

[IN THE COLONIAL COURT OF ADMIRALTY.]

1944

Present: Howard C.J. (President).

In Prize.

1939—No. 1

LOXLEY v. ATTORNEY-GENERAL.

PART CARGO *ex m.v.* "TARN".

*Prize—Condemnation of cargo—Sale of goods by contract—Consignor and consignee—Jus disponendi.*

The Crown applied for the condemnation of 29 bundles of hides shipped from Hong Kong on m.v. "Tarn", a Norwegian vessel, bound for Hamburg. The hides were, by virtue of a contract dated July 7, 1939, sold by the claimants, a British firm carrying on business in Hong Kong, to Christian Poggensee (Shanghai) a German firm which had a branch in Hamburg. The contract provided that the shipment should be from Hong Kong. On August 19, 1939, the claimants informed Christian Poggensee that shipment was made by m.v. "Tarn" and asked for Bills of Lading for this vessel. The Bills of Lading stated that the goods were shipped by Christian Poggensee (Shanghai) to their Hamburg Branch and that freight was payable at Hamburg. The Bills of Lading together with a Bank Letter of Credit, three Bills of Exchange and Insurance Certificates were by letter dated August 30, 1939, forwarded by Christian Poggensee to the Hong Kong & Shanghai Bank, who were asked to credit the proceeds to the claimants. The Bills of Exchange were made payable to the Bank and drawn on J. Henry Schroeder & Co. (London) by Christian Poggensee (Shanghai). The Bank was asked by the claimants to credit their account with the proceeds on the understanding that they accepted full responsibility for the bills. On September 27 the goods were seized in Colombo as contraband.

On April 1, 1941, a statement of claim was filed by the claimants alleging that the seizure of goods was unlawful on the ground that they were the lawful property of the claimants.

*Held*, that the goods were sold by the claimants to Christian Poggensee and that the claimants, so far as the shipment of goods was concerned, were merely the agents of Christian Poggensee.

*Held, further*, that the claimants and Christian Poggensee did not stand in the relationship of consignor and consignee, and that the claimants had not a *jus disponendi* on the goods as against Christian Poggensee.

**T**HIS was an application by the claimants for damages for unlawful seizure of goods shipped from Hong Kong *ex m.v. "Tarn"* to Hamburg.

*N. K. Choksy* (with him *R. A. Kannangara*, instructed by Messrs. *F. J. & G. de Saram*, Proctors), for the claimants.

*M. W. H. de Silva, K.C., A.-G.* (with him *M. F. S. Pulle, C.C.*, instructed by *John Wilson*, Proctor), for the Crown.

