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THE PRIVY COUNCIL.

(IN PRIZE.)

Friday, Dec. 17, 1920.

APPEALS FROM ADMIRALTY DIVISION (IN PRIZE).

THE DOCTRINE OF INFECTION. CLAIMS BY NEUTRALS TO COFFEE, &c., CONDEMNED AS PRIZE.

"HILDING" (PART CARGO EX) (L. PAULSEN & CO. v. PROCURATOR-GENERAL); "KRONPRINSESSAN MARGARETA" (PART CARGO EX) (IMPORT A/B VICT. TH. ENGWALL & CO.; BERG & HALLGREN, LEVIN LEVANDER & RUD. OFVERSTROM v. PROCURATOR-GENERAL); "RENA" (PART CARGO EX) (MATTSSON, PETERZENS & CO. v. PROCURATOR-GENERAL); "KRONPRINSESSAN MARGARETA" (PART CARGO EX) (BERGMAN & BERGSTRAND v. PROCURATOR-GENERAL); "PARANA" (PART CARGO EX) (LUNDGREN & ROLLVEN v. PROCURATOR-GENERAL); "KRONPRINSESSAN MARGARETA" (PART CARGO EX) (DAHLEN & WAHLSTEDT v. PROCURATOR-GENERAL).

Before Lord SUMNER, Lord PARMOOR, Sir ARTHUR CHANNELL and Sir HENRY DUKE.

Judgment in these cases, all of which raised the question of the doctrine of infection, was given to-day. The hearings of the appeals took place on June 8, 10, 11, 14 and 15, and are reported at pages 27 and 63, Vol. IV. of "Lloyd's List Law Reports."

Counsel for the claimants in the case of the *Hilding*, which concerned hog products, were Sir H. Erle Richards, K.C., and Mr. R. H. Balloch (instructed by Messrs. Botterell & Roche), while the Attorney-General (Sir Gordon Hewart, K.C.), the Solicitor-General (Sir Ernest Pollock, K.C.), Mr. Stuart J. Bevan, K.C., and Mr. James Wylie (instructed by the Treasury Solicitor) appeared for the Crown.

In the next case Sir H. Erle Richards, K.C., and Mr. R. H. Balloch were Counsel for the appellants, and the Attorney-General, the Solicitor-General, Mr. Stuart Bevan, K.C., and Mr. Hubert Hull for the Crown.

In the third and fourth Sir H. Erle Richards, K.C., and Sir Robert Aske appeared for the claimants, with the Attorney-General, the Solicitor-General, Mr. Stuart Bevan, K.C., and Mr. Clement Davies for the Crown. In the case of the *Parana* Mr. R. A. Wright, K.C., and Sir Robert Aske were Counsel for the claimants, and the Attorney-General, the Solicitor-General, Mr. Stuart Bevan and Mr. Hull for the Crown. Messrs. Botterell & Roche instructed for the appellants in all the cases except in the claim of Rud. Ofverstrom, whose solicitors were Messrs. Thomas Cooper & Co.

In the last case, that of the *Kronprinsessan Margareta*, Sir Erle Richards, K.C., and Sir Robert Aske (instructed by Messrs. Botterell & Roche) appeared for the appellants, and the Attorney-General, the Solicitor-General, Mr. Stuart Bevan, K.C., and Mr. Clement Davies for the Crown. The Treasury Solicitor instructed for the Crown in all cases.

JUDGMENT.

The judgment of their Lordships, delivered by Lord SUMNER, was as follows:

These appeals are brought to test the validity of the doctrine of "infection" and its applicability to the conditions and forms of overseas commerce at the present time, and their Lordships think it right to deal with them accordingly, although, as will appear, they—or, at any rate, some of them—might have been disposed of on narrower grounds. They relate to four ships, the

Hilding, the *Parana*, the *Rena* and the *Kronprinsessan Margareta*, and to five voyages, there being two of the ship last named.

The claimants are Neutrals, who acquired the titles on which they rely in the ordinary way of trade. The goods condemned were coffee and hog products, which are in themselves conditional contraband, and they were carried in Neutral bottoms under the protection of Neutral flags and were shipped from and deliverable at ports in Neutral countries. None of them were shown to have had an ulterior enemy destination, nor was it shown that any of the claimants themselves were privy to the ulterior destination of any of the cargo carried in the same vessels, but in each case there was other cargo, which was in itself conditional contraband and was found to have an ulterior enemy destination, and it is by this that the goods in question have been held to be infected.

The case of the *Hilding* is mainly one of fact, and will be stated later. In the case of the *Parana*, Neutral shippers, acting through agents, shipped sundry parcels of coffee belonging to them, of which one had an ulterior enemy destination, as the President found and as the appellants now accept, and others were consigned to the appellants, Messrs. Lundgren & Rollven, in pursuance of contracts of sale and purchase made before the date of the Bills of Lading. The terms of the sale were c. and f. Stockholm, reimbursement by confirmed sight credit on a Swedish bank. The draft in respect of one shipment, that made at Santos, was met by the bank in Sweden before seizure; the draft drawn in respect of the other shipment, that made at Rio, was met after seizure. Both dates were long after the ship sailed from Santos and Rio respectively.

