CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

1961
June 7, 8
Sept. 19

THE REPUBLIC OF CUBA (a party interested) ..... APPELLANT;

AND

FLOTA MARITIMA BROWNING DE CUBA, S.A. (*Plaintiff*) ..... RESPONDENT;

AND

THE STEAMSHIP *CANADIAN CONQUEROR*, THE STEAMSHIP *CANADIAN HIGHLANDER*, THE STEAMSHIP *CANADIAN LEADER*, THE STEAMSHIP *CANADIAN OBSERVER*, THE STEAMSHIP *CANADIAN VICTOR*, THE MOTOR-VESSEL *CANADIAN CONSTRUCTOR*, THE MOTOR-VESSEL *CANADIAN CRUISER* re-named *CUIDAD DE DETROIT* ..... DEFENDANTS.

Shipping—International law—Sovereign immunity—Vessels in Canadian port sold to Republic of Cuba—Vessels arrested on behalf of private suitor—Impleading foreign sovereign state.

Banco Cubano del Commercio, a Cuban corporation, in August, 1958 purchased at Montreal eight steamships then lying in the Port of Halifax. On the same date it signed a lease-purchase agreement with the respondent, another Cuban corporation, which provided for the operation of the ships by the latter with an option to purchase. On October 31, 1958 the respondent, claiming the bank had repudiated delivery and usurped its rights under the contract, declared it a nullity and

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surrendered possession of the ships to an agent of the bank but reserved the right to claim damages for breach of contract. On June 9, 1959, the bank sold the ships to the Republic of Cuba. On August 4, 1960 the respondent instituted proceedings *in rem* in the Nova Scotia Admiralty District by a writ directed to the owners and all others interested in the defendant vessels and applied for and was granted a warrant for the arrest of the vessels still in Halifax. Counsel for the appellant entered an appearance under protest on the ground that the court had no jurisdiction and moved to set aside the writ and the warrant for arrest and service thereof on the grounds the vessels were public national property of and in the possession of the Republic which could not be impleaded; and further that by the agreement relating to the use and hire of the ships the respondent expressly submitted itself and all questions relating to the agreement to the jurisdiction of the Cuban courts. Pottier D.J.A. dismissed the application. On an appeal to this Court

Held: That having regard to the nature of the appellant's claim to the ownership of and rights of possession and control in the defendant vessels the Republic of Cuba was in fact impleaded and was intended by the respondent to be impleaded. *The Cristina* [1938] A.C. 485 at 492.

2. That a foreign government, claiming that its interest in property will be affected by a judgment in an action to which it is not a party and in which it alleged it is indirectly impleaded, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. *Juan Ysmael & Co. Inc. v. Indonesian Government* [1955] A.C. 72, applied.

3. That on the evidence the appellant's claim to ownership and right of possession of the defendant vessels is not illusory nor founded on a title manifestly defective.

4. That the defendant vessels on August 4, 1960, were the property of the Republic of Cuba.

5. That the rule of sovereign immunity extends to property of a foreign sovereign or state even if that property be used for commercial purposes. The rule as stated by Lord Atkin in *Compagnia Naviera Vascongado v. S.S. Cristina* [1938] A.C. 485 at 490, applied.

6. That the Court having come to the conclusion that conflicting rights have to be decided in relation to the claim of the Republic of Cuba, the writs and warrants of arrest and service thereof must be set aside as the Court is without jurisdiction to entertain the action. *Juan Ysmael & Co. Inc. v. Indonesian Government (supra)* followed.

APPEAL from a decision of the District Judge in Admiralty for the Nova Scotia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Cameron at Halifax.

Donald McInnes, Q.C. and *J. H. Dickey, Q.C.* for appellant.

G. S. Black and *D. S. Kerr* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (September 19, 1961) delivered the following judgment:

This is an appeal from a decision of Pottier, J., District Judge in Admiralty for the Nova Scotia Admiralty District, dated April 25, 1961, dismissing a motion made by the Republic of Cuba to set aside the writ and warrant of arrest in this action, and service thereof, on the ground that the Court was without jurisdiction to entertain the action.

On August 4, 1960, the respondent (hereinafter called Flota) instituted proceedings *in rem* in the Nova Scotia Admiralty District against the seven vessels named as defendants, the writ being directed to "the owners and all others interested in the defendant vessels". Its claim was stated as follows:

> The Plaintiff claims against the Defendant vessels the sum of one million, five hundred thousand dollars ($1,500,000) for injury, loss and damage sustained by the Plaintiff by reason of the breach of a Lease-Purchase Agreement (being an agreement relating to the use and hire of ships and relating to the Defendant vessels and others) dated on or about the 19th day of August, A.D. 1958, and for costs, and the Plaintiff claims to have an account taken.