*Cur. adv. vult.*

February 1, 1944. HOWARD C.J.—

In this case the Crown asks for the condemnation of twenty-nine bundles of hides, or the proceeds thereof, shipped from Hong Kong on *m.v. "Tarn"*, a Norwegian vessel, for Hamburg. The hides in question were by virtue of a contract No. 001 dated July 7, 1939 (marked P 1), sold by the claimants, a British firm carrying on business in Hong Kong, to Messrs. Christian Poggensee, (Shanghai), a branch of the same firm carrying on business in Hamburg. On July 26, 1939, Christian Poggensee were informed by the Deutsch-Asiatische Bank, Shanghai, of the opening of an irrevocable credit. This letter of credit was forwarded to the claimants by Christian Poggensee, (Shanghai), in a letter (marked C 1) dated July 28, 1939. The contract originally provided that shipment should be from Hong Kong. In C 1 the claimants are given what are described as final shipping instructions and are requested to arrange for shipment per *s.s. "Rheinland"*. C 1 also enclosed blank endorsed Bill of Lading forms of the Hamburg-Amerika Linie. The claimants are also asked to return blank Bill of Lading forms if shipment cannot be arranged per *s.s. "Rheinland"*. Insurance was to be effected in Hamburg, and in connection therewith a certificate was requested by Messrs. Christian Poggensee. By letter of August 3, 1939 (marked C 3), the claimants informed Messrs. Christian Poggensee that the goods were being shipped by the "*Burgenland*" as they could not make use of the "*Rheinland*". This letter also refers to the fact that with regard to these goods Christian Poggensee figure as shippers, but suggest that in future in order to eliminate extra troubles all shipments should be made in the claimants' name. On August 19, 1939, the claimants by letter C 4 informed Christian Poggensee that shipment was being made by *m.v. "Tarn"* and asked for signed Bills of Lading for this vessel. These Bills of Lading were sent on the same day, but arrived unendorsed. Further copies endorsed were subsequently sent. The goods were placed on board *m.v. "Tarn"* on August 30, 1939. The Bills of Lading—P 3-P 5—stated that the goods were shipped by Christian Poggensee (Hamburg) Shanghai Branch to Messrs. Christian Poggensee (Hamburg) and that freight was payable at Hamburg. P 3-P 5 are endorsed on the back "*Christian Poggensee (Hamburg) (Shanghai Branch)*". P 3-P 5 together with the Deutsch-Asiatische Bank Letter of Credit, three Bills of Exchange for total of £856, three Invoices and three Insurance Certificates in duplicate were by letter P 9 dated August 30, 1939, forwarded through the claimants by Christian Poggensee to the Hong Kong & Shanghai Banking Corp., Ltd., who were asked to credit the proceeds to the claimants. The Bills of Exchange were made payable

to the Bank and drawn on Messrs. J. Henry Schroeder & Co., London, by Christian Poggensee (Hamburg) Shanghai Branch. Reference was made in the Bills to the Letter of Credit. In forwarding the various documents to the Hong Kong & Shanghai Bank the claimants by letter P 10 dated August 31, 1939, asked the Bank to credit their account with the proceeds on the understanding that they accepted full responsibility for the bills in every way. On August 30, 1939, Christian Poggensee (Shanghai), cabled the claimants to suspend all shipments. The claimants, *vide* letter of August 31, 1939 (P 12), cabled that they were unable to stop shipment. On September 13, 1939, the Hong Kong & Shanghai Bank notified the claimants that the bills had been dishonoured as being drawn by an enemy firm. On September 25, 1939, the claimants requested the Bank to debit their account with the amounts of the bills and to hand over all documents to Messrs. Gillespie Bros. & Co., Ltd., 32, Fenchurch Street, London, to whom the claimants had entrusted (*vide* letter P 14) the task of selling the goods in London. On September 27, 1939, the goods were seized in Colombo as being enemy property. In this connection it would appear that the Customs authorities required that the cargo should be discharged at Colombo or else an undertaking given to take the cargo to London. (*Vide* P 15 dated September 27, 1939.) By P 16 dated October 6, 1939, addressed to the Chief Secretary, the claimants applied for the release of the cargo on the ground that immediately after the Bills of Exchange had been dishonoured they took steps to re-establish ownership of the goods. On December 1, 1939, the goods were released to Messrs. Volkart Bros., the Agents of the claimants, on a bail bond amounting to Rs. 13,500 being given on behalf of the claimants. On April 18, 1941, a statement of claim was filed by the claimants alleging that the seizure of the goods was unlawful on the ground that they were the lawful property of the claimants, in their ownership at the date of seizure and continued to remain their property thereafter.

The only question that requires decision is as to the ownership of the goods at the time of seizure. The matter must be adjudged by English law and in this connection reference is made to the Sale of Goods Act, 1893. The opening words of section 18 are as follows:—“ Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer ”. Rule 5 is as follows:—

“ (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. ”

Section 19 is as follows:—

“(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.”