In the case of the *Rena*, Diebold & Co., a German firm trading in Brazil, had shipped sundry parcels of coffee, of which one, nominally consigned to Swedish consignees, but claimed on behalf of a Dutch firm, the Commanditaire Vennootschap Heybroek & Co., as purchasers, was held by the President to have belonged to Diebold & Co. at the time of the seizure and to have had an ulterior enemy destination at that time given by Heybroek & Co., and was accordingly condemned. The present appellants, while not admitting these facts—to which, indeed, they appear not to have been privy—were not in a position to contest the President's findings and condemnation. This may have been their misfortune, but it cannot affect the case. They are the firm of Mattsson Peterzens & Co., consignees named in the Bill of Lading of another portion of the coffee pursuant to a contract of purchase and sale dated before the shipment, the terms of which were cost and freight Gothenburg, payment at sight on a Swedish bank, who confirmed the credit by telegram to Santos. The Swedish bank met this draft before the seizure but after the ship had sailed. This parcel of coffee was not shown to have had any ulterior enemy destination; on the contrary it was admitted to have been in itself the subject of a legitimate transaction.

In the case of the second voyage of the *Kronprinsessan Margareta*, the claimants and appellants are Messrs. Bergman & Bergstrand. Coffee was shipped by Diebold & Co., under a Bill of Lading dated May 8, 1916, consigned to Messrs. Dahlen & Wahlstedt. This parcel had in fact an ulterior enemy destination and the President condemned it as contraband, but it is contended that it was not liable to condemnation, and therefore not capable of infecting other goods in the same ship, as the Order in Council of Oct. 29, 1914, respecting immunity from condemnation of conditional contraband, consigned to a named consignee at a neutral port of discharge, was still in force and applied to it. There is, therefore, here a question whether this immunity had or had not been revoked before June 15, 1916, the date of seizure. The appellants, Messrs. Bergman & Bergstrand, bought other parcels of coffee from Diebold & Co., under contracts effected before shipment, and were the consignees named in the Bill of Lading. Their coffee was only destined for Sweden. The terms of these contracts provided for payment by sight reimbursement credit on a Swedish bank, but the draft was not met until after the date of the seizure.

The remaining case, that of the first voyage of the *Kronprinsessan Margareta*, is rather more complicated. There are four claimants and appellants—Messrs. Engwall, Berg & Hallgren, Levander, and Ofverstrom—all neutrals importing for neutral consumption only. An enemy firm, Goldtree, Liebes & Co., in Brazil, made shipments of coffee, of which, in addition to the parcels claimed as above, one was condemned by the President as having an ulterior enemy destination and as being the property of the shippers at the date of seizure. The appellants all bought their parcels under contracts made after shipment, except Levander. The terms of his contract were f.o.b. Acajutla, payment 90 per cent. against Bill of Lading and balance on delivery, but he, like the other appellants, did not take up the Bill of Lading and make any payment until after the date of the seizure. In all these cases the appellants were innocent and ignorant of the enemy destination of the infecting parcel.

It will be convenient to consider the nature of the rules impugned and the reasoning and authority on which they rest before dealing with the particular circumstances of the cases under appeal, especially as the application of these rules is complicated by the fact that the purported transfers of ownership have all been effected by transfers of documents representing the goods while afloat and by the fact that, in so far as the position of enemy transferors has to be considered, the appellants further invoke the Declaration of Paris.

For about one hundred and fifty years at least the law of Prize has contained two settled rules, one which refuses to recognise transfers of the ownership of moveables afloat from an enemy transferor to a Neutral

transferee, when unaccompanied by actual delivery of the goods, and the other, which condemns, as if contraband, any goods which, though not condemnable in themselves, belong, or are deemed to belong when captured, to the same owner as other cargo in the same vessel, which itself is liable to condemnation as contraband. It is strictly with owners that these rules deal, and although an owner is normally the person who has and exercises control over goods which belong to him, there is no warrant for saying that either rule refers to anything but ownership. It is not the case that a Neutral, who could not otherwise establish such ownership as the law will recognise, is entitled to be treated as if he had done so, because he can show that he has by personal contact acquired a right to control the goods in certain events, nor is it the case that enemy ownership of goods, so associated with contraband as to become liable to confiscation, may be disregarded if the enemy ownership does not happen to be made active by the exercise of actual control, or if the enemy owner's contractual position has made him indifferent to the fate of his goods. Upon the authorities it is also clear that the above-mentioned refusal to recognise transfers does not apply when both transferor and transferee are Neutral, apart from special circumstances affecting them, and that the common ownership, which involves goods, not in themselves contraband, in the condemnation of other goods which are condemned as contraband, is common ownership which subsists at the time of the seizure and has not previously been determined.

Their Lordships are fully aware that some Continental jurists have criticised the rule of infection adversely, and that Continental Prize Courts have not always accepted it, though it has long been adopted in the United States and more recently in Japan. They are, however, bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish. They would observe that, valuable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic Law of Nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists. The history of this rule is obscure.

A reference to some of the proclamations in Rymer's "Fædera" suggests that it may have had its origin in the practice followed by the executive during the seventeenth century in successive wars, and the theories on which writers like Zouch, Bynkershoek and Heineccius appear to proceed, seem rather to have been an effort to find in their erudition some *ex post facto* warrant for an accepted rule than an historical statement of the reasons which actually guided those who laid it down. Sir William Scott found it well settled, and if he appears to take some credit to the Courts for mitigating the harshness of an older time, this points rather to the substitution of legal doctrines for executive practice than to the exercise of any assumed dispensing power by Courts of Prize.

