

In the matter of the Steamships "Kankakee," "Hocking" and "Genesee."

The American Transatlantic Company - - - - *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 23RD JULY, 1920.

Present at the Hearing :

LORD SUMNER.
LORD PARMOOR.
SIR ARTHUR CHANNELL.
SIR HENRY DUKE.

[*Delivered by* LORD PARMOOR.]

The appellants are an American company duly registered in accordance with the laws of the State of Delaware. They claim that they were the owners of the three steamships, "Kankakee," "Hocking" and "Genesee," at the time of their seizure by the British Naval Authorities.

The ships, until purchased under the arrangement hereinafter described, had been the property of neutrals. At the time of seizure, they were flying the American flag, having been duly registered as American vessels, in accordance with the municipal laws of the United States. There is no material difference in the conditions attaching to the ownership or control of the three vessels at the date of their seizure.

The "Kankakee" was seized on the 31st October, 1915. The learned President has found that the vessel was at all material times enemy property, and that the transfer to the appellants was merely colourable, made with the object of evading capture. The appellants did not argue on the hearing of the appeal that the flag was conclusive in their favour, or that the case was governed by the Declaration of London.

The principal actor in the case is R. G. Wagner, a native-born

American citizen. His father was born in Germany, but he settled in America in 1853, and became a naturalised American citizen before Wagner's birth in 1862. Wagner had carried on business at Milwaukee for a number of years, being President of three sugar companies, and owning in each a considerable interest. Before entering the "beet sugar business," he had been engaged in the structural steel business, and was for a number of years owner and manager of the Milwaukee Bridge and Iron Company. This concern was sold to the United States Steel Corporation, and Wagner was later engaged in what is said to have been a new industry in Wisconsin, "beet sugar raising."

According to the evidence of bankers in Milwaukee, Wagner's interests in various sugar companies represented an investment of about \$2,000,000, and he is said to have been regarded in Milwaukee as a man of large means.

Towards the end of 1914, Wagner visited Germany and Denmark. While in Denmark he made an agreement with Jensen, which is said to have provided that Jensen should acquire and pay for a number of steamships, which were to be transferred to a company, to be formed by Wagner, in the United States. It was further said to be a part of the agreement that Jensen should be reimbursed the expenditure to be made in purchasing these vessels by the issue to him of stock in the proposed company; subject to the right of Wagner to repay Jensen with cash up to 50 per cent. of the expenditure. Whatever may have been the terms of the arrangement between Jensen and Wagner, eleven ships were purchased either by Jensen or his successor, Theodore Lahr. The aggregate purchase money amounted to the sum of \$2,654,850. The "Kankakee," "Hocking" and "Genesee" were among the vessels so purchased.

The first matter for determination in the appeal is the source from which the purchase money for the ships was found. It is not suggested that the purchase money, or any part of it, was, in the first instance, provided by Wagner. Wagner did not undertake at that date to find the purchase money, but to form an American company to which the ships, after purchase, might be transferred. Jensen was not in a position to find the purchase money himself, but the case made on behalf of the appellants is, that he obtained the money by negotiating loans on banking institutions in Copenhagen and Sweden, and borrowing part thereof from a former business associate, Hugo Stinnes, a German subject. On the other hand, the case for the Crown is that the vessels were acquired from their previous owners by Jensen and Lahr, acting as agents of Hugo Stinnes, and with money supplied by him. In other words, that the real purchaser was an enemy subject.

Hugo Stinnes was a German subject of considerable wealth, and Jensen had acted before the war as his selling agent in Denmark, managing for him his business at Copenhagen, called the Copenhagen Coal and Coke Company. It was proved that, soon after the outbreak of war in 1914, Hugo Stinnes deposited about

50,000,000 kr. in the National Bank at Copenhagen for the account of Jensen. A large portion of this sum was subsequently transferred to the Revisions Bank at Copenhagen, and was expended through the agency of Jensen. In November, 1914, and early in 1915, Jensen formed two steamship companies in Denmark for the purchase of the steamships "Island" and "Falkland." There is evidence that part of the monies for purchase of these steamships was provided by Stinnes. In the early part of 1915 Jensen purchased and paid for a number of steamships, including the "Leonidas Cambanis" and the "Condylis." These ships were purchased through the Shipping Agency, Limited, of London, and, upon the making of the contracts, a deposit of 10 per cent. of the price was paid by the representative of Hugo Stinnes, Limited.

