

Privy Council Appeals Nos. 82 and 83 of 1921.

In the matter of part cargo ex steamship "Erviken."

In the matter of part cargo ex steamship "Kronprins Gustaf."

Jens Toft - - - - - Appellant

v.

His Majesty's Procurator-General - - - - - Respondent

(Consolidated Appeals)

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1921.

Present at the Hearing :

LORD SUMNER.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

In this case, Jens Toft, a Danish merchant, appeals against a decree dated the 23rd May, 1919, made by Lord Sterndale, sitting in Prize, whereby he condemned 1,250 bags of coffee laden on the steamship "Erviken," and 1,250 bags of coffee laden on the steamship "Kronprins Gustaf," on the ground that they were lawful prize by the operation of the doctrine of infection. Other grounds for condemnation besides this one were alleged by the Crown, but were not gone into, and were adjourned for further consideration, if necessary. If, therefore, this appeal should succeed the goods cannot be forthwith released to the appellant, but the case must go back for further consideration. The argument on this appeal was confined to the question whether the property

had, before the seizure, passed to the appellant, under the contracts of sale under which he claimed, it being admitted that the sellers to the appellant were at the date of seizure owners of other cargo on board each of the ships which was liable to condemnation, and which was in fact condemned as contraband.

The doctrine of infection was recently fully considered by the Board in the case of the *Kronprinsessen Margareta* and other ships [1921] 1 A.C. 486, and it was then laid down that the doctrine was long ago well established in Prize Court Law and that effect must still be given to it, and that the test of its applicability was common ownership at the date of seizure of the goods under consideration, and of other goods in the same ship liable to condemnation as contraband. In the case of the *Parana* and two others of the ships dealt with in the case reported under the name of the *Kronprinsessen Margareta*, the facts were in many respects similar to those of the present case, and the question on this appeal, put shortly, is whether the facts in this case can be distinguished from the facts in the case already decided.

In the present case, the appellant alleges that he bought both of the shipments of coffee in question from the firm of Eugen Urban & Co., of Santos and Rio, through the agency of A. M. Metz, and he produces copies of the documents which passed. By a contract of the 16th October, 1915, he bought 4,000 bags of coffee of which 1,000 were to be shipped by the "Erviken" and 1,000 by the "Kronprins Gustaf." The price covered cost and freight to Copenhagen. A confirmed credit was to be provided from the Deutsche Bank, Hamburg. Insurance against war risks was to be covered by the purchaser, and the policy was to be deposited with the bank when the credit was opened. The contract does not state that payment was to be against bill of lading, but it does state that the contract is on the shippers' ordinary contract terms. There is a document in similar terms dated the 18th November for an additional quantity of 250 bags to be shipped on each of the two steamers in question. The next document is a request by the appellant, dated the 21st October, 1915, to his bankers, the Revisionsbanken Copenhagen, to open with the Deutsche Bank a credit in favour of Eugen Urban & Co. for an amount up to 60,000 marks to be drawn at sight for his account against the bills of lading and invoices of the shipment of 1,000 bags by the "Erviken," and there is a similar request dated the 19th November as to the additional 250 bags. These requests show that a bill was to be drawn for payment against the bill of lading, although that was not expressed in terms in the contract note, but was no doubt included in the ordinary terms. There are documents showing the communication to the sellers of the credit in their favour, and there is a similar set of documents as to the shipment by the "Kronprins Gustaf." There are also copies of the invoices which give the marks of the goods and state that they are for account and risk of the buyer; and copies of the bills of lading also giving marks, and which make the goods deliverable to the order of the appellant. The bills of lading of the "Erviken" are dated the

4th November, and those of the "Kronprins Gustaf" on the 25th and 27th October. The "Erviken" was seized on the 17th December, and the "Kronprins Gustaf" on the 16th December. The payments of the drafts and invoices were made on or about the 3rd January, 1916, and in April, 1916 (the delay in the latter case being due to the first copies of the bills of lading having been lost in transit), and are stated to have been made against the bills of lading which were being retained at the bank. There is no definite statement either in the affidavits or other documents as to how the drafts and bills of lading got to the bank or by whom they were presented, except in the case of the duplicates sent in place of the lost ones.