That the so-called doctrine of infection does not really rest, in spite of many passages which suggest it, on the personal culpability or complicity of the owner of the goods, is shown by the fact that, if it were so, excusable ignorance would be an answer, and for this there is no authority. The term is as old as the Treaty of Utrecht, but the doctrine is perhaps unfortunately named. From the figure which describes the goods as contaminated when seized, the mind passes to the analogy of a physical taint, which runs through the entire cargo in consequence of its being in one bottom, and begins on shipment or at least on sailing. Hence, "once infected always infected" is assumed to be the rule, and a buyer would get a tainted parcel, even though he became owner before seizure, and was recognised as such. This is inconsistent with the view that the rule is a penal rule, as it certainly has been said to be, but it is argued that the penal effect is only accidental and that the real foundation is the belligerent's right of capture, which may arise as soon as the ship gets out to sea. "Infection" has then attached to all the goods afloat in one common ownership, and to purge it by a subsequent transaction and transfer of ownership on land would be to defeat an accrued belligerent right.

This reasoning is answered as soon as it is appreciated that "infection"—that is, the liability of a particular owner to a derivative condemnation of his goods—is not a quality of the goods themselves, but is an incident of the owner's position, when the seizure is made and the captor's right arises. This consideration operates in two ways. It fixes the critical moment as the time of seizure and makes liability to condemnation depend on the facts as they are then found to be; but it also establishes that by those facts the claimant must stand or fall. His liability is not in the nature of punishment, nor does it involve *mens rea*. It does not depend on his having formed or having abandoned an intention to send the goods in question to an ulterior enemy destination. The destination of the goods is a matter of fact, by whomsoever it is given, and, when transit to that destination is in progress, this may make the goods themselves absolute contraband. When once it is found that, at the time of the seizure, the same person was owner of goods on board and embarked in the same transaction or transit, of which the ulterior destination involved their condemnation, and of goods bound for a Neutral port without any ulterior destination, neither the captor nor the Court is called on to investigate his mercantile operations as to those other parcels—an inquiry complex and remote, in which the claimant has all the information, and the captor all the disadvantage—but these goods also are involved in the condemnation.

Neutrals, however, must be taken to accept the consequences of the belligerent's legitimate exercise of all his recognised rights. If cargo has in fact such an ulterior destination as makes it liable to condemnation, that consequence follows independently of the actual owner's knowledge, intention or interest, for *res perit domino*. It is accordingly beside the mark to say that the appellants were innocent parties themselves; that they never interposed in the war; that, so far as they knew, all the goods with which they were concerned had a final Neutral destination; that if their buyers had arranged otherwise it was unknown to them and unsuspected; that guilty shippers escape because they have been paid, and guilty sub-purchasers because the goods have been intercepted and they are not liable to pay, and that thus the penalty falls for the offence of others on the shoulders of the party who of all is the most innocent.

It has been contended that control and not ownership is the real test, so that either control, divorced from ownership, when vested in a Neutral will avert condemnation, or bare ownership in an enemy, if devoid of control, will be so innocuous as to neutralise any infection. It may be doubted if this point really arises. None of the appellants here had control, as distinguished from a contractual right to obtain control on taking up the documents and thereby becoming owner, and, unless in the cases of the *Rena* and the *Parana* the intention was to retain, if anything, only a lien by way of security and not the general property, none of the transferors were anything less than owners, who had contracted to give control and ownership as well, upon the due taking up of the documents.

In any case, however, there is a fallacy in the argument. In cases like the *Hamborn* (1919, A.C. 993), control is looked to instead of the mere *persona*, in which, according to municipal law, the ownership resides, because under the rules there applicable enemy character is the question and civil property is not. The rules now applicable adopt the test of ownership and not that of enemy character. They may be criticised or impugned on other grounds, but if they are recognised and the question is merely as to their application, they must be accepted as they stand.

It is objected that the rule "infects" goods, which are in themselves free from all objection, by reason of what has been done with other goods, over which the claimants had no control, and which in some cases received their enemy destination from consignees, whose design was unknown even to the enemy shipper. The rule neither penalises nor deters the enemy shipper, especially if it is applied in cases where he has been fully paid. It only operates to pass what belongs to an innocent Neutral into the pockets of the captors.

Though this kind of deterrent is not always of direct and obvious efficacy, few modes of deterring contraband trade are more effectual than to establish a rule, known by and applicable to all, that the inclusion by a shipper among his other shipments by the same vessel of one parcel having in fact an ulterior enemy destination may lead to the condemnation of the whole. On the other hand, the adoption of the date of the seizure is a great protection to the innocent Neutral. Just as the general rule is that a ship is not open to proceedings merely for having carried contraband on a past voyage, so goods are liable to infection not because they formerly belonged to an owner of contraband, but because they are found to do so when the captor's inchoate title by seizure begins. If the common ownership existing before the seizure had then come to an end by means which are valid in prize, this liability does not arise; if it continues till after the seizure, a new and Neutral owner, acquiring ownership only after seizure, though nothing forbids his acquiring title from a belligerent, can have no better right as against the legitimate captor than to stand in the shoes of the owner, from whom he derives title, as they were when the goods were seized, and he, by reason of his common ownership of both classes of goods, would have forfeited them all. At the time of the seizure the subsequent transferee has acquired no right to object, and, the goods having been legitimately brought into Court for condemnation, a claimant on a title not completed until after seizure must obtain them, if at all, only by the aid of the Court and only on the terms of accepting the law there administered as binding upon him.

The rule against recognising transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purposes of a judicial determination. Its application assumes that the circumstances of the shipment, and the dealings with the shipping documents and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee, which in other Courts not bound by such a rule would be valid and enforceable.