On the same date, counsel for the respondent applied for and was granted a warrant for the arrest of the said seven vessels and they were immediately arrested at the Port of Halifax, Nova Scotia. On August 11, 1960, Mr. McInnes, of counsel for the Republic of Cuba, entered an appearance for Cuba, said appearance being under protest on the ground that the Court had no jurisdiction to entertain the action. Shortly thereafter, Mr. McInnes moved before the District Judge in Admiralty for an Order setting aside the writ, the warrant for arrest, and service thereof on the following main grounds:

(*a*) that the said steamships and motor vessels Defendants herein were and are public national property of and in the possession of and public use and service of the Government of the Republic of Cuba at all times relevant to these proceedings, and cannot be impleaded in this action,

(*b*) that the Lease-Purchase Agreement referred to in the statement of claim herein as an agreement relating to the use and hire of ships is an agreement whereby the Plaintiff expressly submitted itself and all questions relating to the said Agreement to the jurisdiction of the competent Judges and Courts of the Republic of Cuba renouncing their right to resort to any other jurisdiction

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by reason of nationality or of domicile or for any other cause whereby this Court is without jurisdiction and the Plaintiff herein is estopped from resorting to the jurisdiction of this Court.

The Learned District Judge in Admiralty dismissed the said application and an appeal was immediately taken to this Court.

It will be convenient to set out at once certain facts which are not in dispute. The Banco Cubano del Comercio Exterior (Cuban Bank of Foreign Commerce), which I shall hereinafter refer to as Banco, was incorporated in Cuba in 1954, one of its objects being to promote foreign trade by ownership of vessels. Browning Lines, Inc. is a Michigan corporation in the business of owning and operating vessels, its majority shareholders being Troy H. Browning and Lorenzo D. Browning, both citizens of the United States. The Browning Brothers were approached by the Director General of Banco with the view of having them operate vessels owned by Banco. As a result, Flota—the respondent herein—was incorporated under the laws of Cuba on April 8, 1958, its main purpose being the operation of vessels owned by Banco. All of the shareholders of Flota, with one exception, are said to be citizens of the United States.

On May 3, 1958, Flota entered into a Lease-Purchase Agreement with Banco relating to the operation of six vessels owned by or being built for Banco in England and Japan. That was at times referred to as the English contract. Shortly thereafter, the Browning Brothers heard that eight vessels belonging to Canadian National (West Indies) Steamships Ltd. were for sale and so advised Banco. After a survey of the vessels by Flota, Banco decided to purchase them. These vessels, which I understand had been strike-bound for some time, were then lying unmanned at the Port of Halifax and included therein were the seven vessels named as defendants in these proceedings. On August 19, 1958, all parties concerned met at Montreal and Banco purchased all eight vessels. They had been registered in Montreal but the certificates of registration were delivered up and cancelled. On the same date, Banco and Flota signed a Lease-Purchase Agreement covering the eight vessels, as well as others, and the contract—at times referred to as the Canadian contract—is that referred to in the respondent's writ. That document was not before

the Court, but portions of it were referred to in the various affidavits filed. I understand that the contract provided for the operation of all the vessels by Flota and that under its provisions Flota on certain named conditions had an option to purchase them. In August, 1958, Flota took one of the vessels to Baltimore, Maryland, for repairs. The remaining seven vessels remained and still remain at the Port of Halifax unmanned, and, while it was agreed in argument that when owned and operated by the Canadian National (West Indies) Steamships Ltd. they were engaged in commercial pursuits, namely, the carriage of passengers and freight, it was also agreed that they had not been used for any purpose whatever, at least since August 19, 1958, when purchased by Banco.

It will be noted from what I have said that Flota—the plaintiff in the action—is a Cuban corporation and that it asserts no right to ownership or possession of the vessels, its claim being for damages for alleged breach of the contract dated August 19, 1958. It is obvious, therefore, that its purpose in taking proceedings *in rem* and in arresting the defendant vessels was to ensure, if possible, that if successful in its action for damages, the vessels might be available to satisfy any judgment obtained. I should note now that no party, other than the Republic of Cuba, has as yet asserted any rights as owners of or as parties interested in the defendant vessels.

Pottier, D.J.A. rejected the submissions made on behalf of the appellant that the Court was without jurisdiction to hear the matter. While he made no clear finding that the defendant vessels were the property of the Republic of Cuba, it would seem that such was his opinion, for, after considering a large number of cases, he came to the conclusion that the claim of sovereign immunity could not be supported as in his view that principle in regard to ships was applicable only "when ships are involved in matters *jure imperii*", or governmental functions. He was of the opinion after hearing the evidence and after viewing the vessels, that they were equipped for passenger and freight service; that, therefore, their use constituted non-governmental functions, i.e., business matters or *jure gestionis*. He therefore applied the so-called restrictive theory of sovereign immunity and disallowed the appellant's motion. He was

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also of the opinion that the respondent company in the circumstances was not bound to resort to the Courts of Cuba for the determination of its claim for damages, notwithstanding the provisions in the contract.

