

circumstances it would, in my opinion, be wrong to allow the 1880.
 matter to be re-opened. I must therefore dismiss the action with THE AFRICA.
 costs.

Solicitor for plaintiffs: *H. C. Coote.*

Solicitors for defendants: *Rollit & Sons.*

[IN THE COURT OF APPEAL.]

Feb. 27.

THE PARLEMENT BELGE. (1878. O. 60.)

Public Vessel—Exemption from Arrest—Trading by Public Vessel.

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory :—

Held, therefore, reversing the decision of the Admiralty Division, that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit in rem to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandize and passengers for hire.

THIS was an appeal on behalf of the Crown from a decision of Sir R. J. Phillimore. (1)

1879. Dec. 11, 12, 13, 20. *Sir H. S. Giffard, S.G.*, the Admiralty Advocate (*Dr. Deane, Q.C.*), and *A. L. Smith*, for the appeal. This is a public ship, and apart from the convention she is not liable to seizure. She belongs to the King of the Belgians in his public character, and if she was trading contrary to her public character that is a question which cannot be raised by a private foreigner though our government might have a right to complain. The property of one sovereign is not subject to seizure in the territories of another, and that the vessel is not armed makes no difference. The carrying arms is only the most usual proof that a ship belongs to the government and is employed for public purposes. *The Exchange* (2) was a strong case, but it has always

(1) 4 P. D. 129.

(2) 7 Cranch, 116.

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been accepted. Any property of a sovereign is protected: *Vavas-seur v. Krupp*. (1) The goods on board may not be protected, but that does not affect the ship: *The Prins Frederik* (2); *Briggs v. The Light-ships*. (3) This ship is employed by the King of the Belgians, officered by him, and carries his flag. She has been invited to the ports of this country under the belief that irrespective of the treaty she would not be subject to our laws. Moreover, she has been declared by the Crown to be a public ship, and this declaration is conclusive. The Court cannot go behind the declaration of the Crown as to the political status either of persons or things. The Crown determines what is an independent government. The Crown declares a blockade, and many other cases may be put. It is argued that this gives the Crown a power inconsistent with the constitution, but that is not so.

[BRETT, L.J. Can her Majesty give to a private ship privileges not recognised by international law?]

It is not necessary to say that she can, but her Majesty's declaration that the ship is a public ship is conclusive. The international law is part of the common law of England: *Triquet v. Bath* (4), and by international law a public ship is free from arrest. The general language of Acts of Parliament however large is construed *salvo jure reginæ*.

[*Webster, Q.C.* That is not disputed.]

Then the question is, whether her Majesty can recognise, and by recognising affirm, the political character of a thing so as to free it from the ordinary jurisdiction of the Courts. Every person residing here is subject to the laws of this country, and the proposition in Viner's Abridgment, Prerogative, T. 7, 8, that the Queen cannot give a foreigner an exemption from being impleaded here is not disputed, but if by a principle of international law a person having a particular character is not liable to be so impleaded the Queen's recognition of him as having that character is conclusive in all her Courts.

[BRETT, L.J. I do not feel clear that if her Majesty chose thus to recognise as ambassador a person who had not been sent by any foreign government he could claim the privileges of an ambassador.

(1) 9 Ch. D. 351.

(2) 2 Dod. 451.

(3) 11 Allen (Mass.), 157.

(4) 3 Burr. 1478.

JAMES, L.J. How can any municipal court try that question? I apprehend that we should be bound to act on the representation of the Foreign Office.]

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The appellants merely use the treaty in the present case in order to get rid of the argument that the ship is not a public ship because of her trading. Were it not for that they would simply rely on her being a public ship.

[BAGGALLAY, L.J. Suppose the conditions in Article X. of the treaty were broken, is the ship still privileged?]

Yes, until the treaty is abrogated for breach it remains in force: Kent Comm. I. 183.

[JAMES, L.J. Would a treaty that all Belgian ships should have the privileges of Belgian ships of war be binding?]

