

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

*Present:* The Hon. Sir Alexander Wood Renton,  
President of the Prize Court.

THE SS. "AUSTRALIA."

*Cause No. 7.*

*Goods shipped by enemy firm to neutral before outbreak of war—Right to seize.*

Where goods are contracted to be sold by an enemy firm to a neutral, and are shipped during peace without any anticipation of imminent war, they cannot be seized or captured afloat after war has supervened, if the property in the goods had already passed to the neutral.

THE facts are set out in the judgment.

*F. J. de Saram*, for claimants.—The character of the goods on an enemy ship depends on the neutral or enemy character of the owner, *i.e.*, the person at whose risk the goods are during transit. Though a German firm, the Barmer Export Gesellschaft, are consignees in the bills of lading, they have been paid the value, and the property in the goods has passed to the Chinese neutral indentors, on whom the risk of loss falls. The Barmer Export Gesellschaft claim as trustees for, or representatives of, the beneficial owners. The enemy or neutral character of the owner is determined by the domicile of the trade he carries on. The domicile of trade is Java. Further, property passed from the Barmer Export Gesellschaft before the declaration of war.

Counsel cited *Tiverton*, pp. 10, 11, 55, 113 referring to the "Abo,"<sup>1</sup> the "Ariel,"<sup>2</sup> and the "Ida."<sup>3</sup>

*Anton Bertram*, K.C., Attorney-General, for the Crown.—The Crown does not raise the question of the right of the enemy firm to be heard. The materials in the affidavit are insufficient to prove that the Barmer Export Gesellschaft have been entirely divested of their interests in the goods as owners.

*Cur. adv. vult.*

July 2, 1915. WOOD RENTON C. J. and P.—

The question for decision on this motion is whether certain goods on board the steamship "Australia," claimed by the Barmer Export Gesellschaft, were or were not liable, at the date of the

<sup>1</sup> *Spinks* 42.

<sup>2</sup> 11 *Moore P. C.* 119.

<sup>3</sup> *Spinks* 26.

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capture of the "Australia" by Commander Caulfield of H.M.S. "Fox," to be condemned as good and lawful prize. The "Australia" was captured on August 10, 1914, and was condemned on October 5, 1914. The present claim was filed on December 10, 1914. By orders of this Court dated December 10 and 12, 1914, the goods in question were released to the claimant on bail to the amount of their appraised value, viz., £2,580. 13s. 4d. The claimant now moves for a declaration that the goods were neutral property at the time of capture, while the Attorney-General on behalf of the Crown prays for a declaration to the contrary effect, and for the condemnation of the claimant and its bail, in the appraised value, if the Court should hold that the claim has not been established. The Barmer Export Gesellschaft, the consignor, is a German company, and the goods in question, which consist of an immense variety of all kinds of mercantile articles exported from Antwerp and destined for Batavia, must be regarded as enemy property till they have been shown by the claimant not to have originally possessed, or to have been subsequently divested of, that character. The case for the claimant is that they are really the property of a large number of Chinese traders in Java, who are, of course, neutrals. The course of business in accordance with which they were purchased has been thus described by Messrs. Van Dyk and Wythoff, lawyers, at the Court of Justice at Batavia, in the certificate C, which has been filed in support of the motion:—

"The Barmer Export Gesellschaft has representatives at Batavia, Samarang, Sourabaya, and Medan. These representatives collect orders from the Chinese dealers and send them up to the head office in Europe. At the date of ordering, the shopkeeper pays one-third of the amount of the order, while two-thirds is payable after delivery of goods against draft at a fixed time. The head office in Europe collects the ordered goods and ships them together, in order to obtain the most favourable freight. The head office sends the bill of lading, one for each lot, to its representatives, who give delivery notes to the shopkeepers, so that these can receive their goods out of the ship. These delivery notes are handed over to dealers against signed drafts."