It is contended by Counsel for the claimants that they, by the terms of the contract, reserved the right of disposal of the goods until the Bills of Exchange had been honoured in London by Messrs. Schroeder & Co., and that, therefore, the property in the goods, notwithstanding delivery to Christian Poggensee, (Shanghai) or the owners of m.v. “Tarn” for the purpose of transmission to Christian Poggensee (Hamburg) did not pass to Christian Poggensee. Rule 5 of section 18 does not apply inasmuch as “a different intention” appears from the terms of the contract and the opening words of the Section are applicable. The Bills of Lading made no provision that the goods were deliverable to the order of the claimants and hence Section 19 (2) would seem to imply that no right of disposal was reserved. In the circumstances and having regard to the fact that a claimant in a Prize Court is in the position of a plaintiff *vide The Mowe*<sup>1</sup> the burden of proving the existence of such a right rests on the claimants. Mr. Choksy for the claimants relies on various authorities. In *The Miramichi*<sup>2</sup> a cargo shipped under a c.i.f. contract by a neutral to a German buyer on a British vessel before the declaration or imminence of war between Great Britain and Germany, was held not to be subject to seizure and condemnation by the Prize Court, the property in the goods not having passed to the enemy subject, nor the documents representing the goods taken up by him, and money having been advanced to the neutral seller on the faith of the documents by a neutral banker. In holding that the property in the goods had not passed to the buyers, the learned President held that the sellers had reserved a right of disposal or a *jus disponendi* over them and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the Bill of Exchange for the price had been paid. It would appear that the sellers in this case held the Bill of Lading which was not indorsed. The sellers were to pay carriage, insurance and freight and payment was to be “by check against documents”. In *The Kronprinsessan Margareta*,

<sup>1</sup> (1915) P. D. at p. 7.

<sup>2</sup> (1915) P. D. 71.

*The Parana and other Ships*<sup>1</sup>, the judgment of the Court was delivered by Lord Sumner. In the case of *The Parana* the appellants, the purchasers, endeavoured to show that the property passed to them before the beginning of the voyage. The goods were sold before shipment for a c. & f. contract which under the terms of the contract was provided for by a confirmed bank credit, the purchasers themselves effected insurances in Europe and the Bills of Lading made the goods deliverable to the purchasers' order. At pages 515-516 His Lordship stated as follows:—

“ 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. ”

I would also invite attention to the following passage from the judgment which appears at page 517:—

“ In the present case it appears to their Lordships that the retention by the seller of the bill of lading was inconsistent with an intention to pass the property. They think that it was 'clearly intended by the consignor to preserve his title to the goods until he did a further act by transferring the bill of lading'. The special circumstance of the existence of a confirmed banker's credit in this case is only indirectly relevant. It no doubt enhances the likelihood that the bills of lading will eventually be taken up and the goods be paid for, and so diminishes the importance to the seller of being still able to say that the goods are his, but it is not direct evidence of intention; it is only a reason why a particular intention is more likely to have been formed in such a case than in others. The intention has still to be inferred, principally from what was done and from the communications made with reference to it, and these point to an intention not to pass the property till the drafts were paid, and it is really rather a reason for intending to get the documents presented and taken up as soon as possible, than for an intention not to retain the ownership even until that could be effected. If the seller was paid or was holder of an enforceable contract from a bank for payment, the sooner he passed the property the better, for he was uninsured, but if he was neither he gained nothing by passing the property away. It was not onerous property. ”

In *The Prinz Adalbert*<sup>2</sup> it was held that when shippers of goods discount a draft upon the consignee and authorize the discounters to hand to him a Bill of Lading, to the order of, and indorsed by, the shippers, upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the ownership of the goods

<sup>1</sup> (1921) A. C. 486.

<sup>2</sup> (1917) A. C. 586.

is to pass to the consignee when he accepts the draft. That inference may be modified, or rebutted, by particular arrangements between the shippers and the consignee, and is subject to the rules which arise out of a state of war existing, or imminent at the beginning of the transaction. The transfer of the property upon the acceptance of the draft is consistent with the consignee being either a purchaser from the shippers or their agent for the sale of the goods. The following passage from Lord Sumner's judgment on pages 589-590 is of interest:—

“ Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted.”

