Privy Council Appeal No. 70 *of* 1925.

In the matter of part cargo ex steamships "Circassia" and "Scindia."

Désiré Georges Homsy - - - - - - *Appellant*

v.

His Majesty's Procurator for Egypt - - - - - *Respondent*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT, SITTING AT ALEXANDRIA (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH MARCH, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* VISCOUNT SUMNER.]

Early in August, 1914, the S.S. "Circassia" and the S.S. "Scindia," both of the Anchor Line, arrived at Port Said and there discharged into the warehouses of the Egyptian Bonded Warehouse Company a number of bales of twist, shipped in July at Bombay by David Sassoon & Co. for transshipment in Egypt to Tripoli in Syria. There they remained; some were disposed of to local merchants, but there were still in warehouse, under detention by the Egyptian Customs Administration on behalf of His Majesty, 122 bales *ex* "Circassia" and 35 bales *ex* "Scindia," when, in July, 1916, they were seized in prize by the Procurator General in Egypt. To these the present appeal relates. On the motion for their condemnation and sale there was an appearance on behalf of David Sassoon & Co. only, who admitted that an order for condemnation could not be resisted, and an order was accordingly made on April 2, 1917. The goods were sold and the proceeds

were paid into Court. The order was in all respects valid and regular on its face.

For some reason not explained, the proceeds were still in Court, when on December 1, 1923, the present appellant applied to have the order of April 2, 1917, set aside and the money in Court paid out to his representatives. His case would appear to have been that, although by birth an Ottoman subject, by trade a merchant, at any rate down to the outbreak of war between His Majesty and Turkey, and at all material times a resident at Aleppo, he was, nevertheless, entitled to claim the goods by virtue of his having been recognised as a French *protégé* before the war. He alleged that it was his intervention, which had prevented the yarn from being forwarded beyond Port Said, and the letters and telegrams, which he produced, supported this statement, and that he had discontinued his trade at Aleppo after the outbreak of war except for the purpose of winding up his business. The point of this was to rebut any possible suspicion of an enemy commercial domicile attaching to him in spite of his alleged status as a French protected person.

The application was heard, partly on a statement of facts prepared by the claimant and agreed on the part of the Crown, partly on documents and certificates, admitted without any objection being taken that they had not been proved or otherwise made admissible, as was certainly the case. Considering that six years had elapsed between the condemnation of the goods and the appellant's application to set it aside, though no irregularity in the original proceedings was suggested, considering also that the claim appeared to rest on grounds, which should naturally have been advanced at the time of the seizure in prize, and considering finally that there were many things, the truth of which lay wholly in his own knowledge, the appellant's claim might well have been dismissed *in limine*, simply on the ground that he failed to satisfy the onus of proof.

Their Lordships think that the appellant should have produced and proved his purchase contract and his ownership of the goods when seized, for although he seems to have produced endorsed bills of lading and to have obtained an admission that he had disposed of some of the goods *ex* warehouse in Port Said, it was not satisfactory to have matters left there, without its being explained, whether the contract made the passing of property depend on payment against bills of lading, and if so, whether and how payment for the goods had been made. He ought to have given evidence that he had in fact been unaware of the original proceedings for condemnation and could not reasonably have come to know of them, though this latter point may be covered by the statement in the agreed facts that, during the war, communication between Aleppo and Egypt was impossible. Still more he ought to have explained why his motion was so long delayed, and when first and how he became aware of the sale and of the fact that there were proceeds still in Court, which made an attempt to set the decree aside worth while. Furthermore, he left wholly unexplained the function, which he had performed as Dragoman to the Ecclesiastical

Institutions in Aleppo, which was the office in consideration of which he said that he had enjoyed French protection. If the Prize Court in Egypt had dismissed his motion because of his failure in these respects, their Lordships would not have been disposed to question that decision.

The ground, however, on which the learned Judge actually proceeded was stated by him to be simply that any status so alleged by the appellant to have been acquired must have rested on French Treaty rights, which came to an end on the outbreak of war, and therefore at the time of the condemnation were not such as a Court of Prize could recognise. He gave leave to appeal, and it is upon this broad ground that the case has been argued before their Lordships.

The appellant has not attempted to show that his position was in any way special, or conferred on him any better rights than those provided by the Règlement, communicated to the Missions on 29th July, 1863, and definitely constituted on 9th August, 1866, in virtue of an agreement between the Sublime Porte and the Foreign Missions in Constantinople, which limited the number of indigenous protected persons and defined the nature, extent and duration of that protection. The effect of that Règlement was, that the protection was deprived of all political importance and became purely personal, existing only on sufferance and as an exceptional privilege. In particular, the following points are to be noted (*see* Young's *Corps de Droit Ottoman*, Vol. II, pp. 235–238) :—

> " La protection des employés privilégiés est individuelle, et attachée à leurs fonctions.
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> " Les employés privilégiés jouiront de toutes les immunités que les capitulations leur accordent, mais leur propriétés payeront l'impôt foncier, et ils ne pourront être exempts du service militaire ou de droit de remplacement.
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> " Aucun sujet Ottoman ne pourra être soustrait à la juridiction Ottomane par la charge, l'emploi ou le service, qu'il tiendrait d'un sujet étranger. Les intérêts étrangers seuls, qui se trouveraient confiés entre ses mains, jouiront de la protection étrangère.
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> " En dehors des intérêts étrangers, dont ils seraient chargés, . . . les sujets Ottomans ne cesseront pas un instant de conserver leur qualité de sujets Ottomans et de relever de la juridiction Ottomane dans leurs affaires privées et dans leur personnes. Cette clause est applicable aux associés et hommes d'affaires des sujets étrangers.
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> " Toutefois, en ce qui regarde les missions ecclésiastiques et les monastères étrangers, il sera accordé à chacun de ces établissements d'avoir un procureur et un drogman, qui jouiront, au même titre que les employés du consulat, des privilèges de la protection temporaire.
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> " Il est bien éntendu que la protection dont les employés privilégiés doivent ainsi être investis, est, comme il est dit dans les articles précédents, toute personelle et uniquement affectée au service effectif ; elle ne saura donc être accordée en aucun cas à titre honorifique, ni s'étendre sur les personnes, qui auront cessé d'être employées."

