Privy Council Appeal No. 9 *of* 1945

In the matter of cargoes ex M.S. "Charles Racine" and M.S. "Petter"

Davis and Company Incorporated - - - - *Appellant*

v.

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

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 10TH DECEMBER, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD WRIGHT
LORD ROCHE
LORD DU PARCQ
LORD NORMAND

[*Delivered by* LORD WRIGHT]

This is an appeal from a judgment of Lord Merriman, P., condemning two shipments of oil as good and lawful prize, being shipments of oil destined for Germany. The oil was admittedly absolute contraband of war. One shipment formed the cargo of the "Charles Racine", a motor vessel owned in Norway, but at the material time under Charter to a Company known as the Eurotank of Hamburg, which it will appear later was a subsidiary of the appellant, Davis & Company, Inc., an American Company. The cargo which consisted of 14,688.77 long tons of gas oil had been shipped in the circumstances to be stated later at Tampico, Mexico, before the commencement of the war under a bill of lading dated 21st August, 1939, and was admittedly destined on shipment for Hamburg. The other cargo was being carried on the "Petter", and consisted of 14,078 tons of fuel oil shipped by the appellant under a bill of lading dated Houston, Texas, the 27th August, 1939, and was likewise destined for Hamburg. There were other circumstances of legitimate suspicion sufficient to justify seizure in prize. After the war broke out on September 3rd, 1939, the two vessels were intercepted by the British Navy on the high seas and their cargoes seized in prize. The appellant claimed the cargoes on the ground that though shipped before the war destined for delivery at Hamburg, that destination had been abandoned and the cargoes diverted to neutral destinations before capture. As to this matter the onus is on the claimant. The learned President in a careful, able and exhaustive judgment came to the conclusion that the appellant had failed to establish his claim. Their Lordships are in full agreement with the President's decision. But after hearing elaborate arguments on both sides, they feel they should state at some length why they agree with the President.

It will be convenient to begin by explaining the general circumstances in which the shipments were made as a preliminary to stating the particular facts of each shipment.

The appellant Corporation, of which W. R. Davis was president until his death in August, 1941, had entered into an agreement dated 18th January, 1939, with the Mexican Government. This agreement, which was elaborate in its details, provided for the sale to the appellant by the Mexican Government of large quantities of Mexican oil to be shipped f.o.b. Mexican port. The oil was to be paid for by means of credits in Reichsmarks to be opened by the appellant in Germany. The magnitude of the transaction may be indicated by the licence dated the 21st March, 1939, granted to the appellant by the Reich Commissioner for Mineral Oil, which covered the import into Germany of the oil bought under the agreement. The condition of the licence was that during the period 1st January, 1939, to 1st January, 1940, the appellant should deliver to German importers some 2,940,000 tons of oil. It was also a condition of the agreement with the Mexican Government that the appellant (through W. R. Davis) should render certain services to the Government for the purchase for shipment to the Mexican Government of equipment and materials necessary for that Government's mines or oil wells. The Schedules contained details of prices, qualities, and the like. The credits furnished by the appellant were to be used in Germany for payment of the cost of the goods and materials and the services just referred to. Sixty-five per cent. of the deliveries of oil were to be destined to Eurotank, the German subsidiary of the appellant already mentioned: the shares in Eurotank were pledged to the German Government by the appellant, the holder, as security for the performance of the appellant's undertakings. Between 22nd March, 1939, and 23rd August, 1939, the appellant shipped some 68 cargoes of oil sold to German importers. These shipments were mainly from Mexico, but a few came from U.S. gulf ports. In addition there were at the outbreak of war five other shipments at sea, including the two shipments which are the subject of the present claim.