I propose to consider first the question of sovereign immunity for, if that be determined in favour of the appellant, the remaining question need not be discussed. I find it unnecessary to consider the origin and general principles of this immunity which are discussed in *Dicey's Conflict of Laws,* 7th Ed., p. 129 ff., and in *Cheshire on Private International Law,* 5th Ed., at p. 88 ff.

It is not disputed that the Republic of Cuba is a sovereign state. Its present government, which was in office on August 4, 1960 when these proceedings were instituted, is recognized by Canada and each country has an ambassador in the other country.

The first question that arises is whether the Republic of Cuba is impleaded in these proceedings. The action is *in rem* and while Cuba is not named as a defendant, the writ is directed to "the owners and all others interested in the defendant vessels". As stated in Dicey at p. 135:

> The immunity described protects a foreign State within the meaning of the Rule, in its various manifestations, not only when it is directly sued *in personam,* but also against indirect proceedings.

In the *Cristina*[1], Lord Atkin said:

> In these days it is unusual to name defendants: when the defendants are described as "the owners of a vessel" they can be at once identified. When persons are not entitled the defendants but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case when they do appear they appear as defendants, and as such I conceive that they are impleaded. And, when they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that, if they are persons claiming an interest, they are by the very terms of the writ impleaded. But in the present case where persons claiming an interest are the only persons entitled defendants, and the Spanish Government are the only persons claiming an interest adverse to the plaintiffs, I have no doubt not only that the Government were in fact impleaded but were intended by the plaintiffs to be impleaded.

On the basis of the conclusions which I have come to regarding the nature of the appellant's claim to the ownership of and rights of possession and control in the defendant vessels (and which I will now discuss), there can be no

[1] [1938] A.C. 485 at 492.

doubt that in these proceedings the Republic of Cuba was in fact impleaded and was intended by the respondent to be impleaded.

In considering the claim of the appellant, I must keep in mind the statements of Earl Jowitt in the Judicial Committee of the Privy Council in *Juan Ysmael & Co. Inc. v. Indonesian Government*[1], summarized in the headnote as follows:

> A foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party and in which it alleges that it is indirectly impleaded, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

The rights of the parties must be determined as of the date of the initiation of these proceedings and the arrest of the ships, namely, August 4, 1960. It is agreed that Banco was the owner of the vessels when it entered into the contract with Flota on August 19, 1958. Whatever rights of possession or control over the defendant vessels that contract conferred on Flota, does not precisely appear, as the contract was not filed. In any event, such rights were clearly abandoned before the end of that year.

In opposing the motion to set aside these proceedings, the respondent filed an affidavit by Lorenzo D. Browning, vice-president and treasurer of Flota, dated November 18, 1960. He stated that following the signing of the Lease-Purchase Agreement with Banco, Flota became the operator of the eight Canadian vessels and that Flota had not consented in any way to the sale of the seven defendant vessels by Banco. An earlier affidavit by Mr. Kerr, counsel for Flota, dated August 4, 1960, and filed in support of the application for the warrant of arrest of the vessels, stated:

> I have been advised by various persons familiar with Cuban affairs and verily believe that it is probable that the said corporation (i.e. Banco) has transferred title to the defendant vessels to some other corporation controlled or operated by the Cuban government.

That affidavit also stated that in view of the uncertainty as to the National character of the vessels and as to their present ownership, it was deemed expedient to serve notice

[1] [1955] A.C. 72.

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of the proceedings upon the Consul General of Cuba at Montreal and on the Cuban Embassy at Ottawa. Such notices, after setting out the nature of the proceedings and the proposed arrest of the ships, state:

> We are sending you a copy of the Writ and Summons. This is to advise you that unless an Appearance in these proceedings is entered within one week exclusive of this date by the owner of the vessels or others interested, the action may proceed to judgment in default.

The appellant's motion was supported by three affidavits of Dr. O. Abello dated August 18, 1960, August 22, 1960 and January 3, 1961. Dr. Abello, then of Havana, Cuba, and a member of the Bar of Cuba, was the legal counselor of the Departmental de Fomento Maritimo "which belongs to the Ministry of Defence of Cuba, which has under its direction all ships and vessels of the Republic of Cuba". Dr. Abello, who joined that department when it was first constituted on February 17, 1959, stated:

> I have personally dealt with all matters relating to the aforementioned steamships and vessels formerly owned by the Canadian National Steamships Ltd. and I have personal knowledge of the facts hereinafter deposed to. In my capacity as counselor to my Department, all legal matters relating to these ships and vessels are under my charge and direction and have been since they were purchased by the Republic of Cuba.

