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Naim Molvan v. Attorney General for Palestine (The "Asya")

NAIM MOLVAN v. ATTORNEY-GENERAL FOR PALESTINE. [THE "ASYA".]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

81 Ll L Rep 277

Hearing Date: 26 February, 1, 2 March, 20 April 1948

20 April 1948

Index Terms:

Palestine -- Illegal immigration -- Forfeiture of vessel in accordance with Immigration Ordinance -- Legality -- Repugnancy to Palestine Mandate

Held:

Ship with illegal immigrants on board sighted by British naval vessel outside Palestinian territorial waters -- Ship flying no flag when sighted -- Turkish flag hoisted later but hauled down when boarding party approached, when Zionist flag was hoisted -- Ship escorted to Palestinian port, where passengers were landed and sent to clearance camp -- Application for forfeiture of ship granted by District Court of Haifa -- Decision upheld by Supreme Court of Palestine -- Appeal by owner -- Validity of Ordinance under which application for forfeiture was granted -- Whether repugnant to Mandate -- Owner not a Palestinian subject nor resident in Palestine -- Immigration Ordinance, No. 5 of 1941 (as amended by Defence Regulations, 1945), Sect. 12:

(3) (i) for the purposes of this subsection --

(b) ... the master, owner and agent of a vessel... are all deemed to have abetted the unlawful immigration of any person... who is proved to have been on board the vessel... in Palestine or the territorial waters thereof, whether that person or the vessel... came there voluntarily or not, unless it is proved --

(1) that that person did not enter or attempt to enter Palestine and did not intend so to do....

Whether Ordinance offended against established principles of international law -- "Freedom of the open sea" -- Penalty imposed upon persons neither Palestinian subjects nor resident in Palestine.

Held, (1) that the Immigration Ordinance, No. 5 of 1941, was not repugnant to or inconsistent with the provisions of the Palestine Mandate.

Per Lord SIMONDS (at p. 282): If the terms of the Mandate required the Mandatory Power to facilitate Jewish immigration into Palestine under any conditions and at any cost to other interests, the contention might be maintainable. But the Mandate does not do so. On the contrary, the facilitation of Jewish immigration is expressly made subject to the term that the Administration shall ensure that the rights and position of other sections of the population are not prejudiced and to the further term that the immigration shall be under suitable conditions. Their Lordships see no reason to suppose that the Immigration Ordinance (which is general in its application to persons of any nation and any creed) departs in the smallest degree from the terms of the Mandate or is in any measure repugnant to or inconsistent with

its provisions.

Held, (2) that the Ordinance did not offend against any established principles of international law, even upon the assumption (which their Lordships doubted) that it directly authorized the seizure of appellant's ship on the high seas and her compulsory direction to a Palestinian port.

Per Lord SIMONDS (at p. 284): To satisfy this test the appellant has invoked the doctrine which is called "the freedom of the open sea," alleging that under the shield of that doctrine the Asya was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine, Their Lordships cannot assent to the proposition that any such right, unqualified by place or circumstance, is established by international law. There is room for much discussion within what limits a State may for the purpose of enforcing its revenue or police or sanitary law claim to exercise jurisdiction on the sea outside its territorial waters. It has not been established that such a general agreement exists on this subject as to satisfy the test laid down by Lord Alverstone [in West Rand Central Gold Mining Company v. Rex, [1905] 2 K.B. 391, at p. 407], but, even if it had been, it is far from clear that it would be applicable to the case of a Mandatory Power carrying out a common policy, the execution of which had been entrusted to it by other Powers. Their Lordships therefore could not in any event conclude that any principle of international law had been violated.

But it further appears to them that in the circumstances of the present case a discussion of the problem is somewhat academic. For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The Asya did not satisfy these elementary conditions. No question fo comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails.

Held, (3) that the offence of "deemed abetment" was rightly chargeable against the owner.

Per Lord SIMONDS (at p. 285): Their Lordships have not been referred to any decision nor to any text-book of authority which suggests that the enactment by a State of a penalty so expedient, if not essential, for the purpose of preventing an unlawful invasion of its territory, is contrary to any established principle of international law.

