

[IN THE COLONIAL COURT OF ADMIRALTY.]

1922.

Present : De Sampayo J.

In re SS. "ARNALDO DA BRESCIA."

Case No. 2.

No power to arrest a ship belonging to a foreign State—International law—Ship engaged in ordinary commerce—Objection to jurisdiction may be urged at any time.

A ship belonging to a foreign state cannot be arrested by our Courts. The foreign state does not lose its immunity from being proceeded against by the arrest of the ship, even if it employs the ship in ordinary commerce.

The Court is bound to withhold its hand whenever it appears that it is without jurisdiction, and cannot refuse to entertain an objection to the jurisdiction at any stage of the suit.

THE facts are set out in the judgment.

Drieberg, K.C. (with him *Hayley*), for H. M. the King of Italy.

Elliott, K.C. (with him *Bartholomeusz*), for the plaintiffs.

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June 6, 1922. DE SAMPAYO J.—

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This is an action in the Supreme Court exercising jurisdiction as a Colonial Court of Admiralty in respect of a collision. The plaintiffs are the Edward Steamship Company, Limited, the owners of the ss. "Clearway." The action is one *in rem*, and the defendant is the ss. "Arnaldo Da Brescia." It appears that on September 17, 1920, while the "Clearway" was lying at anchor in the Colombo harbour, the "Arnaldo Da Brescia" was brought in by a Government pilot to be berthed, and there was a collision between the two vessels. The plaintiffs then instituted this action through their solicitors, Messrs. Julius & Creasy, claiming from the "Arnaldo Da Brescia" the sum of Rs. 100,000 as damages. The circumstances leading up to the matter now before me are as follows: On the application of the plaintiffs this Court issued the usual writ of summons and a warrant of arrest, and under this warrant the "Arnaldo Da Brescia" was arrested in the Colombo harbour on September 17, 1920. The "Arnaldo Da Brescia" was then on a voyage from Europe to Australia under the management of the Lloyd Sabauda, a ship company of Genoa, whose local agents are Messrs. Volkart Brothers of Colombo. On September 21, 1920, Messrs. F. J. & G. de Saram, as solicitors of the Lloyd Sabauda, entered appearance for Lloyd Sabauda, and stating that the "Arnaldo Da Brescia" was owned by the Italian Government, and, therefore, free from arrest, claimed Rs. 12,000 as damages for the unlawful arrest, and Rs. 3,000 per day while the vessel remained under arrest. On September 24, 1920, Messrs. de Saram tendered bail on behalf of Lloyd Sabauda in Rs. 100,000 to answer judgment, and costs in this action, and in the notice it was stated, "it being understood that the bail is given under protest and without prejudice to any defence which Lloyd Sabauda may be advised to make, either on the ground of unlawful arrest or otherwise." The solicitors for the plaintiffs having consented to the application, this Court allowed bail, and a bail bond for Rs. 100,000 was executed by the Bank of Madras (now Imperial Bank of India) and Messrs. Volkart Brothers. The "Arnaldo Da Brescia" was thereupon released from arrest. On October 8, 1920, Messrs. de Saram entered appearance for His Majesty the King of Italy but under protest, "the said steamship being the property of His Majesty, and not subject to the jurisdiction of this Court." On January 25, 1921, this Court allowed an application for pleadings to be filed, and accordingly Messrs. Julius & Creasy, for the plaintiffs, filed their petition, and Messrs. de Saram filed an answer for the King of Italy and the Lloyd Sabauda. The answer contained a counter-claim for Rs. 24,000 for the unlawful arrest and detention of the "Arnaldo Da Brescia," it being stated that the vessel was the property of His Majesty the King of Italy, and was, therefore, not liable to arrest.