With sham transactions Courts of Prize would deal in another fashion; with incomplete transactions insufficient to transfer rights, no Court would deal at all. The expression "mere paper transaction," sometimes used, does not imply that something unreal or ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right, if any, which he may be entitled to acquire

in consequence. The history and the theory of the rule, neither of which is now very clear, are too inconclusive to add weight to the rule itself or throw light on its true application. It appears to have been regarded as a particular example of a wider principle, that the national character of moveables cannot be changed while they are at sea by any independent dealings or occurrences.

Thus, in the *Negotie en Zeevaart*, decided on appeal in 1782, the question was whether a ship, which went to sea a Dutch ship, had ceased to bear that national character when she was taken, because the Dutch colony of Demerara, from which she sailed, had before her capture become British by capitulation to the British Crown. It was held that she had not. This was followed in the *Danckebaar Africaan* (1 C. Rob. 107), where the question was whether the capitulation of the Cape of Good Hope, which had taken place after the ship sailed but before her capture, and had made British subjects of the Dutch owners, had not also entitled them to claim their ship on arrival at the Cape as prize on the ground that there had been in fact a capture of British property. So strict was the rule even then that the claimants, though British subjects themselves at the time of capture, could not be heard to assert that title against the presumptions arising when the ship sailed. Shortly afterwards it was accepted in the *Vrouw Margareta* (1 C. Rob. 336) that there was no recorded instance of a claim being sustained for goods purchased of an enemy in transit in time of war, for the practice of the Prize Court to look only to the time of shipment was already invariable.

It has been contended that this is a rule applied for the purpose of determining the status of goods, and that it is only so applicable; that it decides whether goods have enemy or Neutral character, but not whether they, being Neutral and in themselves innocent, can be condemned as having been infected by other cargo which is contraband. No authority has been cited for this proposition.

Whether the foundation of the rule be taken to be the tendency of documentary transfers to encourage evasion and fraud, so as to defeat a belligerent's rights in one way, or the tendency of changes of ownership in transit to make the right of seizure at sea precarious, and so to defeat in another way the correlative belligerent right—namely, the right to obtain a condemnation—the reasoning is equally applicable to such cases of exercise of belligerent rights as those now in question. Its application in either case involves the proposition that the goods claimed belong in the eye of the law either to an enemy or to another Neutral, and such prior owner being a person unable to claim the goods owing to their destination or their association according to the established law relating to contraband, the captor's claim to condemnation succeeds.

It was urged that if this rule originated in a question of the national character, under which the ship and goods sailed, it would have no application except to cases where the national character, i.e., enemy character, was the ground upon which condemnation was or could be prayed. There is a confusion here. What can it matter whether the form of the decree is that there is a condemnation because the goods are proved to be enemy property in fact, or because the goods are deemed to be enemy property in law? The condemnation must equally be decreed, and the determination that the goods are enemy property according to the laws of property generally, or according to the particular laws, by which in a Court of Prize the question of enemy property is to be tested is equally an application of rules of law which bind the Court.

To proceed a step further, if the determination is that the goods are enemy property, and such as would enjoy the protection of a Neutral flag, were it not for the fact that being contraband they lie outside of that protection, the result is the same, namely, that a forfeiture of goods, which the Court is bound to regard as being still enemy goods, follows under the circumstances of the case. The rule, stated in 1799, as being a settled rule, is still logically as much part of the process by which the liability of goods shipped by enemy merchants is to be determined as if the case had arisen before 1856, or as if the issue, enemy goods or Neutral, arose directly, as it did in the *Odessa* (1916, 1 A.C., 145), and the rule was applicable that ownership and not lien or pledge forms the test which guides the Court.

An attempt was made to use this Board's decision in the *Baltica* (11 Moore, 141), by which their Lordships are bound, as a further ground for excluding the application to these cases of any rule which denies recognition to titles obtained through a documentary transfer made while the goods are at sea. It is true that in that case Mr. Pemberton Leigh, delivering the judgment of the Board, states that there are two possible foundations for the rule—the one that documentary transfers lend themselves to fraud and concealment, and the other that they tend to defeat the belligerent's right of seizure—and then describes the former as the " true " view. It was not, however, any part of the question then to be decided to settle the foundation of the rule, since its mere existence sufficed for the determination of the case, and in the circumstances of that case and the contemporaneous case of the *Ariel* the danger of collusive transfers was the one which was most clearly to be apprehended.

Their Lordships do not regard this judgment as declaring the view that these transfers tend to defeat a belligerent's rights to be a false view. Indeed, it is plain that in the *Daksa* (1917, A.C., 386) this Board was of a contrary opinion. The two views are not really inconsistent. A collusive transfer, the truth of which the Court has no means of penetrating, does defeat the belligerent's rights. On the other hand, the transaction may be genuine, as in the

Baltica it was, yet not be recognised. It cannot be doubted that the reason was not that the Court was afraid of being deceived or felt itself incapable of ascertaining the truth, but because, if it were deceived or left in doubt, it would be unable to do justice to the belligerent captor's claim. It is, therefore, no answer to say that there was no collusion about the present transfers. They fall within a rule, which recognises no personal or particular exceptions, and if the goods were liable to be forfeited, assuming them to be rightly stamped with enemy character when seized, an admission of a documentary transfer to a Neutral would defeat the captor's rights.

As these rules are undoubtedly well established, the appellants have been principally constrained to impugn their application to the facts of the present appeals. The circumstance that they do not appear to have been applied together in the same case before is merely accidental, and if the result seems to wear an artificial appearance that is an accident also. The same may be said of the observation that in the old cases the infecting parcel has been shipped direct to the enemy by the common owner himself, and that infection in consequence of an ulterior enemy destination is new. This is merely a consequence of the development of the doctrine of continuous voyage.

