Privy Council Appeal No. 71 *of* 1920.

In the matter of the steamship "Zamora."

Rederiaktiebolaget Banco - - - - - - *Appellants*

v.

His Majesty's 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 16TH MARCH, 1921.

Present at the Hearing:

LORD SUMNER.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

This was a case of condemnation of a ship and its entire cargo. The latter was contraband and had an ulterior enemy destination; and of this it was held that the shipowner had sufficient knowledge. The ship was Swedish: the voyage New York to Stockholm, and the cargo consisted of 400 tons of copper, 101,494 bushels of wheat and 69,379 bushels of oats. It was purchased on F.O.B. New York terms from sellers unconnected with the contraband adventure. The date of the capture was 19th April, 1915.

At the outset the grounds of suspicion against the cargo were not great. The contraband trade had not then attained the magnitude which characterised it later on in the war. Copper and cereals were no doubt in demand in Germany, but they were also required for common consumption in Sweden and that in large quantities. The proximity of Sweden to Germany was therefore of less importance; unless the case against the cargo succeeded, there was none against the ship.

Claimants duly appeared, and a large body of documents relating to the cargo was soon forthcoming. The purchases, the shipment, the taking up of documents and the destination of the cargo were fully set out and minutely vouched. Though the copper and the cereals were alleged to belong to different consignees,

unconnected with one another, they were all insured by the same policies, a singular circumstance in itself, and the further fact that they were insured F.P.A. raised further suspicion. There for a considerable time the matter rested. It remained a case of the importation of commodities in common use in a neutral ship from one neutral country to another by neutral merchants for consumption in their own country.

Appearances, however, were deceptive. The consignees of the copper were a Swedish company, which might well have been above suspicion, for, as Lord Sterndale records, there were upon its Board of Directors the Minister for Foreign Affairs in the late Swedish Government, an ex-Minister of Finance and an ex-Minister and late member of the Supreme Court, yet behind the screen of these highly respectable personages there was being carried on a speculative adventure, which involved a continuous scheme of deception, to be supported, in case of need, by much hard swearing. The whole cargo, in fact, belonged to the Austrian Government, and was imported into Sweden *en route* for Austria. The ship was chartered to a German, who was acting as agent for the Austrian Government, and the Swedish consignees were merely playing a part in the transaction. The documents were genuine enough: that is to say they came into existence at the time and for the purposes for which they were ostensibly created, but behind them all and behind the charterer and the consignees, who were puppets, handsomely paid, stood an enemy Government. No more striking instance has occurred of a contraband transaction, which all but succeeded; none which proves more conclusively what patience and tenacity are needed in probing to the bottom an apparently straightforward case, or how liberal and even indulgent a Court of Prize must sometimes be in granting the time required to exhaust all the means at the captors' disposal for discovering the truth.

How that truth became known to the Procurator-General, it is not now material to inquire. It was disclosed by him on affidavit in August, 1918, and proved to be conclusive. The claimants of the copper withdrew their claim without a contest. The claimants of the cereals made shift to fight their case and lost. The President condemned both the copper, the wheat and the oats. There remained the case of the "Zamora." After hearing the evidence of Mr. Banck, the managing director of the Company, which owned her, the President condemned the ship. It is from this condemnation that her owners now appeal.

The case made was that even where the whole cargo consists of contraband, nothing less than actual knowledge of its character by the carrier will forfeit the ship. It was not denied that circumstances may raise a presumption of knowledge such that the carrier must rebut it or fail. It was not contended that a person, who had knowledge of facts sufficient to point the mind of a reasonable man to the truth, could escape by wilfully shutting his eyes to fuller information, but the presumption of knowledge was said to be one only of fact and not of law, each case therefore

depending on its own circumstances, so that, if cargo is bound to a neutral port and consists of unwarlike commodities in substantial demand and common use there, only proof and not presumption of knowledge of its ulterior destination will condemn the ship. If the President held that a decree condemning the entire cargo would in itself warrant a decree condemning the ship also, he was wrong in spite of the judgment of Sir Samuel Evans in the *Hakan* and the *Maracaibo* (1916, P. 266). The true proposition was one quoted from the judgment of this Board in the *Hakan* (1918 A.C., p. 155): "there can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo."