On the application of Messrs. de Saram for the issue of a Commission for the examination of witnesses in Italy with regard to the ownership of the "Arnaldo Da Brescia" and the terms on which the Lloyd Sabauda had charge of her, a Commission was, on July 20, 1921, ordered to be issued by this Court, and was actually issued on August 16, 1921, to the British Consul at Genoa for execution. Among the witnesses examined under the Commission were Lieut.-Colonel Lorenzo de Leonardis, Commissary of the Royal Navy, and Comm. Avv. Papa Carlo, Chief of the Legal Department of the General Direction of the Mercantile Marine. By the evidence of these witnesses and by a certificate of the Italian Minister of Marine, it is well proved that the "Arnaldo Da Brescia" is the *ex*-German steamer "Sigmaringen," which was condemned by a sentence passed by the Commissioner of War Booty, and thus became the property of the Italian Government. It is further proved that she was entrusted to the State Department of Navigation, which gave over the vessel to the Lloyd Sabauda, as it was said, "in commercial management." It is explained that the Italian Government wanted to use the vessel to bring cargoes of coal and corn for national purposes, and as the Italian Government had no agencies in the various commercial ports, the vessel was entrusted to the Lloyd Sabauda to be employed on their line of steamships from Europe to Australia, principally to bring coal and corn for the Italian State, with the right to use any extra space for conveying general merchandise, on the terms stated in the letter B addressed to the Lloyd Sabauda by the Assistant Secretary of State. These terms will be hereafter referred to more in detail.

The evidence so far puts it beyond doubt that the "Arnaldo Da Brescia" was, at the time of the collision, the property of the sovereign state of Italy, and, according to the rules of international law, was not liable to be arrested by this Court. The plaintiffs, however, urge, in the first place, that the King of Italy had, by appearing to the action, by filing an answer, and more specially by making a claim in reconvention jointly with the Lloyd Sabauda, submitted to the jurisdiction of the Court and waived the privilege allowed to a sovereign by international courtesy, of not being impleaded in a foreign court of law. As regards this, I think the circumstances should be taken into consideration. According to the practice in England, as illustrated by *The Jassy*,¹ the proceedings in a case of this kind would be simple. The Ambassador or other diplomatic representative of the foreign sovereign would address a written communication to the Secretary of State for Foreign Affairs stating the bare fact of the ownership of the vessel and the circumstances of the arrest, and requesting that steps might be taken to release the vessel from arrest and to terminate the proceedings. The Secretary of State would communicate with the Registrar of

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the Admiralty Court on the subject, sending him a copy of the communication of the representative of the foreign state. These communications would be accepted as sufficient verification of the necessary facts, and the Court would at once release the vessel and dismiss the action. It is not quite possible to follow this course in countries like Ceylon or other British Colonies where there is no diplomatic representation. But something analogous to it has been done. The Acting Consul for Italy, after he had become aware of all the facts, and was in a position to act, addressed a letter to His Excellency the Governor, stating that he had been instructed by the Italian Government to request the British Government to decline to exercise, by any of its Courts, any jurisdiction over the "Arnaldo Da Brescia," and to direct the bail bond to be cancelled and discharged. The Governor, acting through the Colonial Secretary, forwarded the letter to the Registrar of this Court. The Registrar thereupon gave notice to the parties that he would list the matter to be mentioned in this Court. The matter thus before me is an application on behalf of the King of Italy for a declaration that the "Arnaldo Da Brescia" was the property of the Italian State and was employed for public purposes and was not liable to arrest, and for an order cancelling and discharging the bail bond and terminating the action. As regards the appearance already put in, the answer filed, and the proceedings had, it should be noted that there was at the beginning a good deal of obscurity and uncertainty as to the situation. Even as regards the exact position of the Lloyd Sabaud, their agents, Messrs. Volkart Brothers, who instructed Messrs. de Saram, appear to have been in the dark. They called their principals the charterers of the vessel, whereas now there is a question on that point. In any event the circumstances did not, in my opinion, amount to waiver of the privilege of sovereignty and to submission to the jurisdiction of this Court by the King of Italy. His Majesty's appearance to the action was under protest, and it follows that the answer filed and the other steps taken were subject to the same reservation and freedom from prejudice. In this connection the case of *The Jassy* (*supra*) is interesting. There the circumstances were somewhat similar to those of this case. There a firm of Liverpool solicitors acting for the vessel, which had been sued *in rem* under the instructions of a mercantile firm, who were the Liverpool representatives of the Government of Roumania, the owners of the vessel, gave an undertaking to put in bail, and the vessel was released, and an appearance was entered on behalf of the owners of *The Jassy* by the London agents of the same Liverpool firm of solicitors. The appearance, which was unconditional, was entered by the London solicitors under a misapprehension and without the sanction of the Roumanian Government, and was not considered as amounting to a waiver of its privilege. In this case the appearance was not unconditional,

but "under protest," which is the recognized form of appearance to object to the jurisdiction. The fact that the Italian Government was the owner of the "Arnaldo Da Brescia" was disclosed at the very outset by the Lloyd Sabauda. [The Court is bound to withhold its hand whenever it appears that it is without jurisdiction, and cannot refuse to entertain an objection to the jurisdiction at any stage of the suit (*The Mary Anne*,¹ *The Sullan*,² and *The Eleanore*).³]