Except by the reference which it contains to payment being made "against draft at a fixed time," this certificate does not clearly show that the Barmer Export Gesellschaft does not retain through its agency in Batavia a *jus disponendi* over the goods after their arrival in Java. But Mr. Sydney Julius in his affidavit states that after the purchase of the goods in Europe "invoices showing the marks and numbers are made out in the name of the indenters before the arrival of the ship in the Netherlands Indies, and the indenters sign negotiable instrument for the balance purchase money payable on a fixed date, irrespective of the arrival

of the ship, and thus become the beneficial owners of the goods." Mr. Julius's affidavit was amplified on this point in the argument of Counsel for the claimant. He stated that the bills of lading had been made out in the name of the Batavia branch of the Barmer Export Gesellschaft as consignee, to facilitate the completion of the transaction, in view of the numerous orders that had to be dealt with; that on receipt of information that the goods had been purchased in Europe bills were drawn for payment in Europe before shipment of the goods, and that in this way, on shipment, the goods had been paid for and were thereafter at the risk of the beneficial owners, the Chinese indenters, for whom the Batavia branch of the Barmer Export Gesellschaft was only a trustee. The bills of lading were with, and have been obtained from, a bank in Java. The orders with which we are here concerned are alleged in every case to have been given, the negotiable instruments for the full balances due by the indenters to have been signed, and shipments to have been made, prior to the declaration of war. The negotiable instruments have been discounted by the Java bank, who still hold them, and if the present claim is rejected the ultimate loss will fall upon the indenters, as they have had to obtain possession of their goods and are still liable on their drafts. The case for the claimant on these points is strengthened by the production of two documents—the invoice A dated July 16, 1914, and the promissory note B—showing that the transaction to which they relate was anterior to the war, and that the acceptance was to be met at a fixed date, *ex hypothesi* irrespective of the date of the arrival of the goods. The document A discloses also the practice as to the payment of one-third of the price in advance.

To these facts I have now to apply the law. The Attorney-General stated in argument that he did not wish the case to be disposed of on the issue whether a *locus standi in judicio* has been made out on behalf of the Barmer Export Gesellschaft, and he has thereby relieved me from the necessity of considering what would have been, upon the evidence, a somewhat difficult question. The rule of law governing the solution of the problem actually before us may be taken from the judgment of Sir Samuel Evans in the recent English case of *The Cargo ex "Miramichi"*<sup>1</sup>: "Where all the material parts of the business transaction took place *bona fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods. Where goods are contracted to be sold, and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture, unless under the contract the property in the goods has by that time passed to the enemy. It

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<sup>1</sup> Nov. 23, 1914.

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may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership (*c.f.* section 20 of the Sale of Goods Act, 1893). The main determining factor is whether, according to the intention of seller and buyer, the property had passed. The question which governs this case, therefore, is, Whose property were the goods at the time of seizure? This principle is consonant with good sense, and with the notion of what is right in commercial dealings. It is also in accordance with the doctrines adopted by the eminent jurists who have become authorities on the law of nations, and applied in the decisions of our Prize Court (see, *e.g.*, "The Cousine, Mariamne,"<sup>1</sup> the "Ida,"<sup>2</sup> the "Abo,"<sup>3</sup> the "Vraw Margaretha,"<sup>4</sup> and the "Ariel."<sup>5</sup>

The case for the present claimant might well have been stronger. But it is obvious from the affidavit of Mr. Julius and from the statements of counsel that great efforts have been made to render it so, and that these efforts have been obstructed by obstacles of an unforeseen character, such, for instance, as the alleged refusal of the Consul-General in Java to allow any affidavits as to prize ships to be sworn before him. On the whole, I have come to the conclusion that the claimant has shown by evidence, sufficient in the circumstances, that the goods here in question belonged to the indenters, and were therefore neutral property, at the date of seizure. I declare accordingly. The motion of the Crown for the condemnation of the goods and of the claimant and its bail in their appraised value is disallowed.



<sup>1</sup> *Edw.* 346 and 2 *Roscoe* 85.

<sup>3</sup> *Spinks* 42 and 2 *Roscoe* 285.

<sup>2</sup> *Spinks* 26 and 2 *Roscoe* 268.

<sup>4</sup> *L.c. Rob.* 836, 1 *Roscoe* 149.

<sup>5</sup> 11 *Moore P. C.* 119 and 2 *Roscoe* 600.