On these facts it was contended that there were some points of difference between this case and that in the *Parana and other ships*, dealt with in the case of the *Kronprinsessen Margareta*. First, that here the shipment was in named ships, and that the marks on the goods being stated in the documents there was an appropriation to the contract of specific goods, so that section 18, clause 3, of the Sale of Goods Act was satisfied. As to this there may be some doubt owing to the fact that out of the 1,250 bags in each ship, 250 were actually shipped before the date of the contract for their purchase; but for the purpose of this appeal their Lordships will assume that there was an appropriation, so that there remains only for consideration the question of a reservation of *jus disponendi*. As to this the fact was, quite naturally, strongly relied on that the bills of lading were to the order of the consignee. That, however, was so in the case of the *Parana*, but there it was stated that drafts with the bills of lading were sent for collection to an agent of the seller. Here that was not stated. It does appear from a letter dated the 11th March, 1916 (page 34 of the record) that the bills of lading, which were missing, were supposed to have been lost in the post, but that does not show to whom they were posted. Letters in April, 1916 (on pages 62 and 63 of the record) do show that the copies of the missing bills of lading, and the drafts substituted for the lost ones, were sent direct by post to the Deutsche Bank by Eugen Urban, and it would seem that that was the course of business. If, however, it is material in the appellant's case for it to be shown that the bill of lading was sent direct to him, it is for him to give the proof, and he has failed to do so. In fact, however, if these were genuine business transactions and not mere shams or matters of form, the bill of exchange and bills of lading must have been held by an agent of the seller until handed over against payment, or must have been posted by the seller direct to the Deutsche Bank on which there was the credit. The point, however, is not really of importance, for whenever payment or acceptance of a draft is to be against a bill of lading and both are transmitted together, the title to the goods does not pass to the buyer by his getting manual possession of the bill of lading unless he pays or accepts the draft. [*Shepherd v. Harrison*, L.R. 5 E. and I. App. 116 and Sales of Goods Act, section 19 (3).] That the bills

of lading and the draft were transmitted together in this case clearly appears from the letters which passed, especially those in reference to the loss in the post. There is therefore no real difference between the facts of this case and those in the *Parana* so far as they bear on the question of a reservation of the *jus disponendi*. The fact that a credit and the confirmation of it to the seller were stipulated for was also relied on, but this was also the case in the *Parana*, and was in the judgment in that case fully dealt with. The fact that the insurance was effected by the buyer was also much relied on, but on that point the facts were less in favour of the appellant than they were in the *Parana*. Then, there was merely the fact that the insurance was effected by the buyer. Here it was part of the contract that it should be, and that the policy should be deposited with the paying bank. Why that should be contracted for unless the policy was to be for the benefit of the seller as well as of the buyer, it is difficult to see. The fact is explained in the *Kronprinsessen Margareta*, that at this time in the war it had become practically impossible to insure against war risks out of Europe, so that it had become the practice for buyers to insure instead of sellers. It was sought to bring this case within the authority of the *Parchim* [1918] A.C. 157, but then there were special facts which, in the opinion of the Board, were sufficient to rebut the usual presumptions as to the intention of the parties. Here there are no facts sufficient to rebut the presumptions, and both on principle and on the express authority of the *Kronprinsessen Margareta*, their Lordships are of opinion that the appellant failed to make out that the property passed to him before seizure. They will therefore humbly report to His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

In the matter of part cargo ex steamship "Erviken."

*In the matter of part cargo ex steamship
"Kronprins Gustaf."*

JENS TOFT

v

HIS MAJESTY'S PROCURATOR-GENERAL.

(Consolidated Appeals.)

DELIVERED BY SIR ARTHUR CHANNELL.

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1921.

27th July, 1921. The materials were in all substantial particulars similar to those in the former case. Some further materials were supplied by the claimant. He filed an affidavit on the 14th July, 1921, and he gave oral evidence before the President on the 27th July, 1921. He had at that time ample means of knowing what was the nature of the evidence which might turn in his favour the scales which had turned against him in the previous case. But he brought no books, and beyond his own unsupported statement in the box, he adduced nothing which strengthened his case. The President did not believe him, and on the contrary thought that the unfavourable inferences which arose from the state of the documentary evidence and the affidavit evidence were strengthened and not weakened by his evidence. Their Lordships agree with that conclusion of the President. They cannot accept the unsupported statement of a witness who was discredited by the Judge who saw him in the box. In all the cases which turn upon the application of the Order in Council of the 29th October, 1914, their Lordships are of opinion that the claimant is not entitled to the benefit of Art. 35 of the Declaration of London. Jens Toft, who on the ship's papers was shown to be the consignee of the goods, was not the real consignee.

In the case of two lots, viz., 600 bags of coffee on the steamship "Selandia" and 301 bags of cocoa beans on the "Frederik VIII," the Order of the 29th October, 1914, does not apply. The onus here is on the claimant to prove a neutral destination. There is no evidence of it. The materials here are the same as in the cases with which their Lordships have already dealt. If the claimant fails upon those he *à fortiori* fails upon these, and that is their Lordships' opinion.

Their Lordships therefore hold that the claim fails as to all the lots, and that this appeal should be dismissed with costs. They will humbly advise his Majesty accordingly.