It is not necessary to say that it would, but only that the allegation that the ship is a public ship is conclusive. As to her being a public ship, the question is now what is the purpose for which she is used? The distinction is not between public ship of war and private ship of war, but between public ship and private ship. The law is summed up in 1 Phill. Int. Law, 404, 2nd ed. According to that, what is the evidence of the character of the ship—armament, or commission? No doubt commission. A transport or troop-ship commanded by an officer holding a commission from government is a public ship, though unarmed; a privateer though armed is not. A vessel belonging to a sovereign in his public capacity is a public ship whether armed or not: *Briggs v. The Light-ships*. (1) In the case of *The Constitution* (2), a public vessel, though carrying cargo, was held privileged. An armed frigate belonging to a government is undoubtedly privileged—but suppose her steam launch, which is not armed, ran down a vessel, she certainly would also be privileged as part of the fleet. Trading cannot take away the privilege, for if so it would take away the privilege from a man of war. *The Santissima Trinidad*. (3)

Webster, Q.C., and *Phillimore*, contra. This vessel was in fact mainly employed as a trading vessel. The fact of a vessel being in the possession of the sovereign of a country does not

(1) 11 Allen (Mass.), 157, 165, 186.

(2) 4 P. D. 39.

(3) 7 Wheat. 283.

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necessarily make her a public vessel, and she is not so if she is employed in carrying goods and passengers for hire. The privilege is by international law confined to vessels which form part of the armed force of a country: *The Exchange*. (1) The reasoning in which case (2) is inconsistent with the idea that the Court went only on the public character of the vessel apart from her being armed. In *United States v. Wilder* (3) general average was enforced against goods of the United States, it being held that the property of a sovereign is not exempt from process. Halleck's Int. Law, p. 176, ed. 1878, and Phill. Int. Law, vol. i. 2nd ed. p. 343, et seqq., support this contention. The opinion of Lord Stowell set out in the Report of 1876 by the Royal Commission on Fugitive Slaves, p. lxxvi, is in terms which imply that he did not consider a public ship to stand on the same footing as a ship of war. Being owned by a sovereign is not sufficient to give privilege to a ship, and, unless carrying mails is such a public service as to give privilege to ships employed in it, this is not a ship employed for a public purpose. No vessel employed in carrying on a mere commercial enterprise has ever been held privileged. Again, this is not a suit properly speaking against the owners, there is no personal citation to them, it is a proceeding in rem to perfect an inchoate maritime lien: *The Bold Buccleugh* (4); and this is no breach of the privilege if any exists.

[JAMES, L.J. According to your argument any one may seize the ship of a foreign sovereign unless he will appear and defend, which is derogatory. The distinction between giving a remedy against the sovereign and giving a remedy seems unsubstantial.]

The Courts have treated the difference as substantial. In *The Ticonderoga* (5) there was a collision while the vessel was engaged in the French service, and in an action in rem, after the determination of the charterparty, a remedy was enforced against the ship, which shews that there may be a right against the ship which is suspended, for there the ship could not have been proceeded against at the time.

[BRETT, L.J., referred to *The Athol* (6).]

(1) 7 Cranch, 116.

(2) 7 Cranch, 116, at p. 142.

(3) 3 Sumn. 308, 313.

(4) 7 Moo. P. C. 267.

(5) Swa. 215.

(6) 1 Wm. Rob. 374.

The Solicitor-General says this is the first attempt to attach a vessel under these circumstances, but until the case of *The Exchange* (1) it was doubtful whether even a ship of war had the privilege.

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[JAMES, L.J. That is mere matter of history. You admit it to be settled that she has such a privilege.]

The observations of Lord Stowell in *The Prins Frederik* (2) shew that at that time he did not consider it any absurdity to suppose that a ship of war could be arrested. The freedom from arrest is of modern growth and ought not to be extended. Ships of war stand on a different footing from other public vessels, the expeditions on which they are sent may be of the most important immediate consequence to the country. Moreover they are under martial law, and if they were to be held subject to civil law there would be a conflict: *Ortolan de la Diplomacie de la Mer*, 2nd ed. bk. ii. c. 10, 211, 217. In *Morgan v. Lariviere* (3) the title to property was decided upon adversely to a foreign government.