For the handling of this enormous transaction, the appellant Company made use principally of its German subsidiary, already referred to as Eurotank, its full name being Europaische Tanklager und Transport A.G. of Hamburg, a German Corporation but a wholly owned subsidiary of Crusader Petroleum Industries Limited, a British Corporation, which was in turn a wholly owned subsidiary of the appellant. Mention is also made of another German subsidiary of the appellant, referred to for shortness as Eurohandel; that Company was closely affiliated to Eurotank, and likewise carried on business in Hamburg; it does not, however, appear to have taken an active part in the matters here in question. But an important rôle was filled by another wholly owned subsidiary of the appellant, a Swedish Company called for shortness Skanditank, operating at Malmo. This Company was very active in the interchange of cables relating to the impugned shipments when the vessels were approaching Europe about the time when war broke out. The chairman of this Swedish Company was Nils V. Hansell, who was in charge in Malmo during August and September, 1939. He was also a director of the appellant and of Eurotank. Another concern which comes into the picture may be mentioned here: it is Scana A/B, a Swedish Company of Malmo, described in the Swedish Trade Directory as carrying on the business of coal briquetting. It is not known to have had any facilities for the storage of oil. It was owned and controlled by Caesar Wollheim, a German firm of coal merchants carrying on business in Berlin. Closely affiliated with Scana was another Swedish Company, called the Coal & Oil Trading Co. A/B of Malmo, also controlled by Wollheim. It is clear that the appellant and its subsidiaries had wide and complicated relations with Germany, as indeed they were entitled to have as long as the United States were neutral. Towards the end of September, 1939, soon after the cargoes were seized, Davis himself visited Italy and Germany, and during the visit met Goering. It may be inferred that the visit had some reference to the very important contract the appellant had with the German Government and to the cargoes now claimed. The appellant had obviously a great interest in completing as far as possible the contract and perhaps renewing it if the war should be short. The appellant had a large inducement towards keeping on good terms with the German Government because

of the Eurotank shares belonging to the appellant which that Government held as security. Carl von Clemm, a German, had been until 1937 a Vice-President of the appellant and a director of Eurotank until September, 1939. Von Clemm was later, in 1942, charged before a United States Court along with his brother with conspiring to import goods into Germany by means of false documents. He did not appear at the trial, being in Germany, but his brother was convicted.

This is the background to be borne in mind in considering these shipments, the history of which may now be given in more detail.

The " Charles Racine " was at the material time, as already stated, chartered to Eurotank. The bill of lading under which the cargo was shipped was dated the 21st August, 1939, and the destination of the ship shown on it was " bound for off Lands End for wireless orders from Davis & Company Incorporated, New York ", and the cargo was to be delivered unto order of shipper or assigns " at the above destination ". The ship's bill of health issued at Tampico on the 21st August, 1939, bore the signature of the German Consul at that port, which would indicate an intended German destination. Among the radio telegrams found on board the ship there was one to the Master dated the 27th August, 1939, from his owner to the effect that the charterers (that is Eurotank) stated that the cargo had been sold to Scana A/B, Malmo, and that the bill of lading on board was to be null and void. There was also found on board a wireless message in German from Scana telling the Master to give 48 hours notice before arrival at Malmo. On the 9th September, 1939, the vessel was intercepted off Cape Wrath by H.M.S. " Caledon " and sent into Kirkwall with an armed guard for search. It appears that on 5th September, 1939, the owners had communicated to the Master instructions from the war risk insurers, who were at Hamburg, that the nationality markings of the ship should be kept visible from sea and air and the flag illuminated, but instead the Master had kept the ship darkened. The significance of this fact appears to their Lordships to be diminished when it is known that the ship kept her navigation lights burning. On the 15th September, 1939, the " Charles Racine's " cargo was seized in prize and on the 14th October, 1939, a Writ in Prize was issued for condemnation of the cargo as good and lawful prize.

The " Petter ", a Norwegian-owned motor tanker, sailed with her cargo of fuel oil from Houston, Texas, the bills of lading being made out for delivery " at the port of Lands End for Wireless Orders to W. R. Davis ". On the 3rd September, the Master of the " Petter " sent a wireless message to the appellant asking it to advise as to a substituted port to which the appellant replied instructing him to get in touch with Skanditank and authorising him to accept its instructions as to destination. On the morning of the 4th September, the " Petter " reversed her course and sailed in a westerly direction for some hours. On the same day her Master received a message from the owners to the effect that he was to proceed to Bergen by the North of Scotland, and was not to follow any other instructions until he had asked for and received a reply from the owners. The " Petter " later turned and resumed an easterly course; she had received instructions from the owners about 3.20 p.m. on the 5th September, 1939. No explanation has been given of these proceedings. Presumably some wireless messages passed, but they are not produced. She was intercepted on the 16th September, 1939, and taken into Kirkwall. The cargo was seized in prize on the 21st September, 1939, and on the 19th October, 1939, a a Writ in Prize was issued.