It is clear from the third affidavit of Dr. Abello—and his evidence on this point is not denied—that Flota on or about October 31, 1958, declared that the Canadian contract between Banco and Flota was a nullity in its entirety and that Flota was no longer responsible for any of the vessels. Forming part of that affidavit are copies of two cablegrams sent by Flota to Banco on or about that date, in which it is stated:

> Because of your breach of this contract and your repudiation of the delivery to us by the usurpation of our rights under the contract we have no alternative but to consider we have not accepted those vessels and to consider the Canadian contract a nullity in its entirety. We are therefore hereby tendering delivery to you of the three Rio type vessels and arrangements for delivery can be worked out between your representative and our office in Havana. From the date of this telegram we no longer consider ourselves in any way responsible for any vessels under the Canadian contract which we now consider a nullity . . . As far as the Canadian contract is concerned it is considered a nullity and we must take such action as we deem appropriate.
>
> Following telegram sent to Mr. George Campbell quote you as agent for Banco Cubano Del Comercio Exterior. Requested we turn over to you the keys of Canadian National vessels in Halifax. We are instructing our personnel to turn these keys over to you but we wish you to be on notice as is the bank that your action further substantiates our position that the

bank has repudiated their delivery of these ships to us and we are advising you we in no way consider ourselves responsible for these ships as of yesterday and are cancelling all insurance and other arrangements made by us as of November 3, 1958, with this understanding the keys will be transmitted to you. A copy of this cable is being sent to the bank unquote.

The keys of the vessels were surrendered by Flota and turned over to Banco shortly thereafter. In effect, Flota withdrew entirely from the Canadian contract, declared it a nullity, reserving only the claim for alleged breach of contract. Banco was therefore free to dispose of the vessels as it wished without securing the approval or consent of Flota, and did so on June 9, 1959, by sale to Cuba.

The evidence of Dr. Abello, supported by the exhibits to the affidavits is sufficient at least to satisfy the Court that the appellant's claim to ownership of and right of possession of the defendant vessels is "not illusory nor founded on a title manifestly defective". Indeed, in the absence of any evidence to the contrary (although I recognize that in the particular circumstances of the case it might be difficult for Flota to ascertain the full facts), I would be prepared to find that the appellant has established that Banco did convey all its right, title and interests in the vessels to Cuba on June 9, 1959. Exhibit B, forming part of Dr. Abello's first affidavit, is a photostatic copy of the Agreement of Purchase and Sale of the eight Canadian vessels (*inter alia*) between Banco and Cuba. A translation of the essential parts thereof is attached to the affidavit of A. R. Moreira, dated August 24, 1960. After referring specifically to the eight vessels purchased by Banco from the Canadian National (West Indies) Steamship Company, the following clause appears:

Fourth: That in fulfillment of the offer made by the Cuban Bank of Foreign Commerce and the directions contained in law No. 363 of June 2 of the present year published in the Official Gazette of yesterday he sells, assigns and transfers in the name of his representee and in favour of the Cuban State the shipping and the shipping interests described in the preceding clauses of this instrument with everything belonging and pertaining to them free from encumbrances with all rights and actions inherent in them and without reservations and limitations.

That evidence is supported by the Official Gazette of Cuba, No. 102. It includes Law 363 of the Republic dated June 2, 1959, in which Cuba accepted the offer of Banco to sell all its maritime interests, including the defendant vessels, to Cuba. The evidence also suggests that the right to

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operate the vessels was given to Fomento Maritimo Cubano, an office created on or about February 20, 1959, under the jurisdiction of the Cuban Navy, Ministry of Defence. That office, by Law 600 in October, 1959 was transferred to the Ministry of the Revolutionary Armed Forces, that Ministry being the new name of the Ministry of Defence. Again, in January, 1960, that office was re-organized as a department of the Revolutionary Armed Forces.

Further, the affidavits of Dr. Abello and of J. T. Campbell, accountant of G. T. R. Campbell & Co., Naval Architects, Marine Surveyors and Consultants, of Montreal, show that from June 9, 1959, to August 4, 1960, the vessels were in possession of the Republic of Cuba through its agent, G. T. R. Campbell & Co. Prior to June 9, 1959, that company had supervision of the vessels on behalf of Banco, but on that date Banco and the Republic of Cuba notified them that thereafter the ships were to be supervised on behalf of Cuba as owner thereof. Since that day the Campbell company has supervised the defendant vessels, incurred accounts for dockage and wharfage charges, watching charges, examination of vessels and moorings, etc., on behalf of Cuba, and all accounts therefor have been submitted to that government, represented by either the Officina de Fomento Maritimo (a division of the Department of Defence), or later by the Departmento de Fomento Maritimo (a division of the Ministry of Revolutionary Armed Forces of Cuba).

Some reference should be made to a further document, Exhibit B to Dr. Abello's third affidavit, a translation of which was filed. It is a notarial document dated December 6, 1958, entitled "Minutes of the Delivery of Ships". Flota, represented by its second executive vice-president acting as president, and by its secretary (both residents of Cuba) is said to be a party thereto and I am invited to construe the document as a formal waiver by Flota of all its rights in the vessels referred to in the Canadian contract in favour of Banco, reserving only its claim for damages for breach of the contract. In view of the recitals that the party purporting to act as president of Flota stated that he did not know whether or not he had the power to concur in the Act and that he had done so only at the "requirement" of Banco; and the further recital that the only shareholder of Banco is the Cuban State, I have reached

the conclusion, in view of all the circumstances, that no importance whatever should be given to that document. The evidence is wholly insufficient to satisfy me that it was properly and voluntarily executed by Flota.