In *The Gabbiano*<sup>1</sup> it was held that a certain clause in the contract of sale afforded a valid business reason for taking the bills of lading to the sellers' order and that the inference to be drawn from their so doing was that they intended to reserve the right of disposal and thus retain the property in the goods. The local case of *Othman v. Jinadasa*<sup>2</sup> was also cited by Mr. Choksy. In this case it was held that, where a seller shipped goods to a buyer and sent the receipt by value-payable post, thereby intending to make the delivery of goods conditional on payment, the property in the goods did not pass to the buyer on delivery to the carrier and that the risk of loss in transport fell on the seller. The cases cited by Mr. Choksy are in my opinion all distinguishable. In *The Miramichi (supra)* the shipping documents had not been tendered to and taken over by the buyers, the sellers holding the Bill of Lading which was not indorsed. In *The Parana (supra)* the sellers retained the Bill of Lading. In *The Prinz Adalbert (supra)* the shippers discounted a draft upon the consignee and the discounters were authorized to hand him the Bill of Lading only upon his acceptance of the draft. In *The Gabbiano* the Bills of Lading were taken to the seller's order.

In reply to Mr. Choksy's contention, the Attorney-General has argued that on July 7, 1939, the goods were sold by the claimants to Christian Poggensee (Shanghai) and that thereafter, the claimants, so far as the shipment of the goods was concerned, were merely the agents of Christian Poggensee. The orders for shipment were given by the latter firm. The contract of insurance was made in Hamburg by Christian Poggensee. The Bills of Lading were not endorsed in favour of the claimants. The Bills of Exchange were not negotiated by the claimants, but by Christian Poggensee (*vide* P 9) who instructed the Hong Kong & Shanghai Banking

<sup>1</sup> (1940) P. D. 166.

<sup>2</sup> 29 N. L. R. 149.

Corporation to credit the proceeds to the claimants. It was also maintained that the Bills of Lading indicated that the shippers were one firm—Christian Poggensee (Shanghai)—and the consignees were another—Christian Poggensee (Hamburg). In these circumstances the claimants and Christian Poggensee did not, as regards each other, bear the relationship of consignors and consignee and the various cases cited by Mr. Choksy which deal with parties having such a relationship did not, therefore, apply.

I have come to the conclusion that the contention of the Attorney-General is correct. The sale of the hides by P 2 was to include cost of carriage and freight to Hamburg, but in effecting shipment the claimants acted as the agents of Christian Poggensee. The name of Christian Poggensee, (Shanghai), appears on the Bills of Lading as the shippers, the freight due to the shipowners was payable in Hamburg and the insurance was to be effected by them in the same place. The Bills of Lading have not been indorsed in favour of the claimants. The Bills of Exchange were not negotiated by the latter and with regard to the statement that appears in their letter of August 31, 1939, to the Hong Kong & Shanghai Banking Corporation requesting that "we shall be glad if you will negotiate the documents as outlined in their letter and credit our account with the proceeds as per bank statement herewith, on the understanding that we accept full responsibility for above bills in every way", was a matter between the bank and themselves and cannot be construed as an intention to reserve a *jus disponendi* in the goods as against Christian Poggensee. In deciding whether the claimants retained a *jus disponendi* it is also relevant to consider their conduct after war had been declared and commercial relations with enemy subjects were not possible. In a letter dated September 25, 1939 (P 14) addressed to Messrs. Gillespie Bros. & Co., Ltd., the claimants state that "to facilitate matters we have bought back the documents from the Hong Kong Bank". In P 16 dated October 6, 1939, the claimants in a letter to the Chief Secretary recapitulate the steps they have taken to "re-establish ownership" of the goods. The extracts from these letters indicate that the claimants had not retained a right of disposal over these goods.

For the reasons I have given the application of the Crown asking for condemnation of these goods is granted together with costs.

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