In the Privy Council.

In the matter of part cargo ex steamship "Oscar II."

*In the matter of part cargo ex steamship
"Frederik VIII."*

In the matter of part cargo ex steamship "Louisiana."

In the matter of part cargo ex steamship "Texas."

In the matter of part cargo ex steamship "California."

In the matter of part cargo ex steamship "Arno."

In the matter of part cargo ex steamship "Pregel."

In the matter of part cargo ex steamship "Lie."

In the matter of part cargo ex steamship "Selandia."

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DELIVERED BY LORD WRENBURY.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1921.

Present at the Hearing:

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

[Delivered by LORD WRENBURY.]

This is the appeal of the claimant of part cargoes ex nine steamships from the judgment of the President, Sir Henry Duke, condemning the cargoes as contraband. The cargoes consisted of cocoa beans, cocoa and coffee, all consigned to the claimant, Jens Toft, of Copenhagen, except one parcel shipped on the "Frederik VIII." That parcel was consigned to S. Chr. Jensen,

an agent of the claimant in Copenhagen. The consignments amounted in the aggregate to 4,589 bags of cocoa and cocoa beans and 1,100 bags of coffee of the total value of about £30,000 to £40,000. Cocoa and coffee had been conditional contraband since the 4th August, 1914. The shipments were from neutral ports—in most cases from New York—and were in neutral vessels bound for neutral ports. In all cases but one the intended voyage was to Copenhagen, in the remaining case it was to Malmö. The ships sailed at various dates from the 16th October, 1915, to the 10th May, 1916, and the seizures were made at various dates from the 15th November, 1915, to the 6th June, 1916.

The claimant, Jens Toft, is a Danish subject, residing and carrying on business in Copenhagen. In 1907 he was declared insolvent, and compounded with his creditors at 30 per cent. From 1911 onwards he was endeavouring to pay his creditors in full, and there is nothing to show that when these shipments began he had succeeded in doing so, still less that he was in command of substantial means.

This is not the first time that Jens Toft has been an unsuccessful claimant in the Prize Court, nay more, it is not the first time that he has been unsuccessful in respect of a similar cargo shipped on one of the ships in question on this appeal, viz., the "Oscar II," on a previous voyage. On the 25th July, 1919, Lord Sterndale, sitting in Prize adjudicating upon a claim made by him in respect of 34 consignments of coffee and cocoa shipped at various dates between October and December, 1915, from New York to Copenhagen on the three Danish ships, "Hellig Olav," "Oscar II," and "Frederik VIII," condemned the consignments, coming to the conclusion that Toft was acting for some German firm who wanted the goods in Germany and who paid for them. Upon appeal this Board, on the 24th February, 1921, affirmed that decision, holding that the appellant's name was used to cover the importation of goods which were intended to go through to Germany. The case was in the main statistical. In the year 1915 the imports of these food-stuffs into Denmark were about ten times as great as the yearly average of the three years prior to the war. Lord Sterndale was satisfied and this Board was satisfied that a large part of these imports was in fact for German destination. The appellant's case in that case as in this was one in which the documents were all in order, but the Court was satisfied that the documents did not disclose the real transaction. The appellant's case here is that he bought and paid for the goods with his own money through the Revisions Banken of Copenhagen, and that within Art. 1 (3) of the Order in Council of the 29th October, 1914, the ship's papers, in showing him as consignee, showed who was the real consignee of the goods. The onus was on the Crown to show that Toft was not the real consignee. In the former case it was held that the Crown had satisfied that onus.

The previous decision having been, on the 25th July, 1919, before the President, and on the 24th February, 1921, before this Board, the present claim was heard by Sir Henry Duke on the

27th July, 1921. The materials were in all substantial particulars similar to those in the former case. Some further materials were supplied by the claimant. He filed an affidavit on the 14th July, 1921, and he gave oral evidence before the President on the 27th July, 1921. He had at that time ample means of knowing what was the nature of the evidence which might turn in his favour the scales which had turned against him in the previous case. But he brought no books, and beyond his own unsupported statement in the box, he adduced nothing which strengthened his case. The President did not believe him, and on the contrary thought that the unfavourable inferences which arose from the state of the documentary evidence and the affidavit evidence were strengthened and not weakened by his evidence. Their Lordships agree with that conclusion of the President. They cannot accept the unsupported statement of a witness who was discredited by the Judge who saw him in the box. In all the cases which turn upon the application of the Order in Council of the 29th October, 1914, their Lordships are of opinion that the claimant is not entitled to the benefit of Art. 35 of the Declaration of London. Jens Toft, who on the ship's papers was shown to be the consignee of the goods, was not the real consignee.

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