I find, therefore, that the seven defendant vessels on August 4, 1960, were the property of the Republic of Cuba and that they were then, and have since remained, in the possession and control of Cuba or of one of its departments, De Fomento Maritimo Cubano, by its Canadian agents, G. T. R. Campbell & Co. It may be noted here that the cost of maintaining and watching the vessels in Halifax Harbour is said to be about $10,000 per month, for all of which Cuba alone has been responsible since June 9, 1959.

On these findings of fact, has the Court jurisdiction to entertain this action—a proceeding in which a Cuban company claims damages for breach of a contract entered into with another Cuban corporation for the operation of the defendant vessels, and when the ownership, possession and control of the vessels has passed from the second corporation to the Republic of Cuba, or at least to one of its departments of state? It is difficult to see how any such claim could succeed if it went to trial since Flota turned over possession of the ships to Banco which had disposed of them by sale before this action was brought. That matter, however, was not one of the grounds on which this motion to set aside the proceedings was based and was not argued before me, and consequently it is unnecessary to consider that matter.

The general rule in regard to the jurisdiction of the Courts when sovereign immunity is claimed is stated in Dicey's *Conflict of Laws,* 1958, 7th Ed., at p. 129, as follows:

> The Court has no jurisdiction to entertain an action or other proceedings against
>
> (1) any foreign State, or the head or government or any department of the government of any foreign State;
>
> (2), (3), (4) Not applicable.
>
> An action or proceeding against the property of any of the foregoing is, for the purpose of this Rule, an action or proceeding against such entity or person.
>
> Provided that the court has jurisdiction to entertain an action or proceeding against any of the foregoing where the defendant therein, duly authorized when necessary, appears, voluntarily waives any privilege and submits to the jurisdiction.

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It will be noted that the Rule as so stated is absolute. Moreover, its application is not limited to ownership of property as shown by the statement in Dicey on pp. 135-6 and the cases there cited.

The immunity described protects a foreign State within the meaning of the Rule, in its various manifestations, not only when it is directly sued *in personam*, but also against indirect proceedings. "[T]he courts . . . will not implead a foreign sovereign. That is they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. . . . [T]hey will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control." (*The Cristina* [1938] A.C. 485, 490-491, per Lord Atkin) "[T]he rule is not limited to ownership. It applies to cases where what [the foreign State or sovereign] has is a lesser interest, which may be not merely not proprietary but not even possessory." (*The Cristina* [1938] A.C. 485, 507, per Lord Wright) It thus applies where a foreign government has requisitioned a ship without depriving the owners of their possession.

Counsel for the respondent, however, submits that Pottier, D.J.A., was right in applying the restrictive theory of sovereign immunity. That immunity, he says, is available to a foreign state having property in the vessels, if such vessels are engaged in governmental functions, i.e., warships, lightships and the like, but not in cases where the vessels are engaged in non-governmental functions such as the carriage of freight or passengers.

A similar submission was made and rejected in *The Porto Alexandre*[1], a decision of the Court of Appeal in England, the headnote reading as follows:

A vessel owned or requisitioned by a sovereign independent state and earning freight for the state, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals.

In that case, the *Porto Alexandre* came into the Mersey, got on to the mud, and was salved by three Liverpool tugs. On arresting her to obtain security for the payment of their salvage, the Portuguese Republic put forward a statement that she was a public vessel of the Portuguese Republic, and was therefore exempt from any process in England. Accordingly, the defendants moved to set aside the writ and arrest. The trial Judge granted the application and an appeal therefrom was dismissed, all the members of that Court being of the opinion that they were bound by *The*

[1] [1920] P. 30.

Parlement Belge[1]. The *Porto Alexandre,* formerly a German-owned steamship, by a decision of the Portuguese Prize Court in January, 1917, was adjudged a lawful prize of war. She had been requisitioned by the Portuguese Government and handed over to the Commission of Services of Transports Maritims, and when arrested, was being employed in ordinary trading voyages earning freight for the Government.

In that case, Warrington, L. J. said at p. 36:

> Whatever may be the actual use to which this ship is put, I think the evidence is quite sufficient to show that it is the property of the State, and is destined to public use; and, that being so, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* with the result which I indicated at the beginning of my judgment.

Scrutton, J. quoted with approval the statement in the 7th Ed., Hall's *International Law,* p. 211, where, after dealing with warships and public vessels so-called, the author stated:

> If, in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except insofar as it may be needed for the protection of the foreign state.