It was next contended on behalf of the plaintiffs that the Italian Government had either formally chartered the vessel to the Lloyd Sabauda, or had given them absolute possession and control of the vessel, or were partners of the Lloyd Sabauda in respect of the trade. I shall presently refer to the law on the subject, and deal now with the question of fact. I have already mentioned the effect of the oral evidence taken on Commission at Genoa. The document B, the letter of the Assistant Secretary of State to the Lloyd Sabauda, containing the terms of the arrangement with him, must now be examined. It purports to state the terms, "under which the steamer 'Arnaldo Da Brescia' is given on charter to your company on trade management for the duration of one year." I am quoting from the translation made at Genoa from the original Italian. The expression "is given on charter" is strongly emphasized by Mr. Elliott for the plaintiffs. It is a translation of the words "*viene affidato*," which after all may mean no more than "is entrusted." In any case the nature of the contract must be gathered from the whole document, and not from any isolated word here or there, which may or may not have a technical meaning. I shall therefore give a summary of the document:—

Paragraph 1.—The steamer is to retain her present equipment (staff and crew) "depending upon the General Head Office—Navigation Department (late State Railways), which will be hereinafter called Administration." Lloyd Sabauda are at liberty to engage an additional crew at their own charges "for the protection of the Company's interests, and particularly with regard to the relations with the agencies."

Paragraph 2.—The ship's "equipment," wages, and maintenance, &c., "will be at the care of the Administration."

Paragraph 3.—The Lloyd Sabauda will employ the steamer on the Italy-North Europe-Australia line. The various ports at which she is to call on the outward and homeward voyages are specified and include Colombo. The Lloyd Sabauda are to arrange for bunker coal abroad, but in the Italian ports bunker coal is to be supplied by the Administration.

¹ 34. L. J. Adm. 73.

³ Br. & L. 185.

² Swat. 504.

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Paragraph 4.—The Lloyd Sabaudò are through their agents to get all the trade as in the case of the other vessels on the above line on the following terms :—

- (a) All freights will be due to the Administration.
- (b) Stowage, port charges, and other disbursements, &c., Suez Canal dues, Customs duty, Consular dues, and other similar expenses "are at the charge of the Administration."
- (c) Lloyd Sabaudò to pay the commissions to agents, sub-agents, brokers, &c.
- (d) The Lloyd Sabaudò are entitled to 2 per cent. on the gross freights (on goods on Government account).
- (e) The Lloyd Sabaudò to be entitled to 10 per cent. on the gross freights, exclusive of freight for goods on Government account, "by way of compensation concerning the management of the steamer," but with regard to goods on Government account only 2 per cent.

Paragraph 5.—The Administration are entitled to load in the homeward voyage from Australia 1,500 tons of goods, and on the homeward voyage from North Europe the Administration are fully entitled to load coal on Government account.

Paragraph 6.—The maintenance of the passengers is "at the charge and care of the Administration."

Paragraph 7.—The Lloyd Sabaudò on arrival in Italy to render a written account, presenting the documents vised by the Consular, and harbour authorities attesting the expenses and receipts. If such authentication is impossible, the Lloyd Sabaudò to make a declaration.

Paragraph 8.—The Administration grant the management of the steamer "for one year, after which the agreement may be renewed."

Paragraph 9.—Alterations in the terms of the agreement due "to altered conditions of the contracting parties," &c., may be mutually agreed upon.

The expenses, &c., "will have to be accounted for by the most possible careful documentary evidence, it being clearly understood that this department is confident that your Company will take every care for the strictest protection of the State's interests in their co-partnery (*nella sua compartecipazione*) to the exercise of the line."

