

Privy Council Appeal No. 103 of 1919.

In the matter of part cargoes ex Steamship "Kim" and other vessels.

Eric Valeur, Pay and Company, Brodrene Levy, and Korsor
Margarine Fabrik - - - - - *Appellants*

v.

H.M. Procurator-General - - - - - *Respondent*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND
ADMIRALTY DIVISION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1921.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

These appeals relate to various consignments consisting chiefly of oleo stock, lard and fat backs, which were carried on the S.S. "Kim," S.S. "Alfred Nobel," S.S. "Bjornstjerne Bjornson" and S.S. "Fridland" from New York to Copenhagen. The "Kim" was a Norwegian S.S. which sailed from New York to Copenhagen on the 11th November, 1914, and was seized at Falmouth on the 1st December, 1914. The "Alfred Nobel" was a Norwegian S.S. which sailed from New York to Copenhagen on the 20th October, 1914, and was captured on the 5th November, 1914. The "Bjornstjerne Bjornson" was a Norwegian S.S. which sailed from New York to Copenhagen on the 22nd October, 1914, and was captured on the 11th November, 1914. The "Fridland" was a Swedish S.S. which sailed from New York to Copenhagen on the 28th October, 1914, and was seized on the 10th November, 1914.

All the goods in question in the appeal were at the time of seizure conditional contraband. They were suitable for the provisioning of troops, and the lard and fat backs yielded glycerine, a component of high explosives. The consignments were part of a larger number of consignments—more than 600 in all—shipped by various firms of American packers. It is not necessary to consider the conditions, under which all these numerous consignments were dispatched, in order to determine whether the appellants are entitled to the release of the goods they claim. It is right, however, to say that their Lordships do not dissent from the summary contained in the case of the respondent:—

“Consequently in the case of every consignment there was a presumption that goods were destined for the use of the armed forces, or for a government department of an enemy State, and that the onus was upon the owners to prove that their destination was innocent.”

It is necessary to consider in each case whether the appellant has established his ownership of the goods claimed, and, if so, whether he has discharged the onus of proving that their destination was innocent.

There are certain general considerations which apply to the claims in all the appeals. It will be convenient to deal with them at the outset. Subject to any special conditions, which attach to any of the consignments claimed, the consignments were carried on terms in accord with a course of business practice which had for some time been in operation. The usual practice was for the American consignors to draw bills of lading to order, and to endorse them in blank, inserting in some cases, though not in all, the name of the sale agent as the person to be notified. The bills of lading were then sent through a bank to Copenhagen with drafts for acceptance by the agent, or by whomsoever might be the purchaser in Copenhagen or Denmark. In some instances the goods were shipped in response to specific conditions made by the agent to fulfil the requirements of particular customers. In other instances the goods were shipped either to order of the agent as purchaser, or as goods to be sold by him, as sale agent, in the Copenhagen market. Under this course of business the property in the consignments purchased would pass on payment of the price, and on the taking up of the shipping documents. In all cases the first question to be determined is whether the appellants prove that they have paid for the goods seized, and have thus become entitled to claim as owners. The learned President decided this question adversely to all the appellants. The respondent further contends that, whether payment can be proved or not, the goods in question were consigned to the appellants, not as independent purchasers, but merely as sale agents for the consignors. There is, however, evidence that the sale agents were allowed to purchase on their own behalf with certain limitations, and the appellants claim to have proved that the goods seized were purchased by them on their own behalf, and that they were not acting, in respect of those goods, as the sale agents

of the consignors. It is only in the event of both these issues being decided in favour of an appellant that the further question will arise, whether the appellant has discharged the onus, placed upon him, of proving that the destination of the goods was not such as to render them liable to seizure and condemnation.

ERIC VALEUR.

Eric Valeur is a Danish subject, a dealer in lard, oleo and oils, used in the manufacture of margarine. There is no allegation made against his character as a merchant. He was entitled as a neutral to trade with Germany, subject to the risk of the capture and condemnation of his goods by a belligerent in exercise of belligerent rights. He claims two consignments from the cargo of the "Kim":—

140 tierces oleo stock marked "M.P. 208 Copenhagen."

100 tierces oleo stock marked "M.P. 218 Copenhagen."