Both the above cases were considered in *Compania Naviera Vascongado v. S.S. Cristina*[2], a unanimous decision of the House of Lords affirming a decision of the Court of Appeal, affirming the decision of Bucknill, J. The headnote reads as follows:

> A ship, called the *Cristina,* belonging to the appellants, a Spanish company, and registered at the port of Bilbao, was lying in the port of Cardiff. Shortly before her arrival there, but after she had left Spain, a decree was made by the Spanish Government requisitioning all vessels registered at the port of Bilbao, and in view of this, and acting on the instructions of the Spanish Government, the Spanish consul at Cardiff went on board the *Cristina,* stated that she had been requisitioned, dismissed the master and put a new master in charge. Thereupon the appellants issued a writ in rem claiming possession of the *Cristina* as their property. The Spanish Government entered a conditional appearance, and gave notice of motion for an order that the writ should be set aside inasmuch as it impleaded a foreign sovereign State:
>
> *Held,* that the Courts of this country will not allow the arrest of a ship, including a trading ship, which is in the possession of, and which has been requisitioned for public purposes by, a foreign sovereign State, inasmuch as to do so would be an infraction of the rule well established in international law that a sovereign State cannot, directly or indirectly, be

[1] (1880) 5 P.D. 197. [2] [1938] A.C. 485.

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impleaded without its consent, and, therefore, that the writ and all subsequent proceedings must be set aside: *The Broadmayne* [1916] P. 64; *The Messicano* (1916) 32 Times L.R. 519; *The Crimdon* (1918) 35 Times L.R. 81; *The Gagara* [1919] P. 95; and *The Jupiter* [1924] P. 236 approved and applied.

The first judgment was given by Lord Atkin who said at p. 490:

> The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.

Lord Wright seems to have been of the same opinion. At p. 512, after referring to *The Porto Alexandre* and to *The Parlement Belge,* as well as to other English and United States decisions, he said:

> This modern development of the immunity of public ships has not escaped severe, and, in my opinion, justifiable criticism on practical grounds of policy, at least as applied in times of peace. The result that follows is that Governments may use vessels for trading purposes, in competition with private ship-owners, and escape liability for damage, and salvage claims. Various international conventions have discussed this problem and have culminated in the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned ships, of April 10, 1926. The general purport of the Convention was to provide that ships owned or operated by States were to be subject to the same rules of liability as privately owned vessels; ships of war, State-owned yachts, and various other vessels owned or operated by a State on Government and non-commercial service were excepted. There was power for a State to suspend the operation of the Convention in time of war. Great Britain, along with the majority of modern States, signed the Convention, but has not yet ratified it or enacted any legislation to bring it into effect in this country. But even if the provisions of the Convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships or in respect of the carriage of cargoes in them. Thus it would affect claims in rem for collision damage such as the claim in *The Parlement Belge,* 5 P.D. 197 or for salvage as in *The Broadmayne,* [1916] P. 64 and *The Porto Alexandre,* [1920] P. 30 or for cargo damage as in *The Pesaro,* 271 U.S. 562, but it may be, not claims for possession such as that in the present case or *The Gagara* [1919] P. 95 or *The Jupiter,* [1924] P. 236.

I may add that in the present case it is in my opinion sufficiently shown by the evidence before the Court that the Spanish Government had actually requisitioned, and taken possession and control of, the *Cristina*. That is all that is needed to justify the claim to immunity on the ground of "property." The question how far a mere claim or assertion by that Government would be conclusive on the Court, does not arise here.

And, at pp. 504-5, Lord Wright said:

To take the present case the writ names as defendants the *Cristina* and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment in rem is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question de facto enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett L.J. the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign State unless it consents.

Lord Thankerton, while agreeing that the *Cristina* was dedicated to public uses—as in *The Parlement Belge* case—expressed doubts that sovereign immunity applied to ships "being used in ordinary commerce" as in the *Porto Alexandre,* but expressed no final opinion on the matter, reserving the right to re-consider the decision in that case. Lord Macmillan also reserved his opinion on this point. At p. 498, he said:

I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of International opinion or practice to this effect. On the contrary the subject is one on which divergent views exist and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the Courts of this country was first formulated and accepted it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.

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Lord Maugham, while agreeing in the result because of the special circumstances of the case, expressed his opinion that the principle of sovereign immunity should not be applied to State-owned ships engaged in commerce. At p. 522 he said:

> My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our Courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign Governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if Governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal remedies and actions as any other shipowner. This was the effect of the various resolutions of the Conference of London of 1922, of the Conference of Gothenburg of 1923 and of the Genoa Conference of 1925. Three Conferences not being deemed sufficient, there was yet another in Brussels in the year 1926. It was attended by Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Poland, Japan and a number of other countries. The United States explained their absence by the statement that they had already given effect to the wish for uniformity in the laws relating to State-owned ships by the Public Vessels Act, 1925 (1925, c. 428). The Brussels Conference was unanimously in favour of the view that in times of peace there should be no immunity as regards State-owned ships engaged in commerce; and the resolution was ratified by Germany, Italy, Holland, Belgium, Esthonia, Poland, Brazil and other countries, but not so far by Great Britain. (Oppenheim, International Law, 5th ed., vol. I, p. 679.)