[JAMES, L.J. There was a trustee who could be sued here.

BAGGALLAY, L.J. The observations on page 433 shew that the case is no authority for the present case.]

In *Gladstone v. Musurus Bey* (4) there was a decision against a foreign sovereign.

[JAMES, L.J. There again the property was in trustees.]

The case of *Vavas seur v. Krupp* (5) has been referred to, but there the ships were not in use in this country, and the object of the action was to deal with property in the absence of the owner. In *Taylor v. Best* (6) an action against several defendants, one of whom was privileged, having been allowed to go on to replication, the privilege was not allowed. There also Jervis, C.J., said that if the suit could proceed without proceeding against the person of the ambassador it could go on, and the same principle was laid down in the *Maddalena Steam Navigation Co. v. Martin*. (7) In *The Santissima Trinidad* (8) it is laid down that the question whether a ship is a public ship must be

(1) 7 Cranch, 116.

(2) 2 Dods, 451, 484, 485.

(3) Law Rep. 7 H. L. 423.

(4) 1 H. & M. 495; 32 L. J. (Ch.) 155.

(5) 9 Ch. D. 351.

(6) 14 C. B. 487; 23 L. J. (C.P.) 89.

(7) 2 E. & E. 94; 28 L. J. (Q.B.) 310.

(8) 7 Wheat. 283.

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tried by the Court, and that the property of a sovereign may be seized by a proceeding in rem. The case of *Briggs v. The Light-ships* (1) is distinguishable, for the suit was not an Admiralty suit in rem, but a suit to enforce a statutory local lien which could not be enforced without personal citation. The *United States v. Wilder* (2) shews that this makes a difference. It is said that as a man cannot sue his own sovereign, so by the comity of nations he cannot sue a foreign sovereign; but the rule is not co-extensive in the two cases. If the ship is not a ship of war the proceeding in rem is allowable, though a foreign sovereign be the owner. *Prioleau v. United States* (3); *The Marquis of Huntley* (4); *The Cybele* (5); and Bynkershoek favour this view.

[THE COURT intimated that the effect of the convention need not be argued at present.]

Sir H. S. Giffard, S.G., in reply. The respondents refer to Bynkershoek, but do not cite him, for he proves too much; he maintains that ships of war can be seized, a doctrine which all the text writers repudiate: Wheaton's Int. Law, 199, ed. Lawrence. The case of *The Santissima Trinidad* (6) is treated of in *Briggs v. The Light-ships* (7), and explained by the Court. It was a question of prize or no prize, which by the consensus of nations is remitted to the prize courts. The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts. As regards the distinction between proceedings in rem and in personam, it is difficult to understand an action against a thing. A proceeding in rem is only a mode of suing the owners. Precisely the same argument was used in the case of *The Exchange* (8) as here, that there was nothing derogatory to the dignity of a sovereign in a proceeding in rem against his property, but it did not prevail. *Wadsworth v. Queen of Spain* (9) and *De Haber v.*

(1) 11 Allen (Mass.) 157.

(2) 3 Sumn. 308.

(3) Law Rep. 2 Eq. 659.

(4) 3 Hagg. 246.

(5) 3 P. D. 8.

(6) 7 Wheat. 283.

(7) 11 Allen (Mass.) 157.

(8) 7 Cranch, 116.

(9) 17 Q. B. 171.

Queen of Portugal (1) support the view that a proceeding against property is a mode of suing the owner.

[JAMES, L.J. But for the Admiralty Court Act, 1861 (24 Vict. c. 10), this ship could not have been proceeded against in the Admiralty Court, as the collision did not take place on the high seas. It would be rather singular if an English statute, passed only for the more convenient distribution of business, were to be held to affect the rights of a foreign sovereign.]