In each case, appearance was entered on behalf of the appellant and of W. R. Davis, and also of the First National Bank of Boston, which held the documents in pledge in respect of advances made against the cargoes. On the 21st October, 1942, both these latter claims were discontinued in regard to the cargoes of each ship—it is indeed clear that neither the Bank nor W. R. Davis had any title to claim under Prize Law. Under Orders of the Prize Court both cargoes were sold in December, 1939, and the nett proceeds, amounting to £98,460 were paid into the Prize Registry to

await the decision of the claims. It is thus seen that there was no difficulty about selling the cargoes in this country if they had been landed here by the appellant. This fact was also stated to the President by the Attorney-General in answer to a request to him to obtain instructions on the point from the British Government. The President in reaching his conclusion rightly attached great importance to the fact that there was an available market in this country in which the oil could have been sold if the appellant had thought fit to divert the cargoes there instead of continuing the voyage to Scandinavia.

The law in such cases is in their Lordships' judgment clear, though it may be a difficult task in particular cases to apply it. When the original voyage to an enemy destination, commenced before the outbreak of war, has been compulsorily terminated by seizure of the cargoes in prize, the critical question is whether the claimant has abandoned, at or before the time of seizure, the original intention to send the goods to an enemy destination. If he can establish that he may claim release of the goods. The intention to be established is that of the person who has control of the voyage, as the appellant had in this case. Before the war the appellant was entitled to ship the goods to Germany. As soon as the state of war commenced, the goods became contraband of war and were liable to be seized and condemned because of their enemy destination. That liability can, however, be avoided if the incriminating fact is excluded by abandonment of the hostile destination before the seizure. In cases like those in question, the original destination which was Germany and all the surrounding circumstances may raise a case of suspicion, sufficient to justify seizure. It is then for the claimant to show that the goods are not liable to be condemned and to claim accordingly to recover them or their proceeds from the captor. As he is the claimant, it is obviously on him to establish his right to recover possession. His intention to abandon the voyage can only be shown by positive evidence of overt and unambiguous acts consistent only with the change of intention which he has to establish. The doctrine of continuous voyage involves that he cannot show the change of intention merely by showing that he had directed the vessel to some other port than the original hostile destination. That port may be chosen in fact not as intended to be a final destination but for the purpose of evading suspicion and as being a convenient place from which the original adventure to the enemy destination may be continued or resumed when the goods are not seized or released. Thus a Scandinavian destination may be merely a jumping-off point for still achieving by transhipment or by further transit in the same vessel the adventure to a German port. If the "Charles Racine" was ordered to Malmo instead of Hamburg and her cargo was sold (as it is said to have been sold) to Scana, a German owned concern, not ordinarily qualified to handle the import of a large cargo of oil, it has to be borne in mind that Malmo was the nearest port in Sweden to Germany, and that it was as a matter of navigation a simple and easy transit to slip across to Germany with the oil. Scana would not have raised serious or any obstacles to such a course. The further voyage could be made either in neutral or German controlled waters. The appellant seeks to meet this difficulty by relying on Regulations of the Swedish Government forbidding the export of oil from Sweden to Germany almost entirely and penalising attempts to evade export by a sort of blacklisting of the offender: it was said that attempts to re-export from Malmo were too improbable to be for practical purposes taken into account and hence that the Swedish destination must be regarded as final. Their Lordships, however, do not think these suggestions are sufficient to controvert the conclusion that Malmo was merely a stopping place on a transit to Germany, or show an intention to change the real and ultimate destination. As to the Regulations they are not produced and may well allow some administrative discretion. It is not clear that they would have applied if the ship, having reached Swedish waters, did not put into Malmo, but went on to Germany as she might well do. Scana, it is obvious, would not be likely to impede the German policy of getting as much oil as possible. The appellant had, it may be repeated, every interest in performing as far as he could his contract to deliver the oil to Germany. As was said by this Board in *Conservas*

Cerqueira Limitada v. *H.M. Procurator-General,* [1944] A.C.6, in discussing a decree forbidding the export of contraband goods to an enemy destination, a decree of that type may be and frequently is subject to evasion. This is not to charge the Swedish Government with neglect of their duty as neutrals. They may be circumvented by the ingenuity of astute business men having such strong incentives to getting the goods through as the appellant and his associates had in this case. The whole evidence must be scrutinised before a Prize Court can be satisfied that there is positive and convincing proof that the appellant had before seizure abandoned the intention of sending the goods to Germany. As Lord Stowell said in the *Rosalie and Betty* (2 C. Rob. 343), judges of Prize Courts are not to shut their eyes to what is generally passing in the world. And as the learned President acutely observed, in the early days of the war in which the events considered in this case occurred, there is nothing to show that this policy of the Swedish Government was anticipated by either the claimant or Eurotank or Skanditank. Their Lordships are fully in agreement with the learned President's conclusion that in the absence of any business explanation of the sale to Scana, there can be no doubt that the object was to get the " Charles Racine " cargo through to Germany if possible. He also said that he was not satisfied by the evidence that effective steps had been taken to cancel the Scana contract. On the contrary he thought that it subsisted. The President was most careful to deal with every suggestion that could tell in favour of the claimant. Only when he had done so did he reject the claim. Once the oil has been seized on grounds of reasonable suspicion, it is for the claimant to prove affirmatively that it was at the material time no longer destined to Germany. The appellant has plainly in their Lordships' judgment failed to do so. Their Lordships do not feel able to add to or detract from the careful analysis by the President of the documents produced by the appellant in support of its claim in regard to the " Charles Racine." They seem completely to establish the conclusion of the learned President with which their Lordships agree.