Two further arguments are chiefly relied on. The first, that the rule as to infection has been virtually abrogated by the Declaration of Paris; the second, that the rule as to transfers of goods while at sea and without delivery is inconsistent with modern mercantile practice, and therefore ought no longer to be followed. Their Lordships will, of course, pay every possible regard to such an instrument as the Declaration of Paris, but it is necessary to point out exactly what, in this connection, its provisions were. A Neutral flag protects enemy goods from capture as enemy goods; in a Neutral bottom enemy goods are placed on the same footing as Neutral goods. The Declaration, however, is not a charter of immunity in all circumstances for enemy goods under a Neutral flag, nor does it protect goods simply as being enemy goods, which, if Neutral, would have been liable to condemnation. The Declaration says nothing about the criteria by which the enemy or Neutral character of goods is to be determined; it says nothing about the doctrine of "infection"; it says nothing about admissibility or rules of evidence; it says nothing of the rights of a belligerent to repress traffic in contraband of war, or of the modes by which Courts of Prize give effect to and protect those rights.

It is said that the grounds on which so-called "paper transfers" of property at sea are disregarded have no application in the present case, for the goods, even in the cases where they were enemy property when shipped, were covered by the Neutral flag and not even potentially capable of being made good prize, and have since been transferred in good faith and in the ordinary way of trade. The answer is simple. They were capable of being made good prize, even though they were enemy goods in a Neutral bottom, for if they were contraband, or were "infected" by contraband, being in a common ownership with contraband when seized, nothing in the Declaration of Paris either expressly or impliedly protected them.

It is then said that, if so, "infection" has no application, for this principle is a punitive principle, and, as a Neutral is entitled to trade in contraband at his peril, there is nothing for which to punish. He has not intervened in the war or sided with one party against the other, and he has carried on his own Neutral trade in his own and a legitimate way. He is really being penalised in an abortive attempt to punish an enemy, who escapes the penalty. Accordingly, the maxim *cessante ratione legis cessat ipsa lex* applies equally as in the case of the doctrine discussed above. If the rule against recognition of transfers of goods at sea ceases to apply, because these goods cannot be good prize even if enemy-owned, so that the reason of the rule is gone, equally, when the goods are proved to be Neutral property, the doctrine of infection ceases to apply, for that was laid down in order to punish, and this trade is now admitted to be innocent though hazardous. Again, the answer is simple.

Penalty and punishment in this connection are in a further respect unsuitable terms, namely, that they might seem to question a Neutral's right to ship or to buy contraband at his peril. Neither belligerents nor Courts of Prize exercise a general correctional jurisdiction over the high seas. The ownership of contraband goods, though often spoken of as if it were a guilty departure from the Neutral duty of impartiality, is now well recognised as being in itself no transgression of the limits of a Neutral's duty, but merely the exercise of a hazardous right, in the course of which he may come into conflict with the rights of the belligerent and be worsted.

The language about "innocent" and "guilty" goods, about the "offence" of carrying contraband, and about taking contraband goods "*in delicto*" and imposing a "penalty" accordingly, was effective and apt in the connection in which it was used, but that connection involved a decision not as to the rationale of the doctrine of infection, but only as to its application in particular cases. The decisions do not preclude their Lordships from recognising that it is not the function of Courts of Prize to be censors of trade generally during war; that, if Neutrals have the right to carry contraband, belligerents have the correlative and predominant right to prevent it; and that the doctrine of infection was established and still stands as an effectual deterrent, the need and justification for which have by no means passed away.

As to the changes in mercantile practice, it has already been indicated in the *Odessa* case that trade machinery, which is the growth and creation of years of peace, cannot supersede the settled law of Prize. In time of war the remedy is for Neutrals to change their practice and buy before ship

ment, and, if they pay after shipment and before they get the goods, they must take their risk of infection. In the long intervals of peace between war and war, commerce flourishes and commercial practices and modes of business change and develop while the law of Prize is in abeyance, but merchants haye no power to alter or affect this law, nor have Prize Courts any discretion or authority to abrogate settled and binding rules on the ground that their application is inconvenient to or inconsistent with the smooth and regular working of modern commerce.

Nor is it the case that, when the rules now under discussion first grew up, either the use of documents as symbols of goods afloat in connection with passing the property or the practice of loading general ships with an aggregate of parcels, intended to be distributed among sundry consignees, was unfamiliar or unknown. In any case, and although Prize Courts will always be mindful of the just rights of Neutrals, it is certain that none would be greater sufferers than Neutral merchants if it were once admitted that in Prize Courts fixed principles could be disregarded and settled law could be set aside in hard cases, for cases may be hard to belligerents as well as to Neutrals.

The President, Lord Sterndale, made some observations in his judgment in the case of the *Rena*, which show how much he was impressed with the argument that a combination of these two rules, leading to the consequence of condemnation in the present cases, is harsh and impolitic, but it is plain that if mere considerations of particular hardship prevailed to alter the application of the law, the whole uniformity of the system administered by Prize Courts would be impaired. It is plain also that, if a claimant's ignorance could be relied on as an answer to the captor's rights, nothing would be easier than to defeat those rights in almost every case. Strictly speaking, a Neutral is not in a position to complain of being penalised by the doctrine of infection, when his transferor and the common owner of his parcel and of the contraband parcel is an enemy, for, if the Court cannot recognise his title, he fails because he is not the owner, not because he is subject to a general doctrine of infection. It is otherwise when he takes from a Neutral, but here again, if he is not owner at the time of seizure, he fails because he has no right to complain of the seizure or to defeat the rights which the captors derive from it, and if, nevertheless, he has paid his money, he loses it because, before doing so, he failed to ascertain the facts as to the goods and to make sure that the documents taken up would avail him to obtain delivery.