The opinion of Lord Atkin in the *Cristina*, that the rule of sovereign immunity extends to property of a foreign sovereign or state even if that property be used for commercial purposes, has been commented on with approval in a number of texts in recent years. I have already stated the rule as found in Dicey at p. 129. At p. 132 the author states:

> In the second place, the English courts accord full immunity from suit to foreign States, etc., without regard to the nature of the activity out of which the cause of action arises. No distinction is made, in particular, between the personal activities of heads of foreign States and their official acts.
>
> Nor is any line drawn between public law activities and private law activities, nor between acts pertaining to sovereign functions, and commercial transactions. A line of the latter sort, though it is clearly very difficult to draw, is, however, discernible in the practice of at least some other States and it may well be that the system of international law as a whole is moving towards a "functional" concept of jurisdictional immunities which would confine their scope to matters within the field of activity conceived as belonging essentially to a person of that system of whatsoever category.

In Marsden's *Collisions at Sea*, 1953, 10th Ed., the author says at p. 236:

The courts of this country have no jurisdiction to entertain any action or other proceeding against a foreign sovereign or sovereign State, subject to the proviso that appearance, waiver of privilege and submission to the jurisdiction may be voluntarily made, in which case the court has jurisdiction in the cause but no power to enforce any decree by execution in any form. Immunity extends to ambassadors and diplomatic agents duly accredited, members of their suites, and persons and organizations protected by the Diplomatic Privileges Act, 1708, the Diplomatic Privileges (Extension) Acts of 1941, 1944 and 1946, or the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, subject to the same proviso. Proceedings *in rem* cannot be taken against the public ship of a foreign sovereign.

In Oppenheim's *International Law*, 8th Ed., 1955, p. 856, the author says:

451*a*. The increasing practice of Governments of owning or controlling merchant-ships, either for purposes connected with public services such as the carriage of the mails or the management of railways, or simply for the purpose of trade, has led to some doubts as to whether they are entitled to the immunities which are enjoyed by men-of-war. The practice of the courts of different States in this matter is far from being uniform. In Great Britain the practice is still probably as follows. As the result of a series of decisions, of which *The Parlement Belge* (a Belgian public mail-ship) in 1880 may fairly be regarded as the starting-point of the movement in favour of immunity: (*a*) a British court of law will not exercise jurisdiction over a ship *which is the property of a foreign State*, whether she is actually engaged in the public service or is being used in the ordinary way of a shipowner's business, as, for instance, being let out under a charter-party; nor can any maritime lien attach, even in suspense, to such a ship so as to be enforceable against it if and when it is transferred to private ownership.

In Cheshire on *Private International Law*, 5th Ed., 1957, the author states at p. 90:

On the principle that sovereign States are equal and independent the rule has come to be that no sovereign independent State will exercise any jurisdiction over the person or the property of any other sovereign State.

Then, after stating that the law has been reduced to two principles by Lord Atkin in *The Cristina* (*supra*) and after referring to *The Parlement Belge*, he continues at p. 91:

It can, at any rate, be affirmed that in the following cases the immunity is unlimited.

First, where the sovereign State is the admitted owner of the subject-matter of the suit, as in the case of a warship or of the cross-channel steamer in *The Parlement Belge*.

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In the present case, while the respondent does not admit that the appellant is the owner of the defendant vessels, the evidence is sufficient to satisfy me that Cuba is, in fact, the owner.

While the matter is perhaps not entirely free from doubt, I have come to the conclusion that I should follow the rule as laid down by Lord Atkin in *The Cristina* and which has been cited with approval by the well-known textbook writer to whom I have referred. It was also followed in a Canadian case, that of *Thomas White v.* The Ship *Frank Dale*[1], by Sir Joseph Chisholm, D.D.J.A. Reference may also be made to the opinion of Duff, C.J.C. in *Reference as to Power to Levy Rates on Foreign Legations and High Commissioners' Residences*[2]; and to the judgment of Locke J. in *Municipality of Saint John et al. v. Fraser-Bruce Overseas Corp. et al.*[3].

It is to be noted, also, that the reservations of Lord Thankerton, Lord Macmillan and Lord Maugham in *The Cristina* appear to be limited to ships engaged in ordinary commerce or trading. If that be so, it would seem that in general they were inclined to adopt the principles set forth in The International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships of April 10, 1926 (Brussels Convention). But, as stated by Lord Wright in that case, the Convention was not ratified by Great Britain; then he stated also at pp. 512-13:

> Great Britain, along with the majority of modern States, signed the Convention, but has not yet ratified it or enacted any legislation to bring it into effect in this country. But even if the provisions of the Convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships or in respect of the carriage of cargoes in them. Thus it would affect claims in rem for collision damage such as the claim in *The Parlement Belge*, 5 P.D. 297, or for salvage as in *The Broadmayne* [1916] P. 64, and *The Porto Alexandre*, [1920] P. 30, or for cargo damage as in *The Pesaro*, 271 U.S. 562, but it may be, not claims for possession such as that in the present case or *The Gagara*, [1919] P. 95, or *The Jupiter*, [1924] P. 236.