In March, 1915, Jensen was convicted of attempting to send copper out of Denmark into Germany in contravention of the Danish Export prohibition. Thereupon the purchasing of further vessels was undertaken by Theodor Lahr, of Rotterdam, who had also acted as agent of Hugo Stinnes. The same arrangements for obtaining purchase money applied to the purchases by Lahr as had formally been applied to the purchases by Jensen. Lahr established an office of the appellant company at Copenhagen, and among the vessels which he purchased was the "Kankakee." This vessel was purchased after a statute had been passed in Denmark prohibiting the registration of ships under the Danish flag without permission from the Danish Government. The main object of this statute was to prevent the registering of ships in Denmark which had been purchased with German money, and no attempt was made to transfer the "Kankakee" to the Danish flag. It is alleged that the transfer was made direct to Wagner or the appellant company.

After the conviction of Jensen, Wagner wrote to him in June, 1915, that he had decided to eliminate him entirely from the project, and to provide all the money from the American side to pay for the ships which had been purchased in his name or the name of the company. If the ships had been bought by Jensen, with money provided by him, it would, of course, have been impossible for Wagner to eliminate him entirely from the project without any consultation or arrangement. This action taken by Wagner indicates that he did not regard Jensen as the real owner, but as an intermediary, who could be eliminated so soon as it was convenient that such a course should be taken.

On the 8th July, 1915, Wagner, writing for the appellant company, informed the United States Commissioner of Navigation, that, if the foreign holding of stock in the appellant company was an obstacle to obtaining registry, the capital should be found in the United States. On the 9th July, 1915, Wagner wrote to Jensen, and cabled on the same day as follows: "As objection to your personal interest has not been overcome, I will take all of the stock in the enterprise and send you my personal one to five years' notes at 6 per cent. in payment of monies advanced.

Cable acceptance." No reply to this message was disclosed. On the same day a special meeting of the appellant company was held, at which it was decided to increase the capital of the company from \$200,000 to \$2,500,000 ; but for reasons given later, there is no evidence that any money was paid by the new stockholders in respect of stocks subscribed for by them, or that any portion of the increased capital was taken up, and paid for, by *bonâ fide* new subscribers.

On the 12th July Wagner wrote again to Jensen saying that he would take all of the stock in the enterprise, and send him his personal one to five years' notes at 6 per cent. in payment of money advanced. He enclosed in the letter ten notes, each \$250,000, and one note \$154,850, making a total of \$2,654,850.00, saying that these notes were in full payment for all monies advanced for the purchase of eleven steamships in his name, and in the name of the company. Wagner expressed regret that he was compelled to take this action, but that it was necessary in order to secure American registry. No reply to this letter was disclosed.

In the opinion of their Lordships, it is not possible to reconcile the terms of this letter with the allegation that Jensen, or his successor, Lahr, had purchased the ships with money found by them, or that they had become in any real sense owners thereof. There is no suggestion in the letter, nor was there any suggestion in the former cable, that there was any necessity to consult Jensen before coming to a decision to eliminate him from the position of owner. The notes are expressed to be in full payment, not of purchase money, but of money advanced by Jensen. There is no suggestion in any part of the letter that the purchase money had been found by Jensen or Lahr, or that the property of the ships was, or at any time had been, in Jensen. The notes are expressed to be sent to Jensen, not as purchase money, but in lieu of the stock of the American Transatlantic Company, which Jensen was to receive under the personal understanding reached at the time of Wagner's visit to Denmark.

If the ships were not purchased either by Wagner or Jensen, there is no alternative to the inference that they were in the first instance purchased by Hugo Stinnes through his agents Jensen and Lahr, and that the purchase money was provided by him for this purpose. It is fair, indeed, to say that, during the argument, no other alternative suggestion was put forward. The statement made in the memorandum by the American Ambassador to the Foreign Office in November, 1916, appears correctly to summarise the true position of Stinnes in the transaction :

" At the time of the company's organisation, one Albert Jensen, a Danish citizen, had been the agent through whom some of the vessels were purchased for the American Transatlantic Company. It is understood that this purchase was made possible by a loan obtained by Jensen through a German citizen named Hugo Stinnes. At the same time that he negotiated this loan for the American Transatlantic Company he purchased several ships on his account, with the same sort of financial aid from Germany."

Their Lordships therefore are of opinion that it has been clearly established that all the ships in question in this appeal were purchased in the first instance by an enemy subject, Hugo Stinnes, and, on purchase, became his property and subject to his control. So soon as it has been established that the purchase of the ships was originally made by Stinnes, an enemy subject, then the onus is shifted, and the burden lies upon the appellants to prove that the ownership of the ships has been transferred to them.