The result of these considerations is that, subject to the exceptional points which follow, the appellants were rightly held to be affected by the doctrines impugned and their claims were properly dismissed. It remains to consider three special cases; in two of which it is contended that the appellants became owners before the commencement of the voyage, while in the third reliance is placed on the terms of the Declaration of London Order in Council, dated Oct. 29, 1914. It is convenient to take this last case first.

In the case of the *Kronprinsessan Margareta's* second voyage, two firms, Dahlen & Wahlstedt and Bergman & Bergstrand, each claim portions of her cargo. Dahlen & Wahlstedt admitted that their parcel had an ulterior enemy destination, but claimed that the Order in Council of Oct. 29, 1914, applied to it, and, in accordance with the language of Art. 35 of the Declaration of London, waived the Crown's right to ask for its condemnation. The question is whether that Order in Council, so far as it would affect this parcel, had been revoked prior to the seizure on June 15, 1916—that is to say, by the Order in Council of March 30, 1916—and this is a question of construction.

In general, when the Crown exercises such power as it has to affect the rights of Neutrals by Order in Council the terms of that Order, to be effectual, must be unambiguous and clear. In the *Kronprinsessan Victoria* (1919, A.C. 261), their Lordships have so held. In the present case the Neutral rights affected are such as subsist by virtue of a prior Order in Council intimating an intention to waive a portion of the full belligerent rights of the Crown for the time being, but this circumstance does not affect the construction of the Order under discussion. The Declaration of London Order No. 2 had announced that the Crown would observe certain Articles of the Declaration of London, of which that now material was Article 35. No doubt that was a concession to Neutral interests, and Dahlen & Wahlstedt's transaction would fall within the terms of the Article.

The Order in Council of March 30, 1916, after reciting that doubts have arisen as to the Declaration of London Order No. 2, says in Art. 1 :—

> The provisions of the Declaration of London Order in Council No. 2, 1914, shall not be deemed to limit nor to have limited in any way the right of his Majesty to capture goods on the ground that they are conditional contraband, nor to affect or to have affected the liability of conditional contraband

to be captured under circumstances such as those of the present case; in other words, that for the future his Majesty no longer assents to any limitation on his full belligerent rights in the matter in question, the terms of the Declaration of London Order No. 2 notwithstanding. In what respect are these words wanting in clearness, and how do they fall short of an unambiguous withdrawal of any prior waiver of the Crown rights as affecting certain Neutral shipments? They are more than a notice warning that the Crown can, by revocation of prior waivers, return to the exercise of its full belligerent rights unimpaired, nor was there any occasion for such a declaration.

Attention is first drawn to the words "shall not be deemed . . . to have limited" those rights. As these words refer to the past, and to the consequences of transactions which have already occurred, they are clearly severable from the other words of the sentence, which refer to the future. Even if they are ineffectual, for an Order in Council cannot give to a prior Order any other validity or effect than that which its terms, truly construed, possessed according to law, they do not diminish the full effect of the other words as to matters within the undoubted competence of his Majesty in Council, nor do they cloud or obscure their meaning. Their Lordships think it needless and inexpedient to surmise with what object these words relating to past occurrences were inserted. The formula, now so common, which declares something to be deemed to have been what it really was not is sometimes, no doubt, convenient, but the limits of its utility are soon reached, and they may have been exceeded here. This their Lordships have not to consider. It is enough that the obscurity of the words in the past tense, such as it is, does not touch those in the future.

The next point is that the Order of March 30, 1916, itself in Art. 2 virtually makes a reference to Art. 35 of the Declaration of London as modified by Art. 1 (iii) of the Order of Oct. 29, 1914, which is only consistent with the continuance of that Article in force, and by Art. 5 expressly revokes any recognition of Art. 19 of the Declaration of London, thereby showing that the intention is to name Articles no longer recognised, and not further or otherwise to withdraw the Declaration of London Order No. 2. Their Lordships can only observe that, the question being one of clearness or ambiguity, the clearness is on the side of Art. 1 of the Order of March 30, 1916, and that Art. 2 is not clear enough to preserve what the words used *de futuro* in Art. 1 have clearly renounced. The effect of Art. 2 is not a point that they need further pursue. As to Art. 5, there may be more ways than one of being clear, but the use of general terms in Art. 1 is not ambiguous merely because the use of particular terms is adopted in Art. 5, nor does the first expression fail to be clear merely because, following the model of the second, it might have been clearer.

The last contention is that the express revocation of the Declaration of London No. 2 Order in terms and *in toto* by the Maritime Rights Order in Council of July 7, 1916, is in itself a ground for construing the Order of March 30, 1916, wherever possible, as being something less than a revocation, and it is said that the Order of July, 1916, recognises that some part of the Order of October, 1914, then still subsisted. In the *Kronprinsessan Victoria* their Lordships observed that its whole tenor, the recitals, the repeal and the re-enactment are consistent only with the view that the Order of Oct. 29, 1914, had up to that date remained in full force and unaffected, and such was doubtless the view which those who framed that Order in fact entertained.