It thus appears that, except within limits strictly laid down, the protected person remained for all purposes an Ottoman subject ; that his status of protection was temporary, individual,

and attached to his functions, and was confined to the period of his effective service ; that it ended with the cessation of his employment and extended only to the interests of his foreign employers. and not to his own private affairs. The appellant's official position of Dragoman would not, therefore, give him any rights as a merchant; these would continue to depend on his Ottoman nationality. The position of an Ottoman subject, who enjoyed the benefits of British protection in time of peace, was the subject of decision in *Abd-ul-Messih* v. *Farra* (13 A.C., p. 431), but that case lends no support to the appellant's contentions. Finally, the status was a concession, which was the creature of consensual arrangements made between the Ottoman Government and the Government of the protecting State. No vested right, such as a right of property, was conferred on the protected person, but his position stood or fell with that of the protecting power, though, even under the protection, it was subject to the closest personal limitations.

The facts, as brought before the learned Judge, were substantially as follows. It was agreed that the appellant was born in Syria, of an Ottoman father. By religion a Christian, he became a French protected person in 1895. He was then only 18 years of age. In 1914 he was a merchant at Aleppo, though still holding the aforesaid office, but there is no evidence that during the war he performed any official functions, or that the Ecclesiastical Institutions or any of them were actually present in Aleppo after the outbreak of war. Whatever may be surmised about the fidelity of the missionaries to their flocks, it is not for the appellant, who could have proved the facts, to resort to mere suggestion. Two certificates, signed by French officials in Syria, have been produced. The first, dated in 1911, states that the appellant was then registered at the Consulate as a "French citizen," an expression obviously loose and inexact. The second, under date the 22nd August, 1922, certifies that he was inscribed at the Consulate as a "protégé français" in 1895, and that since that date he "has never ceased to enjoy French protection." The same official certifies, in the following year, that "La Maison Désiré G. Homsy" enjoys the same protection, and in December, 1923, there is a further certificate, under the same hand, that of M. Ceccaldi, that, in right of being a French protected person, the appellant enjoys for himself and his goods all the privileges which the Capitulations accord to French citizens in the Ottoman Empire. This, of course, is only a personal expression of opinion, very natural in view of the present position of France in Syria and of the admitted high character of the appellant, as a charitable and respected inhabitant of Aleppo, on a question of law, which it is for their Lordships to determine judicially. Finally, in 1924, M. Ceccaldi certifies once more that the appellant, now described as a French protected person "au titre de Procureur du Couvent de Terre Sainte à Alep," did not resign his office during the war, "et a assumé ses fonctions malgré les

inconvenients de toute sorte, qui en résultaient," but what these "inconvenients" were, and in what the assumption of his functions consisted, the appellant has not proved.

These certificates, the materials for which do not appear, evidently go beyond the legal provisions applicable to the matter, if their terms are read literally. There is, however, another, which exceeds even these French documents in its amplitude. A Mr. Jesse B. Jackson, formerly United States Consul at Aleppo, certifies in 1924, being then in Italy, that during the war he was in charge of the protection of British, French and other allied interests, and that the appellant, to his certain knowledge, was official Dragoman of the French Consulate, a position which he never resigned; that, by virtue of it and according to the provisions of the Capitulations, he enjoyed all the privileges, rights, and immunities accorded to British and French nationals, then residing within the Ottoman Empire; and that throughout the war he was considered by the French Government and the Imperial Ottoman Government as entitled to all such privileges.

These certificates might inspire more confidence, if they were even approximately in agreement with one another, or if the appellant had thought fit to say whether he was Dragoman to the French Consulate at Aleppo, or only to the Ecclesiastical Missions generally, or on the other hand was Procureur to the Couvent de la Terre Sainte in particular, and whether any of these functionaries or institutions remained in being at Aleppo during the war, so that his service, whatever it was, could be effective. Their value in the first instance was a matter for the learned Judge, and he plainly put no faith in them. No doubt they were honestly given, but they are in conflict with one another as to facts, which those who sign them could know only at second hand and in no case so well as the appellant himself.

Their Lordships agree with the learned Judge, that, at any rate on the outbreak of war, the Capitulations, being of a Treaty character, came to an end and were not in force when the order was made which the appellant desires to have set aside. The Treaty of Lausanne, 1923, did not restore the Capitulations, nor, if it did, could they have a retrospective effect. Whatever declarations were then made on the subject between the high contracting parties in view of Turkey's repudiation of the Capitulations on the 10th September, 1914, they cannot affect the present issue.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

DÉSIRÉ GEORGES HOMSY

v.

HIS MAJESTY'S PROCURATOR FOR EGYPT.

DELIVERED BY VISCOUNT SUMNER.

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