Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Her Majesty the Queen and another v. *Casaca and others* (*ship "Ovarense"*), *from the Vice-Admiralty Court of Sierra Leone, delivered 6th May* 1880.

Present:

Sir James W. Colvile.
Sir Robert J. Phillimore.
Sir Barnes Peacock.
Sir Montague E. Smith.

This is an appeal from so much of a decree of the learned Judge of the Vice-Admiralty Court of Sierra Leone, as awarded damages, expenses, and costs to the Respondents against the Appellants. The decree was made in a cause brought by the Appellants against the Portuguese vessel called the "Ovarense," of which the Respondent Manoel dos Santos Casaca was master, and the Respondents Manoel Roderigues Formigal and Fernando de Olivera Bello, of Lisbon, merchants, were the sole owners, and against her tackle, apparel, and furniture, and the goods, wares, merchandise, and moneys on board the same, and against three alleged male slaves Grando, Panik, and Yoroba, seized by James Craig Loggie as liable to forfeiture under the provisions of the statutes 5 George IV., c. 113, and 36 and 37 Vict., c. 88 ("the Slave Trade Act, "1873").

The "Ovarense" was seized by James Craig Loggie on the 5th day of December 1876, whilst lying at anchor in the harbour and port of Freetown, in Sierra Leone.

Mr. Loggie was duly authorized by the Governor of Sierra Leone to seize, detain, and arrest all vessels which should or might be liable to be forfeited for any offence committed against the provisions of the said Acts of Parliament.

The Appellants proceeded by libel, and alleged that the brig "Ovarense," being in the harbour of Freetown, in British waters, was engaged in and fitted out for the slave trade, having on board three slaves and a larger quantity of water than was requisite for the consumption of the crew of the brig as a merchant vessel, and an extraordinary number of empty casks for which no certificate was produced that security had been given that these casks were for lawful traffic; and also 73 bags of rice and 32 mats, such rice and mats being as alleged more than necessary for the use of the crew; and that the brig had shackles concealed on board on her arrival, which were afterwards removed; that Manoel dos Santos Casaca and Francisco Ferreira de Moraes were not engaged in emigration according to law, but were engaged in the slave trade; that the aforesaid three slaves were carried away by Francisco Ferreira de Moraes from Cape Palmas, to be dealt with as slaves; and they prayed that the said ship and slaves should be forfeited, and Manoel dos Santos Casaca condemned in costs.

In reply, the Respondents, filed their plea, alleging that the said brig was not engaged in or fitted out for the slave trade, but was an emigrant vessel, duly licensed as such, and that the three persons on board were not slaves, but free immigrants, destined for the Portuguese island of St. Thomas, where slavery did not exist; that the rice was in the brig's manifest; that the 32 mats were old mats which had been left in the said brig from the last voyage, having been used to line the said brig when laden with

coffee, as is usual; that of the water two tanks and nine puncheons were in the manifest, and the remainder had been taken on board in the harbour of Freetown after the arrival of the said brig; that of the empty casks some had contained stores, and the remainder had been taken on board in the said harbour of Freetown after the arrival of the said brig, and that therefore the certificate mentioned in the libel was not required by law until the said brig cleared out of the said harbour; and that there never were any shackles on board; and the plea prayed that the suit should be dismissed, and the brig, tackle, and goods and the three alleged slaves should be restored and the seizor condemned in costs, losses, damages, demurrage, and expenses.

It may be as well to dispose at once of a point which was raised on the argument that the Judge had not certified under the Customs Consolidation Act, 1876, 5 & 6 W. IV., c. 60, section 267, that there was reasonable cause for the seizure of the brig. Their Lordships are clearly of opinion that the provisions of the Act in question do not in any way affect the present case.

A great many witnesses were examined both on behalf of the seizor and of the claimant. The evidence was generally of an unsatisfactory kind, and resulted in a great conflict of testimony.

But after taking some time to consider the written depositions and documentary evidence, the learned Judge of the Vice-Admiralty Court, on the 9th November 1877, pronounced judgment in favour of the Respondents (the then claimants), and "decreed the said brig, goods, "wares, merchandise, and two of the said three "boys, Grando and Yoroba, called slaves, sur- "viving at the time of the passing of the said "sentence, to be restored to the claimant, on "behalf of himself, and of Manoel Rodrigues "Formigaes and Fernando Oliveira de Bello for

" the brig, her tackle, apparel, and furniture,
" and on behalf of the said Francisco Ferreira
" de Moraes for the goods, wares, merchandise,
" and moneys, and for two of the said three boys
" called slaves, Grando and Yoroba, surviving at
" the time of the passing of the said sentence,
" and condemned the said seizor in costs and
" damages."

From this condemnation in costs and damages, though not from the release of the ship herself, the seizor has appealed. In arguing the case before the Court, his Counsel have maintained that there was evidence which would have justified the condemnation of the ship, though in the absence of proof of the guilty knowledge of the owners such a condemnation according to the law laid down upon the subject could not be enforced. They have, nevertheless, used the evidence which, as it was alleged, ought to have enured to the condemnation of the ship, in support of his claim to be relieved from that part of the sentence which condemned him in costs and damages.