It may be admitted that knowledge of the character of the cargo is more obviously natural when the ship is being loaded for her owners' account than when she is only chartered, and when she is chartered at a rate of freight on the quantity delivered with a cesser of liability in favour of the charterer than when she is chartered for a lump sum freight payable in advance. Conversely a voyage to an enemy port is more significant than one to a neutral country, even though it is a neighbour of enemy territory, and the loading of a cargo of arms and ammunition than the loading of commodities no less indispensable to neutrals than to belligerents. So far the circumstances of each case may vary and modify the conclusion almost indefinitely, but one circumstance is common to all the cases and can never be forgotten, that is the existence of a state of war with the temptations and the profits which contraband traffic holds out to complaisant traders. It does not follow that every case stands by itself and is independent of authority, nor need captors make out the knowledge of the shipowner as prosecutors have to bring home a charge to a person accused in an English criminal court. In any case there is no immunity to a shipowner, because he charters his vessel and does not concern himself with the cargo. Indeed, in one respect at least this case requires a sharper degree of scrutiny, for such a course is so easily made a screen for the schemes of others, and so easily becomes deliberate blindness.

It is clearly settled that a shipowner, who carries an entire cargo of contraband knowingly, forfeits his ship in prize. What constitutes knowledge and what suffices as evidence of it may be matters of difficulty. During part of the eighteenth century the rigorous doctrine still prevailed that any carriage of contraband involved as a penalty the confiscation of the carrying ship. By the end of that time, Sir William Scott records, in *The Ringende Jacob* (1 C. Rob., p. 89), and in the *Neutralitet* (3 C. Rob. 295), that the practice of the great powers had greatly relaxed that rule. In the *Hakan* and the *Maracaibo* (1916, P. 266), Sir Samuel Evans did not enquire whether the carrier knew the contraband character of the cargo. He took it that the ancient rule was suspended only and was still in existence and capable of being revived so that, except in so far as the Crown had waived its rights by adopting Article 40 of the Declaration

of London, the old rule must still be enforced. The objection to this is that Sir William Scott records a change founded on the agreement of nations, one of the most important sources of international law. After over a century of recognition, can it be said that the relaxation is a mere revocable waiver, which a single sovereign can withdraw? Lord Parker of Waddington, in pronouncing their Lordships' judgment on appeal in the *Hakan*, pointed out that the common element, which unites the varying practices of different nations, is knowledge on the carriers' part of the character of the cargo carried, and that a presumption of knowledge, sometimes rebuttable and sometimes not, is the feature which makes relevant the proportion of the contraband cargo to the whole. Some countries attach to certain proportions, a presumption of knowledge in all cases, irrespective of the extent to which the mind of the particular carrier or shipowner may consciously have been privy to the carriage of contraband. The English Prize Courts, at any rate, have long held that if a shipowner knowingly carries a cargo, which is, in whole or in large part, contraband, he is liable to forfeit his ship. It accordingly becomes necessary to examine the facts of this case somewhat at length, for if they warrant the inference, that the shipowners knew that they were carrying contraband, the decree of condemnation should be affirmed without further inquiry.

The Rederiaktiebolaget Banco, of Stockholm, owned two steamers, the "Zamora" and the "Augusta." Most of the shares were held by the family of Banck, and Mr. Bror Banck, its head, was the largest shareholder and managing director of the Company. He was also managing owner of another ship, the "Orion," managing director of the Orient Company, which also owned a vessel, and had a good deal of house property. He must, therefore, be credited with much business experience, and his affidavits and oral evidence testify to his good education and his extensive knowledge of English.

