

following day. On the 14th the captain of the vessel, one Samuel Harrison, heard that he was to have two passengers with him on his voyage, and he made preparations accordingly. On his return to his ship from shore on the 16th he found on board Alexander Serebrenik and two persons awaiting him, strangers to him. Serebrenik introduced them as Pilsener and Gorschalko, two German subjects, and informed him they were to go to Vladivostock as supercargoes, one for the "Nigretia" and the other for a steamship called the "Nordpol," which had previously sailed for that port.

The ship, when off the coast of Corea, was seized by a Japanese cruiser and taken to Sasebo, where it was established in a Prize Court that the two so-called Germans were Russian naval officers, who had escaped from Port Arthur in a torpedo boat, had blown up their vessel at Chefu and were endeavouring to return to Vladivostock in disguise; and by the Judgment of that Court dated the 17th April 1905 the ship together with her cargo was condemned as lawful prize of war, on the ground that the said Alexander Serebrenik had attempted to transport to Russia two Russian naval officers under pretence of being supercargoes, and thereby planned the illegal carrying of contraband persons, and actually carried the plan into effect, by reason whereof the 60,000 cases of oil were wholly lost to the Plaintiffs.

The Defendant pleaded amongst others the two following defences:—

1. That at the time the policy of insurance was effected the Plaintiffs wrongfully concealed from the Defendants a material fact then known to them and unknown to the Defendants, namely that two Russian naval officers were about to be shipped on board the "Nigretia" as supercargoes under pretence that they were

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Russo-Chinese Bank v. The Yangtze Insurance Association, Limited, from His Britannic Majesty's Supreme Court for China and Corea; delivered the 26th April 1907.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ARTHUR WILSON.

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[*Delivered by Lord Atkinson.*]

The action out of which the question for decision in this case has arisen was brought by the Russo-Chinese Bank against the Yangtze Insurance Association, Limited, to recover the sum of 195,000 taels on a certain Marine Insurance policy, dated the 9th of December 1904, including war risks, on 60,000 cases of kerosene oil shipped on board the steamship "Nigretia" to be carried from Shanghai to Vladivostock.

One Alexander Serebrenik, a Russian subject resident in Shanghai, who happened to be the charterer of the "Nigretia," acting on behalf of the owners of this cargo of kerosene oil, effected this policy of insurance and, having effected it, deposited it together with the bill of lading and some other documents with the Plaintiffs as a security for certain advances made by them on the account of the before-mentioned owners.

The "Nigretia" left the wharf at Shanghai on the 15th of December, and sailed upon the

citizens of a neutral State, or in the alternative that the Plaintiffs' agent, Alexander Serebrenik, wrongfully concealed from the Defendants the above-mentioned material fact then known to him and unknown to the Defendants.

2. That after the insurance was effected and before the loss the Plaintiffs materially increased and changed the risk mentioned in the policy by causing to be shipped on board the "Nigretia" the two Russian naval officers as super-cargoes under pretence that they were citizens of a neutral State, or in the alternative that Alexander Serebrenik, acting as the Plaintiffs' general agent with respect to their interest in the cargo on board the "Nigretia," materially increased and changed the aforesaid risk.

The action was tried on the 22nd and 23rd January 1906 before Sir Havilland W. de Sausmarez, a Judge of the Supreme Court for China and Corea, and a jury. No question was left to the jury on the second defence, and the issue joined thereon is still undetermined. But the following question amongst others was left to the jury on the first defence:—

"Did Serebrenik intend to ship the officers knowing them to be such when he insured on the 9th of December?"

And the answer given by the jury was,—

"Serebrenik had the intention on or before the 9th of December to ship Russian officers on the Nigretia."

On this finding the learned Judge entered Judgment for the Defendants. Thereupon a motion was made by the Plaintiff for a new trial on the grounds (1) that there was no evidence to sustain the finding of the jury on the above-mentioned question, and (2) in the alternative that the finding was against the weight of evidence. Judgment was, on the 16th March 1906, delivered dismissing this motion with costs, and it is from this Judgment the Appeal now before their Lordships has been taken.

The burden of proving that Serebrenik had on or before the 9th of December 1904 (the date of the policy) the knowledge that the persons subsequently shipped on the "Nigretia" were Russian officers, and also that he with that knowledge had on or before that date formed the intention so to ship them, as he afterwards did, rested on the Defendants.

Serebrenik himself swore that he first met or heard anything about these men five days before their departure, which would be the 10th or 11th of December, that is one or two days after the policy was effected; and that he did not know that they were Russian officers at any time before they sailed. Some facts proved in evidence were relied upon to show that Serebrenik must, when he met these men, have known they were Russian officers, and that his evidence to the contrary was false. But even if that contention be well founded, their Lordships are of opinion that there is no evidence whatever to establish what the Defendants must establish in order to succeed, namely, that Serebrenik had acquired this knowledge at or before the time when the policy was effected. He himself swore he knew nothing about the men before the 10th or 11th of December. It is impossible, in the absence of all other evidence on this point of time, to prove that he knew at an earlier date than that which he names what was the real character of these men simply by showing that the evidence he gives is not to be believed.

On the ground therefore that the Defendants have failed to adduce any evidence to prove that Serebrenik at or before the time when he effected the policy knew that the men to be shipped were Russian officers, and on that ground alone their Lordships are of opinion that there was no evidence to support the finding of the jury in

answer to the second question left to them, and that the Appeal must accordingly be allowed and a new trial granted. As, however, the question whether Serebrenik knew at any time before he shipped these men as supercargoes that they were really Russian officers, must be raised, on the second of the above-mentioned pleas, and determined by the jury, their Lordships think it more desirable to abstain from expressing any opinion as to whether or not the evidence given at the trial already had would suffice to sustain a finding in favour of the Defendants on that issue.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed, that the Judgment of the 16th March 1906 ought to be set aside and a new trial awarded, that the costs of the first trial ought to abide the result of the new trial, and that the Respondents ought to pay the costs of the motion for a new trial.

The Respondents will pay the costs of this Appeal.

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