Cases cited in the Judgment:

McLeod v. Attorney-General for New South Wales, [1891] A.C. 455; West Rand Central Gold Mining Company v. Rex, [1905] 2 K.B. 391.

Introduction:

This was an appeal by Naim Molvan, owner of the motor vessel Asya, from a judgment of the Supreme Court of Palestine sitting as a Court of Civil Appeal at Jerusalem, dismissing an appeal from an order of the District Court of Haifa forfeiting the vessel to the Government of Palestine under the provisions of Sect. 12 of the Immigration Ordinance, No. 5 of 1941, as amended by Defence Regulations made by the High Commissioner for Palestine in 1945.

Counsel:

Sir Valentine Holmes, K.C., and Jacob S. Shapiro appeared for the appellant; C. T. Le Quesne, K.C., Frank Gahan and Godfray Le Quesne represented the respondent, the Attorney-General for Palestine.

Sir VALENTINE HOLMES said that the order of forfeiture was made under the provisions of the Immigration Ordinance, No. 5 of 1941, and the appeal raised questions as to the validity and construction of the Ordinance of 1941 as subsequently amended by Defence Regulations made in 1945.

The facts giving rise to the appeal were shortly as follows. On Mar. 27, 1946, the Asya was sighted by a British destroyer, H.M.S. Chequers, on the high seas some 100 miles south-west of Jaffa. She was flying no flag when first sighted, but later hoisted a Turkish Flag. Thereafter the destroyer hailed her and asked her destination by signal, to which she made no reply. A boarding party of 18 persons was sent from the destroyer, and when it arrived at the ship the Turkish flag was hauled down and the Zionist flag hoisted. Four charts on the ship appeared to have on them a course with fixes from La Ciotat Bay, France, to a port just north of Tel-Aviv. The boarding party brought the Asya to the outer harbour at Haifa, escorted by the destroyer. The Asya was a freighter with little accommodation for passengers, but the hold had been fitted with tiers of bunks. There were 733 persons on board, none of whom had any passport, travel document or visa to enter Palestine.

On arrival of the Asya at Haifa, the police and immigration authorities boarded her on Mar. 28 at 7 45 p.m., put the passengers ashore and sent them to a clearance camp at Athlit, near Haifa, where the immigration officer signed a warrant of detention for them. It was not disputed that the Asya was a Turkish vessel or that the appellant, the owner, was neither a Palestinian citizen nor domiciled or resident in Palestine, nor was he present in Palestine at any material time.

Counsel contended that what happened in this case -- the seizure of the vessel on the high seas and the forfeiture of her -- was contrary to the rules of international law. The relevant section of the Ordinance should be construed is such a way that this forfeiture could not be validly made under it; alternatively, the Ordinance was invalid because the Crown had not conferred on the High Commissioner power to make such an Ordinance.The appellant also contended that the Ordinance was repugnant to the Mandate. Further, as the appellant was not a Palestinian citizen and as the Asya was not a Palestinian vessel, the section of the Ordinance did not apply to him.

Counsel (continuing) said that the Defence Order in Council, under which the regulation concerned was made, did not give the High Commissioner power to make a regulation which was inconsistent with the established rules of international law. There was no doubt that there was power to forfeit a ship which was "hovering" under the general rule of international law under which a nation was entitled to protect its revenue or health. But international law did not recognize the right of any contry to forfeit a ship which had been seized on the high seas and brought by force into a port of that country. The Asya was seized 100 miles from the coast, far beyond any territorial waters and far beyond the provisions of any Hovering Act which had ever been recognized in the United Kingdom. There might conceivably be a right to seize a ship on the high seas and bring her into port for search on suspicion of piracy.

Lord SIMONDS: Are you saying that however sure the authorities were that a vessel was heading straight for a Palestine port, conveying illegal immigrants, there is no authority to stop them until they were within the threemile limit?

Sir VALENTINE HOLMES: None whatever. It is contrary to international law.

Counsel said that his next point was that Sect. 12 of the Immigration Ordinance, 1941, under which the vessel was forfeited, ought to be construed in such a way that it did not enable a ship to be forfeited in circumstances such as those existing in the present case. Prima facie the country, Palestine, could not make a person who was not a Palestinian a criminal in Palestine, unless he committed an offence in Palestine. The words "master, owner or agent" in the section must refer to either a Palestinian subject or a person resident in Palestine. The present appellant had been charged with the crime of "deemed abetment," but for all they knew he might not have the least idea of what was happening to his ship.