To Mr. Bror Banck there came one day early in 1915 a Mr. G. Pott, who introduced himself as a shareholder in the Orient Company, seeking a disengaged ship as he wished to charter one for grain and general merchandise from New York to Stockholm. He came twice. Mr. Banck looked him up in the directory, and found that he had a good address and a large income, and spoke about him to a friend or two, "who had only good to say of him." Accordingly he obtained the "Zamora." Pott was in fact a German, who previously had had something to do with goloshes. He had now gone into shipping. There was no correspondence. The charter party, though made out on a form which was ill adapted to a lump sum freight, provided for a hiring for the voyage for "£14,500, all in British sterling, payable before signing bills of lading at current rate of exchange for bankers' sight bills on London bank." It is dated 20th February, 1915.

The ship was then two days out from the Tyne bound for New York. On reaching that port his agents told the captain that they had a cable from Mr. Banck giving the names of the

shippers and receivers for the grain, and later on another cable gave the same information for the copper, and added "instruct Ohlson proceed direct home north of Shetland." Mr. Banck must have surmised that Pott had sublet the entire steamer to other parties, who were to provide the cargo, and, when Pott afterwards told him so, he seems to have expressed no surprise. He says that he thus prescribed the route for fear of mines and to the suggestion, that the real reason was to escape search by British ships, he replied "Not particularly." From whom he learnt the names of the shippers and receivers of the cargo he does not say. Thus, when his own Company's interest would have suggested inquiry as to the character of those concerned in an adventure, which might involve an ulterior enemy destination, he knew little of his charterer, and of the shippers and consignees he knew and asked nothing at all.

The bills of lading for the grain were dated the 18th March and made it deliverable to B. Ursells Eftertraedare, paying freight as per charter party. There is no charter to which this term could apply. The bill of lading for the copper was dated the 20th March, and provided for payment of freight in cash immediately on discharge in the usual money of the country, but it named no rate. Pott should have paid Mr. Banck £14,500 at least by the 20th March, when the "Zamora" sailed. Mr. Banck produced his company's books to show that in point of fact £7,500, or its equivalent in kroner, was paid to the Company on the 17th March, for which he said a receipt was given, though no counterfoil was produced nor does the name of the payer appear. The balance only appears in the Day Book as paid on the 30th April. Mr. Banck said that it was Pott who paid both sums.

According to Mr. Banck, £14,500 for a voyage of some six weeks or so was just a normal freight at the time, a few pence over the last fixture he had seen, but he produces no charters or evidence to corroborate his statement. It is true that the Crown gave no information upon the point either, but, on a question of freights in Sweden, there can be no doubt which side was best able to develop the evidence. Now the "Zamora" had been bought by the Rederiaktiebolaget Banco in 1912 for only £11,250, being then 30 years old and in need of repairs, but what they cost is not stated. For insurance purposes she was estimated as being worth £20,000 in 1915, though the sum insured was only £16,000, and, in consideration of a bail of £14,000—which the President's judgment states to have been the result of a valuation made for the purpose after the seizure—was released to her owners. When the Company was incorporated in 1905 its joint capital was fixed at 335,000 kroner as a minimum, and 1,000,000 as a maximum. In 1918 the shares issued, assuming that they were all fully paid, accounted only for 415,000 kroner. Accordingly, the freight for a voyage of two months at most exceeded the purchase price of the steamer three years before and exceeded the amount of her valuation for bail. It fell little short of the amount for which she was insured, and it was very much more than half

of the paid-up capital of the Company. In favour of Mr. Bror Banck their Lordships will suppose that during the war neutral shipowners regularly made handsome profits, but these figures appear to them to be more than normal. They were, at any rate, big enough to make it worth Mr. Banck's while to put himself about unless he was assured that his freight was in no peril.