Their Lordships are of opinion that the burden of proof which rests upon the appellants has not been discharged.

It will be convenient in the first place to trace the history of the appellant company. After the return of Wagner to America, in the early part of 1915, the appellants were incorporated on the 22nd March, 1915, with an authorised capital of \$200,000. The first meeting of the company was held on the 29th March. On this date the incorporators of the company transferred their shares to Wagner and his son, and one W. B. Atwater. At the same meeting, Wagner and his son, and Atwater, were elected directors. Atwater subsequently resigned, and his place was filled by W. B. Berger, of Milwaukee, Wisconsin. In May, 1915, Wagner started to make arrangements in the United States to transfer the steamships, purchased through Jensen and Lahr, to the American Registry. There was some difficulty in obtaining registration. It is not necessary to refer to this matter in detail, but in August and September American registry was obtained of the three ships involved in this appeal, and of the eight other ships. The Department of Commerce of the United States, in advising Wagner of the decision to grant American registry, wrote as follows on the 23rd August, 1915 :—

“ I take this occasion to advise you, as you have been several times advised orally by the Commissioner of Navigation, that the Government of the United States cannot, of course, give any assurance that the American claim of ownership of the “ Laura ” or of the other ships you have recently acquired, and for which, under the direction of the Secretary of Commerce, provisional registers have been issued, will not be challenged by belligerents, or that the ships will not be arrested on the high seas and sent to a Prize Court for adjudication of that question. With the facts before it, this Department is of the same opinion as the State Department, that the case will be one appropriate for the decision of the question on ownership by a Prize Court. I think, further, that American exporters or importers of goods by these ships, or charterers, ought to be advised of this situation.”

And in a further letter, dated the 17th May, 1916, the Hon. William C. Redfield, the United States Secretary of Commerce, informed R. G. Wagner that :

“ In granting registry to the vessels of your company, the Department complied with the technical requirements of the law. It did not, therefore, express confidence in your purposes, or pass upon the equities of your case.”

Although the point appears to have been raised in the first
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instance, the appellant company did not in the appeal question the accuracy of this statement made by the Department of Commerce in the United States, or argue that the fact of such registration was in any way conclusive in proceedings in the Prize Court.

Prior to the 15th July, 1915, there had been an alleged transference to the appellants of nine vessels, including the three in question. The bills of sale relating to the transaction are set out in the record. In each case the purchase price is alleged to have been paid at the date of sale, and the total sum involved was about \$1,801,550. The minutes of the company, however, record that it was not until the 14th July that at a special meeting of stockholders a resolution was passed to increase the capital of the company from \$200,000 to \$2,500,000. The only stockholders present on the occasion when the resolution was passed were Wagner and his son. Jensen never subscribed to any shares in the American company. Wagner, however, states in his affidavit of the 28th April, 1916, that subsequent to the transmission to Jensen of his individual promissory notes, he solicited his business friends and associates to take part of the stock subscribed for, and taken by him, in the company, and that, as a result, the stock was issued to a number of persons whose names are set in the stock list against the amounts of stock issued to them. There is no evidence that any of the persons named paid for the stock issued in their names. It is difficult to understand that there should be an omission of any statement to this effect in the affidavits if, in fact, payment had been made. On the other hand, Wagner in October wrote a note to Mr. Elcock, of Chicago, informing him that all the stock of the company was in his interest, and that shares to the extent of \$200,000 had been placed in his name. The following is a copy of the letter:—

“DEAR MR. ELCOCK,

“Last January, whilst I was in Europe, a proposition was put up to me by some Danish parties to go into the ocean steamship business, which on account of the war is very profitable.

“The plan was to purchase neutral ships, place them under the American flag, and operate them from New York strictly as a legitimate money proposition. The American flag was desired because it was feared that all Europe might become embroiled in the war.

“Because the beet sugar business without tariff protection has no future, I consented to undertake the New York end of the proposition, and am now in charge of the American Transatlantic Company, a Delaware Corporation which I organised upon my return to this country. The capital stock of the company is \$2,500,000, all paid up and, of course, non-assessable, and at present this stock is all in my control.