The oleo stock marked "M.P. 208 Copenhagen," was shipped by Morris and Co., a Company incorporated under the laws of the State of Maine (U.S.A.). The Bill of Lading contains the following terms: "Consignee and destination Order, Morris and Company, Copenhagen, Denmark. Party to be notified, Morris Packing Company, Christiania, Norway." Morris and Co. had head offices in many of the principal towns in Europe, but not in Copenhagen. Their head office in Scandinavia was in Christiania, where the Morris Packing Company have been established for several years. The goods are to be delivered as consigned, or to consignees' assigns, upon payment of the freight charges. The conditions as to delivery and payment in the case of the two consignments of oleo stock M.P. 218, aggregating 100 tierces, are substantially the same as in the case of consignment M.P. 208. There is a note attached to the bill of lading that the merchandise covered thereby is the sole property of Morris and Co., but the case for the claimant is that, prior to the date of seizure, the property in the goods had passed to him, by payment of the price and delivery of the documents. The affidavit filed on behalf of the claimant states that his agency on behalf of Morris and Co. comprehends Denmark only, and a schedule is attached differentiating between goods sold by the claimant as agent, and those bought by him on his own account. Among the goods stated to be bought by him on his own account are the goods in question, being the consignments M.P. 208 Copenhagen, and M.P. 218 Copenhagen. In confirmation of this statement a sale note was produced purporting to show that the oleo stock M.P. 208 was sold to the claimant on the 13th October, 1914, for prompt shipment upon the terms "cash less 1 per cent. against documents, destination Copenhagen." This document is not dated, but the price payable is calculated at Kr. 26,561.54. A sale note is produced in similar terms relating to the consignment M.P. 218, dated the 19th October, 1914. In this case the document is dated the 16th November, 1914, and the invoice price is calculated at Kr. 14,212.23.

There is nothing unusual in the form of these documents and there is no reason to doubt their genuine character. They support the contention of the claimant that in the business of these consignments he was acting as purchaser, and not merely as sale agent. They are not sufficient in themselves to prove that payment had been made or that the property and the goods had passed to the claimant before the date of seizure. A petition was, however, presented on the hearing of the appeal asking their Lordships to allow the production and admission of two documents which were said to be the receipts for payment, but which had not been formally put in at the trial.

After the learned President had given his decision an application was made that two documents, purporting to be the receipts for payment, might be included in the record, although these documents had not been put in, during the hearing in the Prize Court. This application was dismissed by the Registrar, whose decision was upheld on appeal by the President. In support of the application to their Lordships, an affidavit was filed by Thomas H. Warland, Managing Clerk for the solicitors of the appellant. It was sworn in the affidavit that the two receipts marked respectively "T.H.W. 1" and "T.H.W. 2," produced and shown to him, were received by him from Messrs. Botterell and Roche on the 12th March, 1915, and that he was informed and verily believed that the said receipts were received by Messrs. Botterell and Roche from Mr. Drexell, the agent in this country of a Danish War Risk Insurance, for goods, in the month of March, 1915, after they had been amongst other documents submitted to H.M. Procurator-General; that these receipts were included in documents referred to in the affidavit sworn in this cause on the 10th December, 1917, and included in the record. This affidavit states that all the said documents "were produced in Court and remained there during the whole period at the trial, and were on several occasions handed to the law officers of the Crown at their request so as to enable them to offer any criticism which they might desire to make upon any or all of the documents, which had been sent to this country by the claimants in support of their respective claims."

The affidavit then states in paragraphs 5 and 6 the reasons why the documents were not put in at the trial.

"The reason why the documents set out in Supplemental Record 'A' were not put in on the hearing of these cases in the Prize Court is, the deponent attended in Court with the documents printed in Supplemental Record 'A' for nine days, but the cases involved in this Appeal were not reached. On the closing of the Court on each of the said nine days the deponent left the documents printed in Supplemental Record 'A' in a bag in the care of the Usher of the Court.

"(6) On the morning of Wednesday, the 28th of July, 1915, the deponent had an important engagement in the City, and being under the impression that these cases were not likely to be taken for another day or two, did not attend in Court until 2 p.m. When he arrived in Court he was informed by the Counsel briefed in the cases, on behalf of the claimants, that they had been called on suddenly and that he had not been able to communicate with the deponent's office."