He had another reason for concern. His hull insurance against war risks was void, if the ship carried contraband of war to a belligerent power, and, of course, as his lump sum freight was to be prepaid, he had no policy on freight at all. Now, of Pott he knew little, and of the consignees less, if he knew anything at all. The welcome awaiting American copper and cereals in Germany, if forwarded from Sweden, would obviously be so warm, that the unknown consignees might quite probably be importing them for the purpose of sending them on, but if they left New York by the "Zamora" with an ulterior destination, his war-risk policy on the ship would be void. Nevertheless he remained unconcerned as to the cargo and its consignees, and, even when nearly half his freight remained unpaid until after the ship was in the captors' hands at Barrow, he took it almost as a matter of course. He asked Mr. Pott the reason for the capture, but he was not anxious. "I felt myself as strong as anything," he says, "and I knew there was nothing incorrect." How he knew this he does not say, but he leaves it to be inferred that this was the result of the confidence with which Mr. Pott or perhaps the directorate of the Swedish Trading Company had inspired him. Of the balance of his freight he said nothing: his trust in Mr. Pott's ability to pay was complete. He had heard nothing up to that time of any connexion between Pott and contraband German trade. He did not associate high freights, if this was a high freight, with contraband. As he says, "this was only just in the beginning of the war and we never thought anything of it." He had no reason to doubt that both the copper and the grain were destined for Swedish use, and, further, the export of both commodities from Sweden was prohibited by the Swedish Government. It has been suggested on his behalf that he was just an old ship's captain, a very simple person.

Mr. Bror Banck's confidence in his new acquaintance, Pott, went considerably further. When the second instalment of the "Zamora's" freight was already some four or five days overdue, he actually chartered to him a second ship, the "Augusta," and again for a lump sum on the same form of charter. This time, however, the freight was paid all at once on the 30th April, but the charter was somewhat departed from, since instead of drafts in New York, cash was forthcoming in Stockholm.

If these deviations from the strict language of the charters stood alone, they might be explicable on the ground that printed forms of charters were used, more suitable to freights payable on the quantity delivered at rates agreed than to a lump sum payable in advance. There is, however, a further deviation, which is quite inexplicable. This was put to Mr. Banck, who professed to be taken by surprise and said it was a puzzle, a term

which the President somewhat ironically adopted. Argumentative explanations were offered, of which it is enough to say that they do not fit the facts. The one person who ought to have explained the matter was not called. This person was Mr. Carl Banck, who was associated in the management of the appellant company's business with his father, Mr. Bror Banck, and had control of it during the latter's not infrequent visits during March and April, 1915, to his house property at Trelleborg and Helsingborg. This gentleman either was unaware of the existence of the lump sum charters for the " Zamora " and the " Augusta " or he treated them as shams. In each case he gave the consignees of the cereals receipts for freight due on those parcels on shipment, in the former case at the rate of 72 kroner per ton of 20 cwt., in the latter at the rate of 60 kroner only. The first was dated the 17th March, that is before the date of the bill of lading, the second the 7th April, three weeks before the lump sum freight was paid, if paid it was. The sum mentioned in the " Zamora " receipt cannot be made to correspond with the sums entered in the day book as received for chartered freight, and the amount of money exceeds by more than 100,000 kroner the sum which it was Mr. Bror Banck's case that he received from Pott on that very day. Who paid these bill of lading freights, and how the weights of the cargo came to be known in Stockholm at or before the dates of shipment in New York does not appear. Mr. Sten Stendahl, who carries on business as B. Ursells Eftertraedare, the consignees of the cereals, swore that these receipts represented the conditions of his freight engagements with Pott and were given when the money was paid to the appellants for account of Pott, but Mr. Bror Banck evidently professed to be quite unaware that his Company had been receiving Pott's freight at all.

The appellants are, therefore, in a dilemma. If what Stendahl says is true, the appellants, by one of their managers, were assisting in the creation of that screen of mercantile documents, with which the cargo claimants disguised the truth of the transaction, and in default of explanation must be taken to have done so deliberately, for they were taking charge of Pott's profits, though Pott was in default in paying what he owed them. The accounts, which such a transaction must certainly have involved, have not been disclosed, doubtless for good reasons.