Counsel then dealt with his contention that the Ordinance was invalid as being repugnant to, or inconsistent with, the provisions of the Mandate. The object of the Ordinance was certainly not to "facilitate Jewish immigration," * and if it not only did not facilitate Jewish immigration but actually impeded it, it was impossible to say that the word "under suitable conditions," which followed, made any difference.

* See Art. 6 of Mandate, p. 280 post.

Lord SIMONDS informed Mr. C. T. Le Quesne, for the respondent, that the Board did not desire to

hear him on the point of repugnancy to the Mandate.

Mr. LE. QUESNE, for the respondent, said that the vessel was in fact found within the territorial waters of Palestine, and there were some 700 odd passengers on board. Under Sect. 12 (3) of the Ordinance, as amended, and by virtue of that Ordinance, there arose upon those facts the rebuttable presumption that the owner of the vessel had abetted unlawful or prohibited immigration. That presumption had not been rebutted in any one of the ways provided, and the owner had therefore failed in showing cause against the making of an order in confirmation of the forfeiture. The appellant said that none the less the Court ought not to have confirmed the forfeiture because the regulation under which it had been confirmed was invalid, there being no power in the High Commissioner to enact it under the Defence Order in Council of 1937. The argument rested upon the application to the regulation of a doctrine which was said to have been laid down in the case of McLeod v. Attorney-General for New South Wales, [1891] A.C. 455. That doctrine was said to amount to this: that a subordinate legislature in the exercise of powers which had been conceded to it by a superior legislature must not enact anything which would infringe the rules of international law. Counsel contended that here they were dealing with legislative powers which had not been created by delegation but which were part of the prerogative of the Crown. The Order in Council had the same effect as an Imperial statute, which might authorize someone to make an Ordinance or regulation which conflicted with international law.

Suggesting that so-called rules of international law varied very much in their precision, Counsel submitted that it could not be said that what H.M.S. Chequers did was against international law when regard was had to what she had discovered. She had found the Asya carrying this large number of people, on

her way to crossing the three-mile limit with a view to landing these illegal immigrants on Palestine soil. In those circumstances it could not be said that there was any established rule of intrnational law as a result of which the destoryer, after making this discovery, should simply turn round and leave the other ship to pursue her voyage as she thought fit. There was no rule which would forbid the destroyer bringing her in to within the three-mile limit. There still remained the consideration, of the utmost importance, of the conduct of the vessel. When she was sighted she was flying on flag. She ran up the Turkish flag when the boarding party approached, but that was pulled down and the Zionist flag hoisted in its place. No ship's papers were produced, and he submitted that it would be impossible to contend as a matter of international law that what was done to this ship constituted any violation of her rights. It would be difficult to hold that the exercise of the right to search and to bring in a vessel was excluded from the powers of the High Commissioner under the Order in Council.

Counsel also contended that to limit the Ordinance to Palestinian ships would nullify it. It must often happen that the owner of a ship forfeited under our own customs law of smuggling was out of the country altogether and might not even know that his vessel was employed in that way.

Sir VALENTINE HOLMES, in reply, argued that his friend's submission that the same consideration applied to the construction of this legislation as applied to an Act of the Imperial Parliament was fallacious. Asking their Lordships to consider the realities of the position, Counsel said that there was nothing in international law which enabled a ship of war to bring a merchant vessel into a port of the ship of war's country from a spot on the high seas for the purpose of forfeiting it because by being there it was committing a breach of municipal law. Further, it seemed an astonishing thing if it could be said that a person who was an owner could have his ship foreited although he knew nothing whatever about what was happening.

Judgment-READ:

Their LORDSHIPS reserved judgment. Tuesday, Apr. 20, 1948.

PANEL:

Before Lord SIMONDS, Lord MORTON OF HENRYTON and Sir CHETTUR MADHAVAN NAIR

Judgment By-1: Lord SIMONDS

Judgment One:

Lord SIMONDS: This appeal is brought by Naim Molvan, the owner of the motor vessel Asya, from a judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal at Jerusalem, which

dismissed an appeal from an order of the District Court of Haifa, whereby that Court, upon the application of the Attorney-General for Palestine under the provisions of Sect. 12 of the Immigration Ordinance, No. 5 of 1941, confirmed and ordered the forfeiture of the said vessel to the Government of Palestine.