The effect of this affidavit is to show that the documents in question were in existence and had been submitted for examination to H.M. Procurator-General before the date of the trial, that they had been produced in Court, remaining there during the whole period of the trial, and that they had on several occasions been handed to the law officers of the Crown at their request, so as to enable them to offer any criticism which they might desire to make; and that the reason they were not put in at the hearing was that a mistake was made as to the date at which the case of the claimant would be called on in Court, during the course of a long trial, including a number of parties whose claims were separately heard, and which depended largely on different considerations and special evidence.

Under these special circumstances their Lordships decided, during the hearing of the appeal, that the documents having been in existence before the date of the trial, and open to the inspection of the respondent, and the omission to put them in being the result of a mistake, as explained in the affidavit, it was in the interests of justice that the documents should be produced and admitted. The case is clearly distinguishable from one in which evidence is alleged to have been discovered subsequently to the hearing in the Prize Court and not open to the objections which arise in such cases. In several instances their Lordships have refused an application to admit such evidence. The documents were thereupon produced before their Lordships, and no question was raised as to the genuineness of their character. They are receipts for payment by the claimant on the 13th November, 1914, of the sum of Kr. 26,561.54 in exchange for documents covering 140 tierces extra oleo stock, being the 140 tierces M.P. 208; and for payment by the claimant on the 16th November, 1914, of the sum of Kr. 12,204.23 in exchange for documents covering 100 tierces peerless oleo stock, being the 100 tierces M.P. 218.

These receipts are evidence sufficient to prove that payment was made at the respective dates in exchange for the attached documents. On such payment the property in the goods in question passed to the claimant, and the payment was made prior to the date of seizure. Their Lordships therefore find, on evidence which was not before the learned President, that the claimant, Mr. Eric Valeur, has proved that he was the owner of the goods claimed at the date of seizure. Having regard, however, to the failure to put these documents in at the trial in the Prize Court, their Lordships propose to make a special order as to costs, which will be referred to later.

The further question, therefore, as to the effect on the appellant's claim of the provisions of the Declaration of London Order in Council No. 2, of the 29th October, 1914, arises for decision. These provisions clearly apply. They were in operation both at the date when the "Kim" sailed and at the date when she was seized. The Order in Council of the 29th October, 1914, repealed the earlier Order in Council of the 20th August, 1914, and provided that, notwithstanding the provisions of Article 35

of the Declaration of London, conditional contraband shall be liable to capture on board a vessel bound for a neutral port, if the goods are consigned to order, or if the ship's papers do not show who is the consignee of the goods; and that in such cases it shall lie upon the owners of the goods to prove that their destination was innocent. Therefore in this appeal the question is whether the appellant has discharged the burden which the Order places on him of proving the innocency of the destination of the goods. In order to discharge the burden which lies upon him, the appellant states that the goods were required for consumption in Norwegian and Danish margarine factories. *Prima facie* there is no improbability in this allegation, and it is not inconsistent with the statistical evidence produced on behalf of the respondent. The evidence of the claimant is that out of the 140 tierces oleo stock M.P. 208, 80 tierces were sold to Danish margarine makers, but that these orders were cancelled, so that the whole lot became unsold; and that out of the 100 tierces peerless oleo stock M.P. 218, 15 tierces were sold to Margarine Fabrik Samhold, Stavanger, Norway, and 30 tierces to Odense Margarine Fabrik, Odense, Denmark, but that this latter order was cancelled, so that 85 tierces were unsold. In support of this case a document is produced of the 23rd October, 1914, before the date of the sailing of the "Kim," directed to the appellant, and confirming a purchase of 70 tierces Morris extra stock on terms of nett cash against documents, shipment first half of November from factory in America, including sea insurances. On the 28th November, 1914, there is a sale note of 70 tierces extra stock to Faellesforenngen, &c., Margarine Factory, Viby, identified as part of M.P. 208, nett cash against documents. There is no reason for holding that these documents are not genuine, and they corroborate the statement made in the affidavit of the claimant. Under these circumstances their Lordships are of opinion that the appellant has discharged the burden which the order places upon him of proving the innocency of the destination of the goods. In the result the appeal of Eric Valeur succeeds. Their Lordships will humbly advise His Majesty accordingly. There will be no costs of the appeal.

PAY AND COMPANY.