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Cur. adv. vult.

1880. Feb. 27. The judgment of the Court (James, Baggallay, and Brett, L.JJ.) was delivered by

BRETT, L.J. In this case proceedings in rem on behalf of the owners of the *Daring* were instituted in the Admiralty Division, in accordance with the forms prescribed by the Judicature Act, against the *Parlement Belge*, to recover redress in respect of a collision. A writ was served in the usual and prescribed manner on board the *Parlement Belge*. No appearance was entered, but the Attorney-General, in answer to a motion to direct that judgment with costs should be entered for the plaintiffs, and that a warrant should be issued for the arrest of the *Parlement Belge*, filed an information and protest, asserting that the Court had no jurisdiction to entertain the suit. Upon the hearing of the motion and protest the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. The Attorney-General appealed. The protest alleged that the *Parlement Belge* was a mail packet running between Ostend and Dover, and one of the packets mentioned in Article 6 of the Convention of the 17th of February, 1876, made between the sovereigns of Great Britain and Belgium; that she was and is the property of his Majesty the King of the Belgians, and in his possession, control, and employ as reigning sovereign of the state, and was and is a public vessel of the sovereign and state, carrying his Majesty's royal pennon, and was navigated and employed by and in the possession of such government, and was officered by officers of the Royal Belgian navy, holding commissions, &c. In answer it was averred on affidavits, which were not contradicted, that the packet boat,

(1) 17 Q. B. 196.

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besides carrying letters, carried merchandize and passengers and their luggage for hire.

Three main questions were argued before us: (1.) Whether, irrespective of the express exemption contained in Article 6 of the Convention, the Court had jurisdiction to seize the Belgian vessel in a suit in rem; (2.) whether, if the Court would otherwise have such jurisdiction, it was ousted by Article 6 of the Convention; (3.) whether any exemption from the jurisdiction of the Court, which the vessel might otherwise have had, was lost by reason of her trading in the carriage of goods and persons. In the course of the argument we desired that it might, in the first instance, be confined to the first and third questions, reserving any further argument on the second question to be heard subsequently, if necessary. We have come to the conclusion that no such argument is necessary. We, therefore, give no opinion upon the second question. We neither affirm nor deny the propriety of the judgment of the learned judge of the Admiralty Division on that question.

The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed in rem against, and, in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the government as part of the military force of the state. On the other side it is contended that all moveable property, which is the public property of a sovereign and nation used for public purposes, is exempt from adverse interference by any court of judicature. It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any

court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain or of a foreign sovereign can be seized by any process whatever, exercised for any purpose, of any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit in rem against the vessel itself. This contention raises two questions: first, supposing that an action in rem is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the Court? Secondly, is it true to say that an action in rem is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the Court to the extent of his interest in the property?

The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every Court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations. The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a state which is destined to the use of the state, depends on whether the principle, on which the agreement has been implied, is as applicable to all that other public property of a sovereign or state as to the public property which is admitted to be exempt. If the principle be equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such

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public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

The first question, therefore, is—What is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised? “Our king,” says Blackstone (B. 1, c. 7), “owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?” In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. “The world,” says Wheaton, adopting the words of the judgment in the case of *The Exchange* (1), “being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.” “This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.” “One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why have the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.” By dignity is obviously here meant his independence of any superior authority. So Vattel, Lib. 4, c. 7, s. 108, speaking of sovereigns, says:—“S’il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu’il représente et qu’il gouverne, le met à couvert de toute insulte, lui

(1) 7 Cranch, 116.

assure des respects et toute sorte d'égards, et l'exempte de toute juridiction."

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In the case of *The Duke of Brunswick v. The King of Hanover* (1), the suit was against the king. There was a demurrer to the jurisdiction. Lord Langdale in an elaborate judgment allowed the demurrer. He rejected the alleged doctrine of a fictitious extra-territoriality; he admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign, but he nevertheless adopted an analogy between the cases of the ambassadors and the sovereign, and allowed the demurrer on the ground that the sovereign character is superior to all jurisdiction. "After giving to the subject," he says (2), "the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes, at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, and in requests for justice, which might be made without any suit at all; that even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations, I think that on the whole it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there."