The facts of the case are not in dispute. On Mar. 27, 1946, the Asya was sighted by a British destroyer, H.M.S. Chequers, on the high seas some 100 miles south-west of Jaffa. She was flying no flag when first sighted, but later hoisted a Turkish flag. Then the destroyer hailed her and asked her destination by signal, to which she made no reply. A boarding party of 18 persons was

sent from the destroyer and when it arrived on the ship the Turkish flag was hauled down and the Zionist flag was hoisted. Four charts on the ship appeared to have on them a course with fixes from La Ciotat Bay in France to a port just north of Tel-Aviv. The boarding party brought the Asya, under the escort of the destoryer, to the outer harbour of Haifa. The Asya is a freighter with little accommodation for passengers, but the hold had been fitted with tiers of bunks. There were 733 persons on board, none of whom had any passport or travel document or visa to enter Palestine. There was no passenger list nor any usual ship's papers.

From these facts the inference has been drawn that the passengers intended, if possible, to effect an illegal landing in Palestine. In their Lordships' opinion the inference was properly drawn.

On the arrival of the Asya at Haifa the police and immigration authorities boarded her on Mar. 28, 1946, and put the passengers ashore and sent them to a clearance camp at Athlit, near Haifa, where the Immigration Officer signed a warrant of detention for them.

On Apr. 18, 1946, the respondent applied to the District Court of Haifa for an order confirming the forfeiture of the vessel to the Government of Palestine under Sect. 12 of the Immigration Ordinance, No. 5 of 1941, on the ground that on Mar. 27, 1946, 733 persons were on board the vessel within the territorial waters of Palestine in circumstances in which the master, owned or agent of the vessel was deemed to have abetted the unlawful immigration of those persons.

On June 14, 1946, the learned trial Judge in the District Court made an order confirming the forfeiture.

From this order an appeal was preferred to the Supreme Court, and on Nov. 11, 1946, that Court, consisting of Sir William Fitzgerald, C.J., Mr. Justice Edwards and Mr. Justice Shaw dismissed the appeal.

It is necessary for a proper understanding of the appeal which has now been brought to His Majesty in Council to state at some length the relevant instruments under and by virtue of which the vessel was forfeited to the Government of Palestine.

In the first place, since learned Counsel for the appellant has based an argument upon its terms, reference must be made to the Mandate under which His Majesty acts as the Mandatory Power for Palestine. By the Mandate it is provided as follows:

1. The Mandatary shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

. . .

4. An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the

Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

. . .

6. The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Art. 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

By the Palestine Order in Council, 1922 (which was amended by the Palestine (Amendment) Order in Council, 1923, and wil be cited as so amended), His Majesty, after reciting (inter alia) that the Principal Allied Powers had selected him as the Mandatary for Palestine and that by treaty, capitulation, grant usage, sufferance and other lawful means he had power and jurisdiction within Palestine, by virtue and in exercise of the powers in that behalf by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, was pleased by and with the advice of His Privy Council to order and it was thereby ordered (inter alia) as follows: --

17. (1) (a) The High Commissioner shall have full power and authority, without prejudice to the powers inherent in, or reserved by this Order to His Majesty, and subject always to any conditions and limitations prescribed by any such instructions as may be given to him under the Sign Manual and Signet or through a Secretary of State, to promulgate such Ordinances as may be necessary for the peace, order,and good Government of Palestine, provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship, save in so far as is required for the maintenance of public order and morals; or which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion, or language.

. . .

(c) No Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate and no Ordinance which concerns matters dealt with specifically by the provisions of the Mandate shall be promulgated until a draft thereof has been communicated to a Secretary of State and approved by him, with or without amendment.

In exercise of the powers so conferred on hin the High Commissioner duly made divers Ordinances relating to immigration into Palestine and matters connected therewith, and these were consolidated in the Immigration Ordinance, No. 5 of 1941. But before the happening of the events out of which this appeal arises

this Ordinance was varied by regulations made by the High Commissioner under the Palestine (Defence) Order in Council, 1937, and it is convenient to refer first to that instrument.

