

Privy Council Appeal No. 3 of 1916.

**In the Matter of Part Cargo *ex* Steamship "Eleftherios
K. Venizelos"**

(Appeal of La Società Anonima Alfredo Kun, of Genoa)

FROM

**HIS MAJESTY'S COMMERCIAL COURT FOR THE ISLAND OF MALTA
AND ITS DEPENDENCIES. (IN PRIZE.)**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1917.**

Present at the Hearing :

LORD PARKER OF WADDINGTON.

LORD SUMNER.

LORD PARMOOR.

LORD WRENBURY.

SIR SAMUEL EVANS.

[*Delivered by* LORD SUMNER.]

This appeal relates to a part cargo of wheat, 1,000,000 kilos. in weight, which was captured on the 27th February, 1915, by H.M.S. "York," on board the Greek steamer "Eleftherios K. Venizelos," V. Velivanakis master, and condemned as prize by a judgment of His Majesty's Commercial Court for the Island of Malta and its Dependencies (In Prize), dated the 15th July, 1915, upon the ground of enemy destination on a continuous voyage.

The appellants, who were claimants below, are an Italian company, the Società Anonima Alfredo Kun, of Genoa, of which the shares are, as appears from the evidence, largely owned by a firm of Bunge and Born, grain merchants, of Buenos Ayres. The partners in this firm are two subjects of the Argentine Republic, named Ernesto Bunge and Alfredo Hirsch, and one J. Born, a Belgian subject. The whole cargo, consisting of various cereals, was shipped by Bunge and Born at Bahia Blanca, and the parcel in question was represented by a single bill of lading, which made the wheat deliverable at Genoa, the vessel's port of discharge, to the Untermühle Zug Actiengesellschaft, Zug, Switzerland, or their assigns.

The appellants' case was as follows. The parcel in question was shipped in performance of a prior contract of sale between Bunge and Born, represented by the appellants as their agents, and the Untermühle Zug Actiengesellschaft. The residue of the cargo was consigned to various other named Swiss consignees. To the other parcels the captors made no claim; but, as at any rate a large portion of them had been

acquired by the Italian Government, in favour of whom His Majesty's Government were willing, for the sake of amity, to waive any claim they might have, no inference ought to be drawn from this circumstance. On the very day on which the "Eleftherios K. Venizelos" finished loading at Bahia Blanca, the Società Anonima Alfredo Kun, without the receipt of any communication on the subject from Bunge and Born, so far as appears, began a negotiation by telegram for the purpose of purchasing the wheat from the Untermühle Company of Zug. They did this, as they say, because, as the market stood, the parcel was cheap, and accordingly they began by offering a premium or allowance for it of 30,000 fr. The Swiss Company at once stood out for 50,000 fr. Four days later, bargaining going on meantime, the appellants learnt by cable from Bunge and Born that the wheat, actually shipped under the Swiss Company's bill of lading in question weighed 3 kilos. per hectolitre more than the buyers were entitled to under the purchase contract.

Fortified by this private information, the appellants continued the haggling for the rest of the day, and eventually agreed to pay the 50,000 fr. originally demanded, while protesting that the price was "enormous." They stipulated, naturally, that the bill of lading, which was then in course of transit by post, should be endorsed to them by the consignees, when it arrived, and this was done. The fourteen telegrams by means of which this negotiation was carried out were produced. They record in ordinary terms the interchanges that might be expected between two hard bargainers, acting at arm's length and each determined to get the better of the other. The subsequent course of the market, according to the appellants' evidence, showed that they had the best of it.

Subsequently the Società Anonima Alfredo Kun disposed of their purchase by sales to the Molino Carlo Molinari, fu Carlo, of Genoa, and Arturo Baranzini, of Milan, and by delivery under a prior sale to the Molino Bossi, of Lugano. Baranzini, in his turn, sold over to Fioruzzi and Co., of Piacenza, and the Molino Bossi to La Banca Russa per il Commercio Estero, at Genoa, who sold again to the Molino Sismondi, of Pinerolo. When the last of these sales was made by the appellants, the "Eleftherios K. Venizelos" was still on passage in the Atlantic, and they gave directions accordingly to the firm of cargo superintendents, who were to act in the discharge at Genoa, and sent bills of lading or delivery orders to the buyers to enable them to get delivery.

With few and immaterial exceptions, all the relevant mercantile documents, which would be brought into existence in the course of, and would constitute the best evidence of, the transactions above detailed, were placed by the claimants before the Court below. Nor did counsel for the captors, at their Lordships' bar at least, contest their genuineness or suggest that any of them were fabricated. The learned Judge

at the trial appears to have been satisfied that, as documents, they were in the fullest sense what they purported to be.

The captors adduced no evidence in contradiction of the claimants' case, but subjected the whole of the transactions to the closest scrutiny, and suggested that in truth the wheat was on its way to an enemy destination. After full and careful examination, but by reasoning which their Lordships are not able to accept or indeed entirely to appreciate, the learned Judge at the trial arrived at that conclusion.

Two assumptions appear to underlie this view: The first is that the Società Anonima Alfredo Kun desired to recover control of the bill of lading, because it would enable them to effect the transmission of the wheat through Switzerland to Germany, without interference on the part either of the Italian or of the Swiss authorities; the second is that some and probably all of the above transactions were entered into merely to cloak the truth, namely, the enemy destination of the wheat.

Their Lordships are of opinion that all the evidence is to the contrary, and that, being regular in form, genuine in themselves, and contemporary in date, the documents, in the absence of evidence to refute them, are deserving of credit. It follows that the above assumptions are, in their opinion, mere conjectures and therefore inadmissible.

To deal with the latter first. It implies that, in pursuit of a scheme too tortuous to be intelligible, the appellants paid 50,000 fr. to their Swiss partners in the operation, in order to obtain their consent to a change which was necessary to give effect to their common desires, and entangled themselves in serious claims for damages by various purchasers for no object except to give verisimilitude to a sham transaction in case they should be called on to support it in a Court of Prize. Of the former assumption it is sufficient to say that the matter was one for proof, and the evidence given tended to establish the contrary. Their Lordships fully appreciate that the learned Judge may have been possessed of and influenced by information as to the course of transportation as it existed at the time in question over the Gothard Railway, whether obtained from other cases in prize tried before him or otherwise, which might well have seemed to him to support the view which he took upon this point; but as the evidence given in the case failed to support it, they are unable to agree with his conclusion.

In the result their Lordships are of opinion that the claimants' evidence discharged such burthen as rested on them and sufficed to establish their claim. They will accordingly humbly advise His Majesty that the appeal ought to be allowed, with costs, and the order appealed against ought to be reversed so far as it condemns the cargo in question; and that the sum in Court, being the proceeds of the wheat which, on requisition by His Majesty's proper officer, was sold, less any sum paid by the Crown to the master for freight or otherwise under the order of the Court below, ought to be paid out to the appellants.

In the Privy Council.

In the Matter of
PART CARGO *EX* STEAMSHIP
"ELEFTHERIOS K. VENIZELOS."

DELIVERED BY LORD SUMNER.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.
1917.