From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the Courts of

(1) 6 Beav. 1.

(2) 6 Beav. 1, at p. 50.

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the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.

The reason of the exemption of ships of war and some other ships must be next considered, and the first case to be carefully considered is, and always will be, *The Exchange*. (1) It is undoubted that the decision applies, in fact, only to the case of a ship of war. Yet, in considering what was the principle on which the judgment was founded, there are some important circumstances to which attention must be directed. The plaintiffs filed their libel against the schooner *Exchange*, found in an American port, and prayed for the usual process to attach the vessel, and that she might be restored to her owners. Upon this libel the usual process in a cause of restitution was issued and executed, that is to say, the vessel was detained. There was no appearance in the suit. Then the usual proclamations issued for all persons to appear and shew cause why the vessel should not be restored to the owners. No person appeared. Then the Attorney-General of the United States appeared and filed a suggestion. In this it must be noticed that the vessel is not described as "an armed ship of war," but as "a certain public vessel belonging to his Imperial Majesty, and actually employed in his service." It certainly is to be remarked that those who conducted this case with unusual ability, deliberately, in stating the cause of objection, rested the claim of exemption not on the fact of the vessel being an armed ship of war, but on the fact of her being one of a larger class, namely, "a public vessel belonging to a sovereign, and employed in the public service." It is upon the suggestion so pleaded, that the Court gives judgment. It is right, however, to say that the fact of the vessel being an armed ship of war was before the Court, and that the judgment frequently uses that phrase, though by no means invariably. It is impossible within reasonable bounds to set out the elaborate judgment of Marshall, C.J., and the Court. The reasoning seems to be as

(1) 7 Cranch, 116.

follows:—The ship is within the territorial jurisdiction of the United States—*primâ facie* the Court of the United States has jurisdiction. But all nations have agreed to certain limitations of their absolute territorial jurisdiction—as, for instance, they have abjured all personal jurisdiction over a foreign sovereign within their territory, and this on account of his dignity, and all personal jurisdiction over foreign ministers, and, says the judgment, this is on the same principle; and all jurisdiction over a foreign army passing through the territory. Is the same immunity to be held to apply to ships of war? The judgment answers, Yes, and upon the same principle: i.e., that to hold otherwise would be inconsistent with the dignity—that is to say, the recognised independence of the foreign sovereign. After dealing with the case of private foreigners and merchant vessels in a foreign country, the judgment continues, “But in all respects different is the situation of a public armed ship; she constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied license therefore under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality.”

The Prins Frederik (1) seems to us to be worthy of great attention. An armed ship of war belonging to the King of the Netherlands, was arrested on a claim for salvage. The case was elaborately argued upon the question of jurisdiction. An argument of the closest and most forcible reasoning, to which we see no answer, was presented by Dr. Arnold, the Admiralty advocate (see p. 466). “There is a class of things,” he says, “which are not subject to the ordinary rules applying to property, which are not liable to the claims or demands of private persons, which are described by civilians as *extra commercium*, and in a general enumeration are by them denominated *sacra religiosa, publica*

(1) 2 Dod. 451.

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publicis usibus destinata. These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined. Ships of war belonging to the state are included in this class of things, by their nature and of necessity arising from their nature. The same inconvenience which would arise from such proceedings in the courts of their own country, would equally arise if such vessels could be arrested and detained in a foreign port. There is another point of view. It is the interest and duty of every sovereign independent state to maintain unimpeached its honour and dignity." The point and force of this argument is that the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of states, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. The dignity and independence of each state require this reciprocity. It was this reasoning which induced Sir William Scott to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reason could not be controverted. The case has always been considered as conveying his opinion to have been to that effect. Such was the view of Lord Campbell, who in *De Haber v. The Queen of Portugal* (1) says that the difficulties suggested by the argument were in the opinion of Sir William Scott insuperable. But if so, he assented to an argument which embraced in one class "all public property" of the state, and treated "armed ships of war" as a member of that class.