Following upon earlier so-called "Defence" Orders in Council it was of a drastic character. Its title indicates that its essential purpose was the defence of Palestine, and in fact it conferred very large powers on the High Commissioner. By it "law" was defined to include any Order of His Majesty in Council and any Ordinance, Ottoman law, order, rule, regulation, by-law, or other law for the time being in force in Palestine, and by Sect. 6 (1) it was provided that the High Commissioner might make such Regulations (in that Order referred to as "Defence Regulations") as appeared to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defence of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community, and, by Sect. 6 (2), without prejudice to the generality of the powers so conferred, by Defence Regulations (a) make provision for the detention of persons and the deportation and exclusion of persons from Palestine, and (d) amend any law, suspend the operation of any law, and apply any law with or without modification. By Sect. 6 (4) it was provided that a Defence Regulation, or any order, rule or by-law made in pursuance of such a Regulation should have effect not-withstanding anything inconsistent therewith contained in any law.

The character and wide scope of the powers given to the High Commissioner are relevant to the question, which has been much debated before their Lordships, whether the regulations which will not be considered were validly made.

As has already been stated, Ordinances dealing with immigration into Palestine were made at an early date in the administration of the Mandatary.Nothing was more important to the peace and good government of the country. In 1945 the High Commissioner found it necessary to make Defence Regulations amending the existing Immigration Ordinance of 1941, and the relevant provisions of that Ordinance as so amended must now be referred to.

The Ordinance, after certain definitions which included that of "Commanding Officer" as "the commander or officer in charge of any ship or boat in His Majesty's service or in the service of the Government of Palestine," and after making provision (by Sect. 3) for the boarding of any vessel for the detention and examination of any person reasonably supposed to be a foreigner who desired to enter or to leave Palestine as therein mentioned and (by Sect. 5) for the exclusion from Palestine of

certain categories of persons and (by Sect. 8) for the inspection, detention and removal of intending immigrants, by Sect. 12 defined the offences and described the penalties which are relevant to the present proceedings.

The material parts of Sect. 12 (as amended) are as follows:

(1) If any person acts in contravention of or fails to comply with any of the provisions of this Ordinance or any order or rule made thereunder, or aids or abets in any such contravention, or harbours any person who he knows, or has reasonable ground to believe, has acted in contravention thereof, he shall be guilty of an offence under this Ordinance....

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(2) Any foreigner who --

(a) enters Palestine in contravention of Sect. 5...

shall on being found in Palestine be guilty of an offence under this Ordinance....

(3) (i) for the purposes of this sub-section --

(a) a persons abets the commission of an offence if he aids, counsels or procures the commission of the offence, whether or not the person abetted does in fact commit the offence or is capable in law of committing it;

(b) without prejudice to the provisions of this Ordinance relating to actual abetment, the master, owner and agent of a vessel and the commander, owner and agent of an aircraft are all deemed to have abetted the unlawful immigration of any person (hereinafter called "that person") who is proved to have been on board the vessel or aircraft in Palestine or the territorial waters thereof, whether that person or the vessel or aircraft came there voluntarily or not, unless it is proved:

(1) that that person did not enter or attempt to enter Palestine and did not intend so to do....

(ii) any person who abets any other person in any contravention, or attempted contravention of this Ordinance or any order or rule made by virtue thereof or harbours any person whom he knows or has reason to believe to have contravened or attempted to contravene this Ordinance or any order or rule made by virtue thereof, and any master, owner or agent of a vessel or commander, owner or agent of an aircraft who is deemed for the purpose of this sub-section to have abetted the unlawful immigration of any person, shall be guilty of an offence and may be tried summarily therefor by a District Court and shall be liable on conviction to a fine of one thousand pounds or to imprisonment for eight years or to both such fine and imprisonment....