Taking this document as a whole I think that it does not constitute "a charter" of the kind contended for, that possession and control are not absolutely given over to the Lloyd Sabaudò, and that, as stated by the witnesses examined on commission, the Lloyd Sabaudò were practically agents of the Italian Government to manage the steamer with a small share of the freight as compensation for their

trouble. With regard to the suggestion of a partnership between the Italian Government and the Lloyd Sabauda, the word "co-partnership" in the last sentence of the above agreement has been emphasized. It, however, appears to me to be a reference to the participation of the freight, and, in any case, the document, as I said before, should be construed according to the substance of its contents, and not by the use made of particular words, especially in a translation. Assuming, however, that the situation was as alleged on behalf of the plaintiffs, it is necessary to consider what the law on the subject is. *The Annette*,¹ which was cited on behalf of the plaintiffs, is not a good case for the present purpose. The chief question in that case was as to the status of the Provincial Government of Northern Russia, which it appeared had not been formally recognized by the British Government and the Allied Powers, and on the facts the Court came to the conclusion that the vessel was not in the possession of the provisional Government. I am also referred to the unreported case of *The Tervoete*, a note of which is given in the *Law Times Journal* of March 18, 1922. That was a case of collision. The vessel which was sued had at the time of the collision belonged to the Belgian Government, but was sold by that Government to private owners after the collision, and the Court held that a maritime lien had attached to *The Tervoete*, and might be enforced against private individuals after she had passed out of the ownership of the Belgian Government. This is nothing new; it was decided in the much earlier case (*The Bold Buccleugh*)² that maritime lien may be enforced against the vessel in fault even in the hands of an innocent purchaser and that it travels with the vessel, and in the case of a proceeding *in rem* it relates back to the time when it first attached. The cases cited, however, are not relevant to the point under consideration. On the other hand, there are several cases which have a more direct bearing on the questions at issue in this case, and which support the application on behalf of the King of Italy. In *Parlement Belge*³ the Court of Admiralty took the view that trading with the property of a state might render the property liable to seizure, but the Court of Appeal dissented from that view, and laid down the general principle that, as a consequence of the absolute independence of every sovereign state and of international comity, every other sovereign state respects that independence, and declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of the sovereign or over the property of the state destined for public uses. *The Parlement Belge*³ was the property of the Belgian State and was a mail packet, and it was held that the immunity from arrest in a suit *in rem* for damages for a collision was not lost by reason of the packet also carrying merchandise and passengers for hire. That decision fits the circumstances

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of this case. In *Young v. The Scotia*¹ the Lord Chancellor observed: "The seizure is intended to be a preliminary to the sale of the ship, and what would be sold would not be the mere possession, but the proprietary right. If the proprietary right could not be sold by reason of the ship's belonging to His Majesty, the question of possession may be passed by as immaterial." *The Porte Alexandre*² went a step further. The vessel belonged to the Portuguese Republic, but was not being used at the time in the public service or for public purposes. She was, in fact, employed by the Government in ordinary commerce. The question was definitely raised, whether a foreign state which owns a ship loses its immunity from being proceeded against by the arrest of the ship if it is at the time employing the ship in ordinary commerce, and it was decided both in the Admiralty Court and in the Court of Appeal that the question should be answered in the negative, the principle acted upon being that a sovereign state cannot be impleaded by proceeding against its property, and that it does not matter whether the vessel is employed in commerce or not. *The Charkieh*,³ which was cited by Mr. Elliott, cannot be regarded any longer as an authority.

On the above authorities it must, I think, be held that the "Arnaldo Da Brescia" was not liable to be arrested. Mr. Elliott, for the plaintiffs, however, maintains that, even if this Court should so hold, the plaintiffs can still continue the action against the Lloyd Sabauda and execute any judgment by realizing the security given. I do not think that by the mere giving of bail the action *in rem* was converted into one *in personam*. Whatever the form of the bail bond may be, there is no question that the bail was given for the release of the vessel from arrest. The Lloyd Sabauda in tendering bail did so "under protest and without prejudice." They had already intimated that the arrest of the "Arnaldo Da Brescia" was unlawful, as she belonged to the Italian State. Rule 48 of the rules applicable to the proceedings of this Court provides that property arrested by warrant may be released on one or more bail bonds being filed for the amount claimed or for the appraised value of the property arrested. Rule 40 provides for the form of bail bond whenever bail is required, and the form No. 14 in the schedule, to which rule 40 refers, has been followed in this case. The bail bond has, I think, taken the place of the vessel, and if the arrest of the vessel is unlawful, the bail bond goes with it, and should be discharged too.

The proper order, I think, is to set aside the writ and all subsequent proceedings, including the bail bond, with costs. I make order accordingly.

Ship released.

¹ (1903) A. C. 501.

² (1920) 122 L. T. 661.

³ (1873) 4 Adm. & Ecc. 59.