In the case of an Order in Council, however, the same weight does not attach to the view of the existing law adopted by its authors as attaches to the language of the Legislature when amending existing law, and in that case their Lordships had not to consider the Order of March 30, 1916, at all, and decided nothing about it. Doubts had arisen, and continued to arise, as to the effect of these Orders in Council, and it might well be thought right *ex abundanti cautela* to declare in July, 1916, finally and in the most general terms the revocation of an Order which had already been cancelled, not, indeed, in such downright language, yet with sufficient clearness.

Accordingly the claim of Dahlen & Wahlstedt fails, and it is admitted that the claim of Bergman & Bergstrand is covered by the same considerations, for the shipper of the two parcels was the same person, and an enemy—and no title having been acquired by Bergman & Bergstrand before the commencement of the voyage (subject to what is hereafter said upon the effect of a confirmed credit on the transaction) the enemy destination, which made Dahlen & Wahlstedt's parcel of conditional contraband liable to be condemned would also infect the parcel claimed by Bergman & Bergstrand, and warrant its condemnation also, as the property in it was, at the time of seizure, in the same owner as the property in the contraband parcel.

The peculiar conditions produced by the war have led to two new features in transatlantic commerce, not necessarily connected, but, as it happens, both present in these appeals. One is that all the insurances are effected in Europe by the consignees; the other that the consignor stipulates for a confirmed bank credit, against which he draws. The first appears to have been due to the difficulty of covering the war risks in America; the second doubtless arose from the fact that commerce has been carried on in new channels, and not always with persons of unimpeachable personal repute, and it had the additional advantage of minimising the inconvenience to the seller of sharp fluctuations in the rates of exchange. The question now raised is whether, under circumstances which include especially these two practices, an intention can be inferred to pass the property in cargo before the voyage commences, independently alike of payment for the property or delivery of documents.

If it can, the Neutral buyer, becoming owner from the Neutral seller and shipper before the beginning of the transit, to which the doctrine of infection applies, escapes from the risk of it. Further, in the two cases when the sellers and shippers were the enemy firm of Diebold & Co., the transaction of purchase would be complete before the point of time at which the rule against documentary transfer of goods afloat begins to apply. These points arise in the cases of the *Parana*, the *Rena*, and the *Kronprinsessan Margareta*, on her later voyage, but, as the facts are similar in all three, the argument was presented mainly on those of the *Parana*.

In the case of the *Parana* the terms stipulated on behalf of Urban & Co., the Neutral sellers and shippers, were "cost and freight Gothenburg . . . reimbursement A/S on Malare-Provinsernas Bank, Stockholm." The buyers applied to this Bank to open a credit available to the sellers and to confirm to the latter the fact of their having done so, and they deposited a sum of money to make the credit effective. The Bank did cable confirmation of this credit in the following terms :—

> Confirmed credit opened 100,000k. account Lundgren Rollven against 2000 bags coffee shipment *Parana*.

The shippers thereupon took Bills of Lading making the coffee deliverable to the consignees' order and sent them with an invoice and a sight draft for its amount, through collecting agents of their own, to be presented together to the Bank in Sweden. The appellants contend that the effect of this transaction was that the property in the coffee passed from the sellers to the consignees before the commencement of the voyage and that infection has accordingly no application to their case.

The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inferences to be drawn from their situation and interests and from the mercantile operations which they conducted. What law they supposed would govern their transaction is not shown, nor is any evidence given of the provisions of any foreign law, and, for the reasons given in the *Parchim*, (1918) A.C. 157, the law to be applied must under these circumstances be that of England so far as the matter is one of law at all. That law has attached definite presumptions as to intention to definite courses of procedure and modes of expressing and dealing with common mercantile instruments.

If the shippers had insured the goods and had attached the policy to the draft, and if they had taken the Bills of Lading to their own order, no question could have arisen. Again, if in pursuance of the contract the consignees had insured for the benefit, as between buyer and seller, of whom it might concern, there would have been little doubt possible. Their Lordships will assume, because the argument appeared to assume on all hands that the insurance effected in Europe was for the consignees' benefit only, though they are by no means satisfied that it was so, and that none was effected by or for the consignor. The importance which always attaches to the incidence of insurance in international commerce makes this a significant point.

Again, importance attaches to the fact that the shippers, having loaded the coffee on a general ship—a bailment to the carrier—took the Bills of Lading to the consignees' order. Without the consignees' indorsement they could not thereafter demand delivery ex ship as a matter of course, though without delivery of the Bills of Lading to the consignees they in their turn would not obtain delivery in the ordinary way of business. The 2000 bags bought by Lundgren & Rollven appear to have been part of a total quantity of 4000 bags shipped by Urban & Co. (see *Parana* record, pp. 35, 42 and 45). These bags were lettered and numbered in different ways, probably according to the place of origin and quality of the coffee, and, unless the other 2000 bags of similar coffee were nevertheless numbered and marked in a wholly dissimilar way, of which there is no evidence, it would seem from the specification sent forward that specific bags were not appropriated to the contract of Lundgren & Rollven. Their contract was to be satisfied out of the bulk on discharge, and until some bags were then appropriated to the holders of their Bills of Lading, it could not be predicated of any particular bag that it was one of those deliverable to the order of Lundgren & Rollven. In the case of the *Rena* and the *Kronprinsessan Margareta*, however, it does not appear that there was any other cargo on board shipped by the same firm and forming a bulk of which the parcels in question were only an undivided part.