In the case of *The Athol* (2) Dr. Lushington certainly extended the immunity from jurisdiction to a troopship, which was not an armed ship of war, though she was employed in a sense as part of the military force of the country. The reason of his judgment

(1) 17 Q. B. 171.

(2) 1 Wm. Rob. 374.

was in terms that in cases of tort or damage committed by vessels of the Crown, the legal responsibility attaches to the actual wrongdoer only. That is in effect to say that the vessels of the Crown cannot be touched.

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We come next to the important case of *Briggs v. The Lightships*. (1) By the Massachusetts Statute it was enacted that "any person to whom money is due for labour and materials furnished in the construction of a vessel shall have a lien upon her, which lien may be enforced by petition to the superior Court praying for a sale of the vessel. The petition may be entered or filed, a process of attachment issue against the vessel, and notice be given to the owner thereof to appear and answer to the petition." This enactment gave a statutory lien on the vessel, to be enforced by process of a Court. It is a more extensive lien than the common law possessory lien in respect of work done on the vessel, as it is not lost by loss of possession. It is to be enforced by the same process as a maritime lien. It is therefore in effect an enactment which applies the incidents of a maritime lien to a new subject-matter, viz., a claim for work and labour in the construction of a vessel. It follows that upon the point raised in that case the reasoning must be as applicable to every maritime lien, and the means of enforcing it, as to that similar statutory lien. Now, in that case the plaintiffs filed a petition and prayed an attachment and sale of the vessel. The Court thereupon issued process of attachment and ordered notice to be given to the United States by service on their attorney. The vessel was attached and notice given accordingly. The United States appeared specially and pleaded to the jurisdiction, that at the time of the filing of the petition the vessels were the public property of the United States and in their possession, and held and owned by them for public uses, and as instruments employed by them for the execution of their sovereign and constitutional powers, and, therefore, not subject to the process or jurisdiction of the Court. The question, therefore, was whether the Court had jurisdiction to take possession of the vessels in order to sue them if necessary, and to give notice to the government that if they had any objection to such sale they must appear? Every step in that case was the same as

(1) 11 Allen, 157.

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in the case of *The Exchange* (1), and as in the present case. The objection to the jurisdiction as pleaded was in substance the same as that pleaded in the case of *The Exchange* (1) and in the present case. The vessels, however, were not ships of war, or vessels employed in the military service of the state. They were like the *Parlement Belge*—vessels which were the public property of the state and in their possession, and held and owned by them for uses treated by them as public. It is obvious that all the arguments which have been used in the present case on behalf of the plaintiffs might have been, and almost certainly were, used in that case. But the Court gave judgment declining the jurisdiction. “It is said for the petitioners” (says the judgment at p. 165) “that these light-boats were not intended for military service. But after they had once come into the possession of the United States for public uses, they were subject to the exclusive control of the Executive Government of the United States, and could not be interfered with by state process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty. These reasons have satisfied us that there is no principle upon which the Courts of this Commonwealth can entertain jurisdiction of these petitions.” The judgment then reviews many cases, amongst others *The Marquis of Huntley* (2), in which Sir John Nicholl treated “government stores” in charge of a lieutenant, but on board a ship which was only chartered by government, as beyond his jurisdiction, though the ship and freight were within it; *The Schooner Merchant* (3), in Florida, in which it was held that the “mails” could not be arrested or detained for salvage. *The Thomas A. Scott* (4), in which a “transport ship” owned by the United States, but not commissioned, was held to be beyond jurisdiction. The judgment ends thus:—“The exemption of a public ship of war of a foreign government from the jurisdiction of our Courts depends rather upon its public than upon its military character.” The reasoning of that careful judgment is the reasoning of the Admiralty advocate in the case of *The Prins Frederik*. (5) The

(1) 7 Cranch, 116.