(iii) if any vessel, to the knowledge of the master, owner or agent, or any aircraft to the knowledge of the commander, owner or agent, or any vehicle or other means of conveyance to the knowledge of the owner or person in charge thereof, is used in any contravention or attempted contravention of this Ordinance or any order or rule made by virtue thereof, or in the abetment of any contravention or attempted contravention of this Ordinance or any order or rule made by virtue thereof... or if any person is proved to have been on board a vessel or aircraft in circumstances in which the master, owner or agent of the vessel or the commander, owner or agent of the aircraft is deemed to have abetted the unlawful immigration of that person, then --

(a) the vessel, aircraft, vehicle or other means of conveyance, as the case may be, shall, save as hereinafter provided, be for-feited to the Government;

(b) if in any criminal prosecution, facts are established to the satisfaction of the Court which render a vessel, aircraft, vehicle or other means of conveyance forfeited to the Government, the Court may by order confirm such forfeiture and such order shall, save as provided in par (e), be conclusive as to such forfeiture;

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(c) in the absence of any order of a criminal Court confirming a forfeiture as above, the forfeiture may be confirmed by order of a District Court on the application by way of summons of the Attorney-General or his representative, such application being served on the master, owner or agent of the vessel... or being served by affixing a copy thereof to the vessel, aircraft, vehicle or other means of conveyance; and the owner of the vessel, aircaft, vehicle or other means of conveyance shall have the right to show cause against the making of the order;

. . .

(e) an order of any Court confirming a forfeiture shall be subject to appeal as near as may be as though it was a judgment of a District Court in a civil action between the Attorney-General as plaintiff and the owner of the vessel, aircraft, vehicle or other means of conveyance as defendant.

Sect. 13 further defines for the purpose of that section the expression "prohibited immigrant" and provides by sub-ss. (2) and (3) for the pursuit by any commanding officer of any vessel or aircraft within the territorial waters of Palestine which he believes may be carrying persons intending to enter Palestine and for the boarding and searching of such vessel and aircraft, and by sub-s. (6) for the detention by any commanding officer or authorized officer of any vessel, aircraft, vehicle or other means of conveyance, which he may have reason to suspect to be liable to forfeiture, until the question of forfeiture is determined.

Upon the application of the respondent for an order confirming the forfeiture of the Asya, there was no suggestion that there was any other person than the owner who was under the Ordinance to be deemed to have abetted any offence thereunder, and it was the appellant, the owner, who appeared to show cause against the forfeiture.

Numerous contentions were put forward on behalf of the owner before the District Court and the Supreme Court of Palestine, not all of which have been maintained before their Lordships. But throughout the proceedings it has been urged that the relevant provisions of the Ordinance are invalid as being repugnant to or inconsistent with the provisions of the Mandate for Palestine. That this is a justiciable issue their Lordships will assume. But it appears to them that the validity of the Ordinance cannot on this ground be successfully challenged. If the terms of the Mandate required the Mandatory Power to facilitate Jewish immigration into Palestine under any conditions and at any cost to other interests, the contention might be maintainable. But the Mandate does not do so. On the contrary, the facilitation of Jewish immigration is expressly made subject to the term that the Administration shall ensure that the rights and position of other sections of the population are not prejudiced and to the further term that the immigration shall be under suitable conditions. Their Lordships see no reason to suppose that the Immigration Ordinance (which is general in its application to persons of any nation and any creed) departs in the smallest degree from the terms of the Mandate or is in any measure repugnant to or inconsistent with its provisions.

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The second ground of appeal which has been maintained before their Lordships was stated in the form of a dilemma. The relevant facts for this purpose being that the appellant is not a Palestinian citizen now resident in Palestine and that the Asya is not a Palestinian vessel, the assumption of law was then made that the power conferred on the High Commissioner by the Palestine Order in Council to make Ordinances or by the Palestine (Defence) Order in Council to make Emergency Regulations varying any law was a delegated legislative power strictly comparable with that conferred by an Act of the Imperial Parliament upon a Colonial Legislature. From this assumption it followed, so it was contended, that it was not competent for the High Commissioner to make any Ordinance or Regulation which violated any established principle of international law. Then the dilemma was posed. Either the Ordinance as amended must be so construed as not to touch the owner of a vessel who was neither a Palestinian citizen nor within the local jurisdiction of Palestine, or, if such a construction was not admissible, then the Ordinance must pro tanto be regarded as ultra vires and invalid. Linked with this connection was a further argument that in the relevant section of the Ordinance, viz., Sect. 12 (3) (i) (b), the words "whether that person or the vessel or aircraft came there voluntarily or not "must in some way be construed so as not to cover the case of a vessel which, though in fact found within the territorial waters of Palestine, had been brought there under escort of a British man-of-war after capture on the high seas. And here too it was argued that, if it was so construed as to permit the forfeiture of a vessel forcibly directed from the high seas to a Palestinian port, the Ordinance was ultra vires and invalid as infringing a principle of international law.