I have examined the text of that Convention and it would seem to me also that its effect is limited to claims in respect of the operation of such ships or in respect of the carriage of goods in them.

[1] [1946] Ex C.R. 555. [2] [1943] S.C.R. 208 at 229-30.
[3] [1958] S.C.R. 263 at 280-1.

In the instant case, the respondent's claim does not arise from the operation of the defendant vessels but rather from a contract respecting the operation of the vessel. The fact is that while the vessels were originally equipped and used for the carriage of freight and passengers, they had been put to no commercial purposes since about 1956 or 1957 and have never been used for commercial or any other purposes by either Banco or Cuba. They were strike-bound at first and since the purchase by Banco have remained idle at the Port of Halifax. Moreover, there is no evidence that the Republic of Cuba intended to use them for commercial purposes. It is shown that Cuba made an unsuccessful effort to sell them through a New York broker and that Dr. Abello came to Canada in August, 1960 as representative of Cuba to have them taken to Cuba, but for what purposes is not known.

For the reasons stated and having come to the conclusion that the claim of the Republic of Cuba to ownership of the vessels is well founded and not illusory nor founded on a title manifestly defective; and that conflicting rights have to be decided in relation to the claim of the Republic of Cuba, I must decline to decide the rights and stay the action—to use the language of Earl Jowitt in *The Juan Ysmael & Co.* case (*supra*).

Accordingly, the appeal will be allowed, the writ and warrants of arrest in this action and service thereof will be set aside as the Court is without jurisdiction to entertain the action. The appellant is entitled to be paid its costs both in this Court and in the Court below, after taxation.

Before leaving the matter, however, I must refer to certain oral evidence given on April 7, 1961, by Dr. Abello on behalf of Flota. In his judgment, the learned District Judge in Admiralty ruled that such evidence was inadmissible and at the hearing of the appeal counsel for Flota asked that that ruling be reversed.

That evidence was tendered under rather unusual circumstances. It seems that prior to that date, counsel for both parties had completed their submissions and the matter was standing for judgment. On that date, counsel for Flota again appeared before the District Judge and asked for leave to present further oral evidence by Dr. Abello who at that time had left Cuba, being wholly

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dissatisfied with conditions under the present regime in that country. Mr. McInnes, counsel for the appellant, on that date had written to the District Judge as follows:

> Our retainer with respect to the aforementioned litigation has been terminated and, consequently, I wish to advise you that we are no longer acting in the matter. It may be that the Cuban Government wish to retain other solicitors in Halifax to act on their behalf. My purpose in writing to you is to advise you of the fact that on instruction we are retiring from this case.

Counsel for Flota, after referring to that letter, then stated:

> The situation is extremely complicated in that Dr. Oscar Abello, originally retained Mr. McInnes and his firm, and Dr. Abello has been in touch with Mr. McInnes recently and the result of that conference is the letter Your Lordship has received, that Mr. McInnes is no longer retained. Dr. Abello indicated to Mr. McInnes, I understand, that he would like to discuss this case with Mr. Black and myself and I was contacted by Mr. Dickey last night who advised me it was entirely proper for Dr. Abello to see us and discuss the case with us. As a result of what Dr. Abello has told us, we have decided to come to your Lordship to ask to hear the evidence of Dr. Abello as it relates to the problem of sovereign immunity and the ownership of the vessels.
>
> The Court faces one difficult problem, and that is that there is no one here representing the Defendant vessels.

Certain evidence was then given by Dr. Abello, not only on the question of sovereign immunity and the ownership of the vessels, but also as to the nature of the Courts as they are now constituted in Cuba. I have no doubt that counsel for Flota acted in good faith throughout and with the sole desire of assisting the Court by the production of all available evidence. I think, however, that Pottier, J. was right in rejecting that evidence. In his judgment, he said at p. 23:

> There was evidence given on April 7 by Dr. Oscar Abello, and an objection was made against the reception of this evidence or the consideration of it as a part of the application herein. I was asked to make a ruling regarding the same. I find that it was given after the close of all representations by way of evidence and do not consider it a part of this application.

It seems to me that as the matter was standing for judgment prior to April 7, 1961, no further evidence should have been received without proper notice to the claimant—the Republic of Cuba; and that as Mr. McInnes' retainer had been then withdrawn, the application to hear further evidence by Dr. Abello should have been adjourned to enable the claimant to secure other counsel if so advised. I may

add that counsel for Flota intended on the hearing of this appeal to ask leave to adduce evidence by Dr. Abello, but unfortunately he was in the United States and had refused to attend.

Judgment accordingly.