(3) Marvin on Wreck and Salvage, s. 122.

(2) 3 Hagg. 246.

(4) 10 L. T. (N.S.), 726.

(5) 2 Dod. 451.

ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the Courts of either its own or any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public moveable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all Courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state.

The judgment of Lord Campbell in *De Haber v. The Queen of Portugal* (1) seems to the same effect, though the decision may fairly be said to apply only to a suit directly brought against the sovereign. But he relies on the Statute of Anne with regard to ambassadors, and says, "Can we doubt that in the opinion of that great judge (Lord Holt) the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him." And he cites the statute thus: "It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, *or his goods distrained or seized* shall be utterly null and void." The italics are as written by Lord Campbell. And further, citing *The Prins Frederik* (2), he says, "Objection being made that the Court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that being in possession of and having a lien upon a ship which they had saved, the proceeding might be considered in rem. But Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representation to be made to the Dutch Government, who very honourably consented to his disposing of the matter as an arbitrator." The decision therefore is that the immunity of the sovereign is at least as great as the immunity of an ambassador, but as the statute declares that the law is, and always has been, not

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(1) 17 Q. B. 171.

(2) 2 Dod. 451.

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only that an ambassador is free from personal suit or process, but that his goods are free from such process as distress or seizure, the latter meaning seizure by process of law, it follows that the goods of every sovereign are free from any seizure by process of law.

The latest case on the point seems to be the case of *Vavas seur v. Krupp* (1) before this Court. The question was whether the English Court had jurisdiction to order "shells" belonging to the Mikado of Japan to be destroyed, supposing they were an infringement of the plaintiff's patent. All the judges held that there was no such jurisdiction. "I suppose," says James, L.J., "that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent, but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case." Brett, L.J., said, "The goods were the property of the Mikado. They were his property as a sovereign—they were the property of his country." "I shall assume, for this purpose, that there was an infringement of the patent, yet the Mikado has a perfect right to have these goods; no Court in this country can properly prevent him from having goods which are the public property of his own country." And Cotton, L.J., says, "This Court has no jurisdiction, and in my opinion none of the Courts in this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign, as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign."

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every

(1) 9 Ch. D. 351.

other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

It is said, however, that there are authorities inconsistent with the view that this is a part of international law. The case of *The Santissima Trinidad* (1) is relied on. But, as was pointed out in the judgment in *Briggs v. The Light-ships* (2), the former case is one depending upon a well-known doctrine of the law of prize, viz., that property captured in breach of the laws of neutrality is held by the prize courts of the neutral state not to be lawful prize. In the case of the *United States v. Wilden* (3) it would be uncandid to say that there are not expressions of Story, J., which are in favour of the contention that the immunity from jurisdiction is confined to ships and materials of war. But in that case the right which was adverse to the United States Government was a possessory lien for general average. The remedy of the shipowner was in his own hands. He required no assistance from any process of any court, as would also be the case in a lien for freight. As a decision, therefore, the case is not in point, because the United States were plaintiffs voluntarily seeking the assistance of the Massachusetts tribunal. But it seems to us sufficient to say that we do not consider the observations of Story, J., to countervail effectually the arguments and decisions in the other cases which have been cited. There is then the opinion of the learned Judge of the Admiralty Division, expressed in the case of *The Charkieh*. (4) The decision is, of course, not in point, because the case was decided on the ground that the Khedive was not an independent sovereign. But there is a careful consideration in the judgment of the question whether the ship would have been liable to the jurisdiction of the Court, in proceedings in rem in respect of a collision, if the Khedive had been a sovereign prince. The conclusion is that she would have been. Such an opinion deserves

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(1) 7 Wheat. 283.

(3) 3 Sumn. 308.

(2) 11 Allen (Mass.), 157.

(4) Law Rep. 4 A. & E. 59.