If, on the other hand, what Stendahl says is false, as in other matters it mainly is, then the lump-sum charter is a sham and the appellants were receiving on their own account a higher freight than they profess to have contracted for, differently calculated and concealed by false book entries. It is not necessary to consider whether old Mr. Banck was in some respects hoodwinked by young Mr. Banck, for the appellants must be affected by the knowledge and conduct of both their managers, but Mr. Bror Banck's attitude in the witness-box was that of a man who was not so much astonished as surprised. The production of these receipts was something that he had not reckoned on and an explanation was beyond his power to improvise.

In his judgment Lord Sterndale uses the expression, "if Mr. Banck had not actual knowledge, he could have had it, if he had taken the steps, which he should have taken, to acquire it." This proposition does not really lend itself to any misapprehension, but it may be as well to say something as to the nature of the duty to which it refers. Mr. Banck's position involved two kinds of obligation; the one towards his Company, the appellants, and, in respect of his own large holding in it, to himself, and the other towards the Prize Court. His duty to his own Company required that he should, among other things, make proper inquiries to safeguard its interests and to avoid exposing its property to risks, which he did not mean to take, in the transaction to which he was committing it. If he neglected this duty, he was disregarding alike his interest as a capitalist and his obligation as a director, and he is open to the inference of fact that after all he knew what he was about and with a full apprehension of the risks run had made up his mind that the freight made it worth while to run them. To the Court his duty is, as representing the claimants, to present their claim frankly and to make such full inquiries as would enable him to put the Court in full possession of the truth as to the claim, so far as it lay in his power to do so. If this duty was neglected, his company is again exposed to the inference that it was not neglected for nothing; that he had at least got upon the track of matters, which he thought it better not to pursue, or that the claimants were in possession of information, which it did not suit them to divulge. The judgment of Lord Sterndale was not intended to convey and does not convey that Mr. Banck owed a duty to the belligerents to avoid carrying this cargo, but it was carried at his Company's risk and to his Company's profit, and in exercising their right to prevent contraband traffic belligerents are entitled to the full protection of Courts of Prize in penetrating the disguise of a feigned or deliberate ignorance on the part of neutral claimants.

Lord Sterndale thus expressed his final conclusion:—

> "I think the true inference is that, if Mr. Banck did not know this was a transaction in contraband, it was because he did not want to know, and that he has not rebutted the presumption arising from the fact of the whole cargo being contraband."

Their Lordships have been invited to read this as saying, that Mr. Banck is not proved to have known the contraband character of the adventure; that if he did not know, because he did not want to know, he was within his rights and owed no duty to the belligerents to inform himself; and that the "Zamora" is condemned contrary to the passage above cited from the *Hakan* upon a legal presumption arising solely and arbitrarily from the fact that the whole cargo was contraband. It may be that in his anxiety not to state more than he found against Mr. Banck, the learned President appeared to state something less, but there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired

may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction, that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise. It is in the latter sense that their Lordships take the President's words. So far from finding that Mr. Banck was devoid of knowledge of the contraband character of the adventure, he thought, and they agree, that Mr. Banck understood it very well, so well that he knew where to draw the judicious line between scanty but sufficient information and undeniable complicity. Knowledge being proved, no opinion need be expressed as to the effect of presumptions in the present case. The evidence fully bears out the conclusion that the transaction was in its inception ambiguous; that any doubts about it were resolved in favour of an illegitimate complexion, so far as Mr. Banck was concerned, by his incuriosity, his reticence and his detachment. So far from showing that he was truly ignorant, he has only involved his Company, the claimants, in the consequences, which follow from the hazardous possession of sufficient knowledge to condemn them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

In the matter of the steamship "Zamora."

REDERIAKTIEBOLAGET BANCO

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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