Their Lordships will for the purpose of this case assume that the power vested in the High Commissioner by Order in Council is analogous to that conferred on a Colonial Legislature by an Act of the Imperial Parliament and subject to the same limitations. They do not decide the question, and it may well be that different considerations apply to a delegation of legislative power by virtue of the prerogative from those which have been held in the past to govern the relations of the Imperial and Colonial Legislature. Such relations have a historical basis which has no exact counterpart in the somewhat anomalous creation of the Government of Palestine under an immediate exercise of the prerogative and under the ultimate authority of the Mandate. Upon the footing, however, that the initial proposition of law is valid, the dilemma posed by learned Counsel must be examined.

The construction of the Ordinance does not appear to present any doubt or difficulty. In the first place, the meaning of the words "whether that person or the vessel or aircraft came there voluntarily or not" is plain. They do not admit of the gloss which is sought to be put upon them. Either the vessel came voluntarily into Palestinian waters or it did not. There is no tertium quid. In effect, the words bear the meaning which the Supreme Court of Palestine put upon them, "however it got there."

In the next place there is no room for limiting the meaning of the words "master, owner or agent," where they occur in this Ordinance to persons who are either Palestinian citizens or resident in Palestine. It may be stated as a general rule of construction (through it is subject to some qualification) that, since, as it is sometimes phrased, "crime is local," a statute creating an offence and imposing a penalty for it should be so construed as to apply only to those persons who by virtue of residence, or, in some cases, citizenship or nationality, are regarded as subject to the jurisdiction of the State which

has enacted the statute: see, e.g., McLeod v. Attorney-General for New South Wales, [1891] A.C. 455. But in the present case it would largely stultify the purpose and effect of the Ordinance if, wherever the words "master, owner or agent" occur, they were so limited in meaning. The words must clearly bear the same meaning wherever they occur, and that can only be their natural meaning unqualified by deference to the general rules above mentioned. To this matter their Lordships will recur.

Upon the footing, then, that the material words in the Ordinance mean just what they say, the other branch of the dilemma must be examined. Is the Ordinance, so read, ultra vires and invalid?

Let the terms of the Ordinance be applied to the facts of this case. The Asya carrying unlawful immigrants was, whether voluntarily or not, in Palestinian territorial waters. The unlawful immigration was an offence under the Ordinance, and the owner, the appellant, is deemed to have abetted that offence unless he can escape under one or other of the sub-clauses of Sect. 12 (3) (i) (b). This he has not done. Therefore under Sect. 12 (3) (iii) (a) the Asya is forfeited to the Government of Palestine, and the Court must confirm the forfeiture unless the appellant can show cause against it.

It is to be noted as the appellant's learned Counsel with his usual candour admitted, that the issue would be precisely the same of the Asya had been sighted, boarded and directed to port while hovering immediately outside the territorial waters of Palestine with a view to making an illegal landing of her passengers under cover of darkness. An Ordinance designed to discourage such an attempt by providing for the forfeiture of the vessel would, it was contended, be invalid.