The firm of Pay and Co. consisted of Carl Marius Pay, a Norwegian, carrying on business in Copenhagen since 1901 as a dealer in provisions, raw materials of butterine and margarine. It is alleged that the greater part of the purchases of the firm were made for the purpose of keeping up stock, in order to comply with orders from customers who were all resident in Scandinavia. The shipments of the appellants were mainly in lard products. There were four shipments on the "Kim," two on the "Alfred Nobel," three on the "Bjornstjerne Bjornson," and one on the "Fridland." The learned President has decided that in the case of all these shipments the appellants acted as agents

for the consignors, and that they had failed to satisfy him that in any instance they were the owners of the goods claimed. The shippers were Sulzberger and Sons, Morris and Co. and the Southern Cotton Oil Co. The consignments were shipped to order of the shippers, but in the case of Sulzberger and Co. there was a direction to notify the appellants. The firm of Sulzberger and Sons had for many years, prior to the war, maintained a resident agent in Denmark for sale of its products on commission, and the appellants had acted as such sale agents. The practice of Sulzberger and Co. did not differ from the usual practice followed in the case of consignments dispatched to Denmark by American packers. They drew bills of lading to order, endorsed them in blank, and inserted the name of the agent as the person to be notified. The bills were then sent through a bank at Copenhagen, with drafts for acceptance by the agent, or by whomsoever might be the purchaser in Copenhagen or in Denmark. In some instances goods were shipped to Copenhagen in response to specific requisition by the agent, in other instances they were shipped to the agent to be sold on the open market in Copenhagen. The appellants state that on, or about, the 1st August, 1914, their agency for the firm of Sulzberger and Sons was canceled, and that since that day, Leopold Gyth had been the agent of the firm for the sale of its products in Denmark; the evidence, however, shows that the agency continued to a later date, and did not terminate earlier than January, 1915.

On the 6th December, 1914, five days after the capture of the "Kim," the appellants wrote a letter to H.M. Procurator-General enclosing letters, telegrams, invoices and bills of lading which were said to tell their own tale, and to prove that the goods in question were intended for the firm of the appellants. On the 13th February, 1915, the appellants wrote a second letter to H.M. Procurator-General, stating that all the goods, including those shipped by Sulzberger and Sons, had been bought by them as customary C.I.F. Copenhagen, and that they had no knowledge whatever as to by what ships these parcels would be shipped, that most of the goods were insured in British Lloyd, and the remainder in Danish and Norwegian companies. Is there sufficient evidence that the goods referred to in the above letter had become the property of the appellants at the date of seizure? The course of business pursued is not in itself unusual, and there seems no reason for doubting the character of the letter, but the goods would not become the property of the appellants until payment, and the question to be determined is whether the appellants have proved payment. It is the more essential to examine carefully the evidence adduced by the appellants in proof of payment as purchasers, seeing that it is alleged that in all these transactions they were acting, not as purchasers, but as sale agents on behalf of their principals.

The evidence adduced by the appellants in proof of payment consists of a letter written by them to Danske Landmandsbank Hypothek and Vekselbank on the 21st November, 1914, of

the answer thereto of a letter of the 24th November, 1914, and of a further letter from the Danske Landmandsbank to Botterell and Roche of the 6th April, 1915. The first letter in the correspondence encloses a list of shipments on the " Alfred Nobel," the " Fridland " and the " Bjornstjerne Bjornson " between the 24th October, 1914, and the 16th November in the same year, and in regard to these shipments includes a bank statement of drafts drawn at sight by the various shippers. The answer of the bank on the 24th November, 1914, states " that for your account we have paid and placed to your credit the following amounts for shipments." It was suggested on the hearing of the appeal that " credit " had been wrongly inserted and that " debit " should be substituted. Then follows the list of shipments set out in the letter of the 21st November, 1914. The letter further states :—" The bills of lading in question are deposited in this bank, and in accordance with same, the destination of all these goods is Copenhagen. We further beg to state that hitherto we have not from your esteemed firm received any instructions to transfer these bills of lading to any other receiver than your esteemed firm." It will be noted that none of the shipments on the " Kim " are included in the correspondence, but the explanation given is that the shipments were of later date. In the further letter from the Danske Landmandsbank, 6th April, 1915, the bank encloses original and duplicate bills of lading covering five of the shipments referred to above, and says :—

" we would add that these documents have been taken up under a documentary credit opened by us for account of the said firm, and consequently proceeds of the shipment or fresh documents covering the shipments or similar shipments in substitution, are to be handed to our bank."