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respectful attention. We are not quite sure whether we correctly appreciate the grounds of the opinion. The learned judge agrees that "an ambassador is personally exempt from the service of all process in a civil cause and from any action which renders such service necessary;" and that "the law as to the privileges of an ambassador applies with equal force to the sovereign." "But," he continues, "it remains to be considered whether there may not be a proceeding in rem against property of the sovereign or ambassador which is free from the objections fatal to the other modes of procedure." He then says "that he would be prepared to hold that proceedings in rem in some cases may be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit." This is an intimation of an opinion not yet conclusively formed that proceedings in rem are a legal procedure solely against property, and not directly or indirectly against the owner of the property. But then he says that a proceeding in rem cannot be instituted against the property of a sovereign or an ambassador, if the res can in any fair sense be said to be connected with the *jus coronæ* of the sovereign, or the discharge of the functions of the ambassador. From this one would infer that no personal process can issue against a sovereign or an ambassador; that no process in rem can issue against any property which can in any fair sense be said to be connected with the *jus coronæ*, but that such process might issue against other property of a sovereign or an ambassador. But then he says that "it is by no means clear that a ship of war to which salvage services have been rendered may not *jure gentium* be liable to be proceeded against in a Court of Admiralty for the remuneration of such services." Yet such proceedings are undoubtedly by means of process in rem, and it can hardly be denied that a ship of war is property connected with the *jus coronæ*. "I am disposed to hold," he says, "that in case of salvage or collision the *obligatio* attaches *jure gentium* upon the ship whatever be her character, public or private." If this includes a ship of war it seems to us difficult to understand how it is not inconsistent with the principle of the judgment in the cases of *The Exchange* (1) and *Briggs v. The Light-ships*. (2) If it does not

(1) 7 Cranch, 116.

(2) 11 Allen (Mass.), 157.

include a ship of war, the distinction between other processes and the process in rem is not always an answer in the claim of immunity. But then the learned judge expresses an opinion that in the case before him there was a nearer goal at hand, because it was idle to contend that the ships were not trading vessels to all intents and purposes, though, when engaged in their regular employment they carried mail-bags. This seems to intimate that the ships then in question were not public ships at all. We cannot think that this judgment discloses any final opinion of the learned judge, either as to the limits of the nature of the property which is exempt or as to the whole nature of the action in rem with regard to the question under discussion. Having carefully considered the case of *The Charkieh* (1) we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

This proposition would determine the first question in the present case in favour of the protest, even if an action in rem were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the Court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is, undoubtedly, not necessary, in order to enable the Court to proceed further, that the owner should be personally served with any process. In the majority of cases brought under the cognizance of an Admiralty Court no such personal service could be effected. Another course

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was therefore taken from the earliest times. The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him. Besides which, by the regular course of the Admiralty, the owner was cited or had notice to appear to shew cause why his property should not be liable to answer to the complainant. The owner has a right to appear and shew cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But unless it were considered that, either by means of the publicity of the manner of arresting the property or by means of the publicity of the notice or citation, the owner had an opportunity of protecting his property from a final decree by the Court, the judgment in rem of a Court would be manifestly contrary to natural justice. In a claim made in respect of a collision the property is not treated as the delinquent *per se*. Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to shew that the liability to compensate must be fixed not merely on the property but also on the owner through the property. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court. It is no answer to say that if the property be sold after the maritime lien has accrued the property may be seized and sold as against the new owner. This is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favour of an injured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit and the same opportunity and right of appearance as the former owner would have had. He is

impleaded in the same way as the former owner would have been. Either is affected in his interests by the judgment of a Court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading. The case of *The Bold Buccleugh* (1) does not decide to the contrary of this. It decides that an action in rem is a different action from one in personam and has a different result. But it does not decide that a Court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the

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(1) 7 Moo. P. C. 267.

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case of *The Exchange*. (1) Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity. For all these reasons we are unable to agree with the learned judge, and have come to the conclusion that the judgment must be reversed.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*

Agents for Treasury Solicitors: *Hare & Fell.*

(1) 7 Cranch, 116.