The case of the " Petter " has been strongly pressed in this appeal, but on a broad view there appears to be no sufficient distinction which could justify a different result from that arrived at in the case of the " Charles Racine ".

The learned President who had carefully compared all the documents produced relating to both shipments found in the result no reason to distinguish the position of the " Petter " from that of the " Charles Racine ". It is indeed clear that all the general considerations above stated apply with equal force to the " Petter " shipment. There is no reason to think that the appellant had less urgent inducements to get the oil through to Germany than it had in regard to the " Charles Racine " oil. It did indeed order eventually (or says that it did order) the " Petter " to Bergen, a port on the west coast of Norway, somewhat further than Malmo from Germany, but still affording opportunity for the further transit on to Germany. A great many cables are produced in which there are discussions about obtaining buyers in Scandinavia, and arrangements are made with the Bank for sending the documents for both vessels to their agents in Malmo. But it is impossible to find in the cables produced any reason to think that the oil was sold in Norway. The impression which is produced on reading these cables is that they are not complete. That is not helpful to the appellant which is seeking to establish an affirmative case. It is enough to say that before seizure no sale had been effected. Indeed after seizure the cables about selling the cargo in Norway still continue. The cables do not enable any definite view to be taken of the real fact or intention except that, as already stated, at the time of seizure no actual sale of the cargo had been made or was even in sight. Then it may be asked, as in the other case, why was the cargo not disposed of in Britain or sent back to the United States, which latter was the course taken in the case of the " Yolanda," another of the appellant's oil shipments at sea when war broke out and no doubt intended for Germany originally. The question

can be asked with more force when it is remembered that just after the declaration of war the " Petter " actually turned back and only resumed her course to Europe after proceeding westwards for some hours. No explanation (as already stated) has been given of this strange proceeding. No doubt the appellant was placed in a position of some difficulty but what emerges, as their Lordships think, is that the appellant was determined if he possibly could to get the oil to Scandinavia or Germany.

It may be noted that so far as appears there was in Norway no Regulation about the re-export of oil.

The appellant's counsel has strongly urged that the case of the " Anna Knudsen " shows that the " Petter's " oil might have been sold in Scandinavia if it had got there, as the " Anna Knudsen " cargo did. So also was the cargo of the " Polykarp " which had been consigned to a French Company (though as afterwards appeared it was one of the Davis subsidiaries). These two shipments were allowed to go through, and it was argued that the " Petter's " cargo could also have been sold in Scandinavia if it had been allowed to proceed. That however is mere surmise. On the other hand the Crown relies on what was done in the case of the " Pedersen ", which sailed from Mexico about eight days before the " Charles Racine " with gas oil under the German contract and had been ordered to Malmo by the Coal and Oil Company after the outbreak of war. A cable is produced addressed by Skanditank Malmo to the appellant in New York on the 9th September, 1937, saying that " Racine Pedersen documents badly needed." This couples with a reference in a cable from Eurotank to the appellant that the " Pedersen " as well as the " Charles Racine " had been ordered to Malmo, the latter by Scana and the former by the Coal and Oil Company. Sir William McNair has convincingly argued that the " Pedersen " cargo, not having been seized, the fair inference was that the oil went on to Germany and that the same would have happened to the cargoes of the " Charles Racine " and the " Petter " if they had been allowed to proceed.

On the whole appeal their Lordships have arrived at the conclusion that the President was right in holding that the appellant corporation has failed to prove its claims or either of them and that the appeal should be dismissed. They will humbly so advise His Majesty. The appellant must pay the costs of the appeal.

(51639) Wt. 8077—36 200 1/47 D.L. G 338

In the Privy Council

DAVIS AND COMPANY INCORPORATED

v.

H.M. PROCURATOR GENERAL

DELIVERED BY LORD WRIGHT

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1946