Their Lordships have grave doubt whether it is open to the appellant in the circumstances of the present case to challenge the validity of the Ordinance on the ground that the vessel was brought within territorial waters under the compulsion of the British Navy. That act, whether or not it was a breach of any principle of international law, a matter presently to be discussed, was not done or purported to be done under the authority of the Ordinance. The appellant has himself relied on the fact that the Ordinance itself gives a limited right of pursuit and search which would be inconsistent with a larger right being thereby created. But as a result of the act, right or wrong, the vessel was in fact in a Palestinian port and the terms of the Ordinance demanded its forfeiture. The argument of the appellant has assumed that the Ordinance is to be read as if it authorized seizure of the Asya on the high seas and its validity was to be determined accordingly. It would appear that this assumption has been rejected in the Courts of Palestine, and, as their Lordships think, rightly. But inasmuch as the matter has been debated before them with much reference to authority, they think it right to say that in their opinion the Ordinance is not open to challenge on the grounds that it offends against any established principle of international law, even upon the assumption that it directly authorized, in the circumstances in which those acts were done, the seizure of the Asya on the high seas and her compulsory direction to a Palestinian port. The appellant cannot succeed in this plea unless he invokes a doctrin which is, in the words of Lord Alverstone, C.J., in West Rand Central Gold Mining Company v. Rex, [1905] 2 K.B. 391, at p. 407, "one really accepted as binding between nations." It must be shown by satisfactory evidence, that learned Judge adds, either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so

widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international

agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations.

To satisfy this test the appellant has invoked the doctrine which is called "the freedom of the open sea," alleging that under the shield of that doctrine the Asya was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine. Their Lordships cannot assent to the proposition that any such right, unqualified by place or circumstance, is established by international law. There is room for much discussion within what limits a State may for the purpose of enforcing its revenue or police or sanitary law claim to exercise jurisdiction on the sea outside its territorial waters. It has not been established that such a general agreement exists on this subject as to satisfy the test laid down by Lord Alverstone, but, even if it had been it is far from clear that it would be applicable to the case of a Mandatory Power carrying out a common policy, the execution of which had been entrusted to it by other Powers. Their Lordships therefore could not in any event concllude that any principle of international law had been violated.

But it further appears to them that in the circumstances of the present case a discussion of the problem is somewhat academic. For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The Asya did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. Their Lordships would accept as a valid statement of the law the following passage from Oppenheim's International Law, 6th ed., vol. 1, p. 546:

In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State.

Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the Asya could not claim the protection of any State, nor could any State claim that any principle of international law was broken by her seizure.

If, therefore, contrary to the views which their Lordships have expressed, it is legitimate for the purpose of testing its validity to assume that it expressly authorized that which was done, they come to the conclusion that the Order in Council cannot on this ground be successfully challenged.

The further ground of challenge of the validity of the Ordinance has already been indicated, viz., that, upon the construction which has been put on it, it purports to penalize persons who are neither Palestinian subjects nor resident in Palestine. It is necessary, however, to examine more closely what is the act in respect of which a penalty is to be imposed. The offence iteself can only take place in Palestinian territory, for it consists in the unlawful entry

into that territory. But it can be abetted by, and can hardly take place without the abetment of, those who are outside the territory. Accordingly, abetment of the offence is itself made punishable. Particularly the offence can hardly take place without the abetment of the master, owner or agent of the offending vessel, whose actual complicity, while they are outside the jurisdiction, may not easily be susceptible of proof. Therefore such persons are by the terms of the Ordinance "deemed" to have been guilty of abetment and the vessel is liable to forfeiture. The question then is whether there is any principle of international law which is violated by an Ordinance which, in the circumstances in which this Ordinance was passed, penalizes persons of whatever nationality, and wherever resident, who abet or are deemed to abet an offence against its laws. It is to be observed that, so far as their own persons are concerned, they cannot be punished so long as they remain outside the jurisdiction. The question therefore narrows down to this, whether they may be penalized by the forfeiture of their property which is within the jurisdiction. Their Lordships have not been referred to any decision nor to any text-book of authority which suggests that the enactment by a State of a penalty so expedient, if not essential, for the purpose of preventing an unlawful invasion of its territory, is contrary to any established principle of international law. Upon this question also their Lordships are in accord with the views expressed by the Supreme Court of Palestine, and would only add that even if any principle of general acceptation could be found which appeared to cover the case, it would still, as has already been observed in this judgment, remain to be considered whether an exception must not be made in the case of a Mandatory Power enforcing by action, which seems to it essential, the policy which the principal Allied Powers entrusted to its charge.

For these reasons, which are an elaboration of those given by the Supreme Court, their Lordships are of opinion that this appeal must be dismissed and they will humbly advise His Majesty accordingly.

The appellant must pay the respondent's costs of the appeal.

SOLICITORS:

Ince, Roscoe, Wilson & Griggs; Burchells.

Queen's Bench Division