“For certain confidential reasons, it is desirable that a part of this stock should be distributed, and I have taken the liberty of putting \$200,000 in your name. There is no liability of any kind or nature connected with the ownership of this stock, and the only question that may come up is whether or not you own it, and according to the records you do. The question of how much or in what manner you paid for it concerns no one, and need not be answered. The fact that the records show it to be in your name, and you admit it, serves my purpose. Inquiry as to the American citizenship of the owner of the stock of the American Trans-

atlantic Company may come up in connection with one of our steamships, the steamship "Saginaw" (*i.e.*, "Solveig"), seized by the French Government and now in the French Prize Court. This ship was purchased for delivery to our company at Marseilles, France, from its former Norwegian owner while in transit to Marseilles with a cargo of merchandise for the French Government.

"After delivery to us at Marseilles, it was held on suspicion that there was a German interest in the ownership. I will have to show that the ship is all American owned, and for that purpose want your name as a stockholder. That is all there is to it.

"Now, if for any reason you disapprove of my action, and want your name removed from the list of stockholders, frankly write me to that effect, and I will promptly transfer the stock. The stock is in one certificate for two thousand shares.

"The company now owns eleven steamers free and clear of any incumbrance, and they represent a value of more than \$3,000,000. All of the ships were always under neutral flags, and were purchased direct from neutral owners. None of the stock in the company was ever in the name of a citizen of any of the belligerent countries. There is therefore no valid reason for seizing the ship.

"Very sincerely yours,

"R. G. WAGNER."

"P.S.—The Officers of the company are: President, R. G. Wagner; Vice-President, W. J. Berger; Secretary and Treasurer, J. P. Wagner."

Their Lordships attach great importance to this letter.

Mr. Elcock did not allow the shares to stand in his name. Wagner wrote a further letter to him sending a share certificate for one share of \$100, but Mr. Elcock returned it, refusing to have anything to do with Wagner's proposals. Wagner refused to produce his correspondence with Mr. Elcock. These letters were written in October. They contain the statement of Wagner that all the share capital of the company was in his control, a statement inconsistent with the suggestion that there were other stockholders who had bought a number of shares, and held them with all the right of full ownership. Wagner further expressed the opinion that so long as Mr. Elcock's name was entered on the report as stockholder no further question would arise, whether or not he truly owned the stock, and it may well be that he held the same opinion as regards the stock owned by the other stockholders.

Their Lordships can come to no other conclusion than that the company was a one-man company, and that Wagner did, as stated in his letter to Mr. Elcock, control at that date all the stock in the company.

The accounts produced, and the statements made by Wagner to the accountants, Messrs. Marwick, Mitchell, Peat and Company, establish that the money said to have been remitted to Denmark in part payment of the cost of the ships was not money belonging to the appellant company at the date of its remission. Between August and September, 1915, remittances amounting to \$1,154,850 were cabled by Wagner to the Copenhagen office of the appellants purporting to be sent in discharge of the personal notes alleged to have been sent by Wagner to Jensen in his letter of the 12th July. Jensen is said to have surrendered to Wagner notes of an

equivalent value, but none of these surrendered notes have been produced. Wagner claims that he obtained the money remitted to him through the sale of about 9,000 shares in the appellant company, and the sale of other securities. That Wagner obtained funds through the sale of 9,000 shares in the appellant company is not consistent with his statement to Mr. Elcock that he had kept all the stock in his control, or with the conclusion stated above that there was no evidence of any payment by any of the stockholders in respect of shares allotted to them. In addition, Wagner refused to produce the correspondence relating to the sale of shares, or to give any details of the amount alleged to have been received from the various stockholders. The only evidence produced as to the sale of other securities by Wagner is in the affidavit of John S. Lawson, who merely states that during the year 1915 certain shares of the value of \$100 in the Wisconsin Sugar Company were duly transferred in the books of the company from Wagner to other persons. It is, however, not necessary to further analyse the evidence under this head. If, in fact, a payment had been made to Stinnes, some evidence should be forthcoming that he had received such payment, whereas the case made is not that a payment was made to him, but that no payment was due to him, on the ground that the ships had not been purchased by him, or on his account, but by Jensen and Lahr.

Their Lordships are not satisfied that Wagner has fully disclosed the whole character of the transaction involved in sending remittances to Denmark, and the evidence as it stands is in their opinion insufficient to discharge the burden of proof which in this matter rests upon the appellant company. In coming to this conclusion, their Lordships have not found it necessary to attach any weight to the affidavit of Svend Folden Lewin on the 19th January, 1917.

Their Lordships are of opinion that the appeal should be dismissed with costs, and will humbly advise His Majesty accordingly.



In the Privy Council.

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THE AMERICAN TRANSATLANTIC COMPANY

v.

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DELIVERED BY LORD PARMOOR.

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