There seems no doubt that business of this kind was such as the Malare-Provinsernas Bank was always ready to do for a respectable customer, whose credit was good or who put it in funds for the purpose. The customer applying formally to the Bank for the credit was in each case the buyer. There are some expressions in the letters of the sellers' agents in the case of the *Parana*, which suggest that they had made some arrangements on the sellers' behalf with this Bank prior to the completion of the agreement of sale, so as to ensure an available credit ready to be operated upon, but no such arrangement is forthcoming or is proved, nor is there any suggestion of it in the other cases, and it does not appear that anything more passed between the Bank and the consignors than a cabled statement to the effect that "as requested, we inform you that Lundgren & Rollven have opened a credit with us, out of which a draft with Bills of Lading can be met."

Their Lordships are unable to infer that, by English law at any rate, any enforceable obligation arose between the consignors and this Bank. There was no contract of guarantee. The Santos cargo certainly, and the Rio cargo in all probability also, was shipped before the credit was confirmed, for in the latter case the Bill of Lading and the confirmation of the credit are on the same day. No letter of credit was issued; no case of estoppel has been made, and indeed the facts stated by the Bank were true; no request for shipment or consignment to the appellants was made by the Bank; no promise to meet the draft as an obligation *de futuro* arose on any consideration moving from the consignors to the Bank. Their Lordships do not doubt that in the ordinary course this Bank—an institution against which nothing has been said or suggested—would scrupulously apply Messrs. Lundgren & Rollven's funds in their hands to meeting the consignors' draft, duly presented.

Whether the Bank could have resisted, if their customers had claimed to withdraw their funds before presentation of any draft, does not appear, but there is no need to suppose on either side any possibility of such a course being attempted. In the case of the *Kronprinsessan Margareta* the form of application to the Bank provided for the irrevocability of the credit up to a certain time, and for this a blank was left, but it is noticeable that Messrs. Bergman & Bergstrand did not fill up the blank. It is enough to say that no obligation by the Bank to meet the draft, which the drawers of it could have enforced, is shown to have arisen. Not merely was there no payment of the consignors on shipment of the goods, there was not even material for a novation. In spite of the confirmation of the credit, they were and remained unpaid vendors till a much later date.

Now two things are quite plain. The consignors did not propose at any time to rely for payment on the mere personal credit of the consignees, and they carefully kept the Bills of Lading in their own agents' hands until the draft was met (see Moakes v. Nicholson). But for the absence of a policy of insurance they strictly pursued the same course of dealing with the documents as if there had been a c.i.f. sale.

In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren & Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced, and a Bill of Lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees.

Rights to stop *in transitu* or to exercise an unpaid vendors' lien need hardly be discussed, for, on a question of intention in fact as to which there is a good deal of evidence, it would be artificial to assume that the consignors' minds were actually determined to the contrary by consideration of legal remedies, of which it is not shown that they had any knowledge, let the legal presumption be what it will. It is said that, as a matter of business, the confirmed credit relieved the consignors of all further concern in the goods, for they could have no doubt that they would be paid by the Bank in any event and that the failure to insure is proof positive of this. It may be so, though their Lordships do not desire to express any opinion as to the rights of the parties if the coffee were known to be already lost at the time of the presentation of the draft, but it seems clear that the consignors desired to retain an interest in the goods, otherwise why should they retain the Bills of Lading in their agents' hands? It is said that this only points to an intention to reserve a special property as security, but the omission to insure would be equally significant in this case, and there is no reason why, as a matter of actual intent, a special and not the general property should have been reserved. The case might be very different if the Bills of Lading had been forwarded to Lundgren & Rollven direct (*ex parte* Banner, L.R., 2 Ch. D. 278). As it is, Shepherd v. Harrison (L.R., 5 H.L., 116) would surely apply, if on presentation of the Bills of Lading with the draft there had been a retention of the first without payment of the second. There may be explanations of the shipper's election to be his own insurer of the coffee till the sight draft should be met, but, however this may be, there is nothing to outweigh the significance of a dealing with the documents so nearly identical with that in an ordinary transaction c.i.f.

No authority was forthcoming which proved to be completely in point. Cases in which it has been held that taking the Bill of Lading in the shipper's own name negatives any unconditional appropriation to the buyer by the delivery of the goods on shipboard and indicates one conditional on the documents being taken up, can throw only an indirect light on the question here involved. Certainly no case was found, in which it was held that taking the Bill of Lading in the buyer's name, while withholding delivery of it until presentation and taking up of the documents, would not be, as an appropriation, equally conditional. Much reliance was placed on the *Parchim*, a case not only decided on very special facts, but on facts so different from those arising in the present appeal as not in any way to rule it. That case did not in any degree substitute the incidence of the risk for the passing of the general property as the test to be applied. There the sellers of the entire cargo of a named ship took the Bills of Lading to their own order, but it was held that the presumption of an intention to retain the property till something was done by the buyer after shipment was rebutted by the special circumstances of the case. The contract was unusual. It was on cost and freight terms, but was by no means similar to that now under discussion. With the exception of the form of the Bills of Lading, which itself was determined by the sellers' agent without either particular instructions or actual knowledge of the terms of the contract, everything pointed to the intention that the property should pass to the buyer on shipment, though he was only to have possession of the cargo and of the Bills of Lading representing it on subsequently paying the price. Special significance was attached to the fact that, on shipment or at least on notification of it, the cargo was to be at the buyer's risk and he had to pay, lost or not lost. Meantime the documents were held by a bank *in medio*, neither to be transferred to the buyers without payment, nor to be placed at the sellers' disposal, unless and until the buyers failed to take them up.

Incidentally it may be observed that, although the loading was only completed after the outbreak of war, the interval was short, the shipment was made in pursuance