Are these letters sufficient evidence of payment by the appellants before the dates of seizure ?

The answer must be in the negative. The most important letter is that of the 24th November, from the Danske Landmandsbank to the appellants. It is difficult to understand the true meaning of this letter, but it clearly cannot be accepted as proving that the shipments referred to had in fact been paid for by the appellants before the dates of seizure.

At the hearing of the appeal an application was made that leave should be granted to refer to certain documents included in the supplementary record " B," containing *inter alia* certain letters between the Danske Bank and the appellants. This petition was not granted. The result is that the appellants fail to establish their ownership of the goods claimed at the dates of seizure. In the case of the shipments on the vessels other than the " Kim," the Order in Council of the 29th October, 1914, although not promulgated at the date of sailing, had been promulgated at the date of seizure, and therefore would apply to the goods captured ; but, except as regards one consignment on the " Kim," all the goods remained unsold at the date of capture. It would not be possible under these circumstances to say that the appellants, even if they had established their right to claim

as owners, had discharged the burden which the Order in Council places upon them. Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

BRODRENE LEVY.

The firm of Brodrene Levy consists of two partners, Herman Levy and James Levy, both of whom are Danes. The firm was established in Copenhagen in the year 1888, and has carried on business as merchants, dealing in herrings, codfish and provisions. The business is with customers all over Denmark.

The appellants claim in respect of goods carried on the "Kim," the "Bjornstjerne Bjornson" and the "Alfred Nobel." The dates of purchase are alleged to have been the 3rd and 4th October, 1914, and the goods are said to have been purchased for the purpose of furnishing regular buyers, and to have been placed with ordinary stock, so that the firm might be in the condition to comply with the orders of customers, from time to time, when received. It is not necessary to examine the consignments in detail. The two parcels shipped on the "Alfred Nobel" were included in a list of consignments claimed by Morris and Co. The second consignment on the "Alfred Nobel," as well as the consignment on the "Bjornstjerne Bjornson," was shipped by Morris and Company to order of Morris and Co., Copenhagen. Party to be notified, Morris Packing Co., Christiania. The same practice was followed in the shipments on the "Kim," both in regard to the parcel said to have been bought from Backstrom of Stockholm, as well as in the case of the parcels said to have been purchased from "Armour and Co." It is clear, therefore, that evidence of payment is necessary in order to prove ownership. This fact is recognised by the appellants.

In the affidavit of Hermann Levy it is stated that the firm have paid for the goods and taken up the shipping documents, and that they have become the property of the firm. No document is, however, produced to support this contention, and no receipt is forthcoming.

In the absence of such evidence their Lordships are not satisfied that the appellants were at the date of seizure owners of the goods claimed or that there is any reason for dissenting from the judgment of the learned President. Their Lordships will humbly advise His Majesty that this appeal shall be dismissed with costs.

THE KORSOR MARGARINE FABRIK.

The appellants are a margarine factory carrying on their business at Korsor in Denmark. They claim 30 tierces oleo oil M.P. 190 on the "Kim," said to have been bought from Eric Valeur, and 30 tierces of oleo stock M.P. 191 on the "Fridland," also said to have been purchased by them from Eric Valeur. Both consignments were shipped by Morris and Company to order of Morris and Co., Copenhagen (party to be notified, Morris Packing Co., Christiania), and were claimed to be the property of Morris

and Co. In the documents attached to the affidavit of Eric Valeur the 30 tierces oleo stock M.P. 190 are stated to be sold by them, not on their own account, but as agents to the Morris Packing Co., and in a later letter attached to the same affidavit on the 19th October, 1914, the contracts for purchase were forwarded, including both consignments from the Morris Packing Co., with the request that the appellants would kindly return the copies duly furnished with their signature. There were no further documents produced to support the claims of the appellants, and no attempt was made to prove payment, prior to the date of seizure.

It is clear, therefore, that the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

*In the matter of part cargoes ex Steamship "Kim"
and other vessels.*

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BRODRENE LEVY,

and

KORSOR MARGARINE FABRIK

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD PARMEOR.

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