jantzen's contracts. It is hardly likely that Jantzen would make a proposal to a neutral merchant in a foreign country such as is contained in the letter without giving him further details, if it was really intended that he should altogether take over the contract with its attendant liabilities.

The further correspondence is to the effect that Brandon & Co. are to take over the contract between Jantzen and Lubbe & Hasche and the contract between Jantzen and the Chetty firm. Lubbe & Hasche agree to send the first consignment to Colombo on the terms that they are to be paid by Brandon & Co. if and when the Chetty firm pays, and the other parcels are for Brandon & Co.'s account, "if", as expressed in Brandon & Co.'s letter to Lubbe & Hasche of October 13, 1914, "Colombo consents to our taking over the contract". Jantzen agrees to guarantee to the Chetty firm the correct execution of the order, and the increased premium in respect of war risks appears to have been left over for arrangements between Jantzen and the Chetty firm.

The method of payment to Lubbe & Hasche for the goods is somewhat illuminative. Had this been a *bona fide* purchase of goods by a Dutch firm from an Italian firm, one would have expected a draft to have been sent from Holland payable in Italy, whereas we find that payment was by a transfer in German money at the Deutsche Bank in Berlin. From what account the transfer was made does not clearly appear in the correspondence before the Court.

I am not satisfied by the correspondence and the affidavit of J. D. Westenburg that there was ever any *bona fide* transfer of the contracts or of the ownerships of the goods from Jantzen to Brandon & Co., and I believe that it was merely an arrangement between the German firm in Hamburg and the two firms of German merchants established in neutral countries, whereby Brandon & Co. were "handling Jantzen's business in their name" for the purpose of avoiding the appearance of enemy trading.

I find that the goods are the property of Jantzen, and are enemy goods.

1916.

SHAW A.C.J.  
and P.*The ss.*  
*"Dandolo"*  
and *the ss.*  
*"Caboto"*

The other questions that arise in the case are questions of law. It is contended on behalf of the claimants that the goods not having been seized afloat they cannot be condemned as prize; and that even if goods can be followed and seized on shore, the goods in the present case were still under the protection of the neutral flag of the ships that brought them to the port. Both these points I find against the claimants.

So soon as these goods were landed and placed in the warehouse, orders were given by the Customs for their detention. It does not appear that this was expressed to be a seizure as prize, but the Customs is the proper authority to seize and detain, with a view to its condemnation as prize, any enemy property found in the port, and the orders for detention were clearly made on the ground that the goods were enemy property. This point, however, seems to be of no importance, as the goods were formally seized as prize on October 18, before their removal from the warehouse.

In the case of the "Roumanian",<sup>1</sup> petroleum, the property of a German Company, was shipped in an English vessel at a neutral port, before the outbreak of hostilities, bound for Hamburg. The vessel was diverted by her owners, after the declaration of war, into an English port, and the oil was pumped by them into tanks on shore which were under the control of the Customs, it was then placed under detention by the Customs, and finally formally seized as prize. The Privy Council held that the oil was properly seized as prize, although not afloat at the time of seizure. The case is not on all fours with the present, because the oil in that case was brought into port by an English ship, and had at all times on the voyage been liable to seizure as prize, and it was on that ground that the Privy Council actually decided the case. The case, however, shows that the mere fact that the goods seized were not afloat at the time of seizure does not prevent the Prize Court having jurisdiction to condemn the goods as prize so long as they are still within an English port, and their Lordships stated in their judgment that they saw no reason to dissent from the judgment of the President of the Admiralty Division to the effect that the tanks constituted part of the port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm.

This case was followed by the President of the Admiralty Division in England in the case of the "Eden Hall".<sup>2</sup> In that case enemy goods had, prior to outbreak of war, been landed in an English port and placed in a Customs warehouse in the port, and were seized in the warehouse after war broke out. The goods were held liable to seizure upon the ground that they were in port in a warehouse belonging to the port, and were therefore the proper subject of maritime prize.

<sup>1</sup> (1916) A. C. 124.<sup>2</sup> 2 Br. & Col., Prize Cases. Pt. 6, p. 81.

1916.

SHAW A.C.J.  
and P.

*The ss.*  
"Dandolo"  
and the *ss.*  
"Caboto"

On the strength of these authorities, I hold that the goods in the present case had not become immune from seizure because they had been landed and placed in the Customs warehouse in the port of Colombo.

With regard to the second point. Prior to the Declaration of Paris, England had always asserted the right to seize enemy goods on the seas wherever they were found, and whether in neutral ships or not. By the Convention England gave up part of the right she had formally insisted on, and agreed that in the future the neutral flag should cover enemy's goods, with the exception of contraband. This was a concession, not to the enemy, but to neutrals, and the preamble to the Declaration shows that it was for the purpose of international comity, and for the purpose of avoiding disputes between the belligerents and neutral states that the rule was made. The protection of the neutral flag, in my opinion, can only extend to protect enemy goods when actually under that flag, and if they have been freely parted with by the neutral ship and are afterwards seized, either afloat or ashore, on the high seas or in an English port, they are liable to condemnation as prize. In the present case they might have been seized as soon as they were transhipped into the English lighters, and they remained liable to seizure as long as they remained in the Customs warehouse in port.

The goods being, in my opinion, enemy's goods, and lawfully seized as prize, must be condemned. I order accordingly.

[His Lordship made an order for the sale of the goods pending appeal. The Attorney-General offered to deposit the money in Court.]