There are two questions of mixed law and fact which their Lordships are called upon to decide. In order to arrive at this decision it becomes necessary to consider and construe some of the statutes relating to the slave trade, and the Treaty as to this subject between England and Portugal. And first with regard to the statutes:—

The learned Judge of the Court below rightly observed that,—

"Before the passing of the Act 36 and 37 Vict. c. 88 the Statute 5 Geo. 4. c. 113, was the law by which we were to be guided in cases of slavedealing within British waters and jurisdiction, and under that law, and in accordance with decisions pronounced in cases coming under it, the captors were bound to prove, in order to condemn the vessel, not only that she was actually engaged in the slave trade or fitted out for the purposes of the slave trade, but that the owners of the ship were cognizant of the fact or had a guilty knowledge thereof, and that the owners of the cargo on board had also a guilty know-

ledge of the fact to justify a forfeiture of their goods, but that if there was probable cause for the seizure, that is, if from all the surrounding circumstances there was, to a reasonable mind, a fair and reasonable suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade, then although the vessel were restored no damages could be awarded against the seizor."

The next statute which has to be considered is the 6th and 7th Vict., c. 53, which came into operation August 1843. That statute carried into effect a treaty between England and Portugal for the suppression of the traffic in slaves, which had been concluded 3rd July 1842.

The first and second articles of the treaty which is set forth in the Schedule to the Act are as follows :—

"I. The two high contracting parties mutually declare to each other that the infamous and piratical practice of transporting the natives of Africa by sea for the purpose of consigning them to slavery is and shall for ever continue to be a strictly prohibited and highly penal crime in every part of their respective dominions, and for all the subjects of their respective Crowns."

"II. The two high contracting parties mutually consent that those ships of their royal navies respectively which shall be provided with special instructions, as herein-after mentioned, may visit and search such vessels of the two nations as may upon reasonable grounds be suspected of being engaged in transporting negroes for the purpose of consigning them to slavery, or of having been fitted out for that purpose, or of having been so employed during the voyage in which they are met by the said cruisers ; and the said high contracting parties also consent that such cruisers may detain, and send, and carry away such vessels in order that they may be brought to trial in the manner herein-after agreed upon ; and in order to fix the reciprocal right of search in such a manner as shall be adapted to the attainment of the objects of this Treaty, and shall at the same time prevent doubts, disputes, and complaints., it is agreed that the said right of search shall be exercised in the manner and according to the rules following."

Certain articles are then described, which, if found on board of or in the equipment of any vessel visited in pursuance of the treaty, are declared to be *primâ facie* evidence that the vessel was actually engaged in the slave trade, and by Article X. it is declared that,—

"If any of the things specified in the preceding article shall be found in any vessel which is detained under the stipu-

lations of this Treaty, or shall be proved to be on board the vessel during the voyage on which the vessel was proceeding when captured, no compensation for losses, damages, or expenses consequent upon the detention of such vessel shall in any case be granted either to her master, or to her owner, or to any other person interested in her equipment or lading; even though the mixed commission should not pronounce any sentence of condemnation in consequence of her detention."

Among these articles are mentioned shackles, bolts, or handcuffs, an extraordinary number of empty casks, an extraordinary quantity of rice, and mats.

These are the articles specified in the libel.

They are also mentioned in the first schedule of 36 and 37 Vict., c. 88, as among the equipments which are *primâ facie* evidence of a vessel being engaged in the slave trade.

This statute, entitled "An Act for consoli- "dating with Amendments the Acts for carrying "into effect Treaties for the more effectual "suppression of the Slave Trade, and for other "purposes connected with the Slave Trade," was passed on 5th August 1873.

It is a statute which is by no means perspicuously worded, and which has not as yet undergone any judicial construction.

The 3rd section enacts that "where a vessel "is on reasonable grounds suspected of being "engaged in or fitted out for the slave trade, it "shall," subject to certain restrictions, "be "lawful" for certain authorized persons, among whom is, as in this case, the Governor of a British possession, "to visit and seize and detain such "vessel and to seize and detain any person found "detained or reasonably suspected of having been "detained as a slave, for the purpose of the "slave trade, on board any such vessel," &c.

The first and principal question is whether the "Ovarense" was seized on reasonable grounds of suspicion of her being engaged in the slave trade.

What were the facts relating to this vessel at the time when she was seized? The first and not the least important fact is that she was seized in harbour and not upon the open seas. And here it may be well to cite the language of Lord Westbury delivering the judgment of the Privy Council in a similar case (The "Ricardo Schmidt," 4 Moore, P.C., 137).

The law at that time stood, it is true, under 5 Geo. IV., c. 113, but the reasoning is not inapplicable to the present case.

"We have, therefore," his Lordship says, "no circumstances here to which any particular weight or force is to be given by law, as under the 5th & 6th Will. IV., c. 60, would be the case, but we have a case, to be judged of under all the circumstances, whether any person going on board a ship lying in the harbour of Sierra Leone and examining her—going over her—could from the mere circumstance of the number of water casks be warranted in arriving at the conclusion that this ship was intended to be engaged in the slave trade. I need not point out, what was very well commented upon by one of the Counsel for the Appellant, that there may be great necessity for laying down clear and definite rules, as they are laid down in the Statute 5 & 6 Will. IV., c. 60, for the purpose of guiding captors at sea, for there the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature, therefore, defines certain things in that statute, which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the captor from consequences even if the vessel be not condemned. But when you come to the case of a ship quietly lying at anchor in a British harbour, and having been there for some time, not manifesting the smallest indication of anxiety to quit the harbour, but actually and plainly engaged in *bonâ fide* trade within the harbour, the obligation on a seizor to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which, *per se*, have not an overpowering weight on the mind at the time when the seizure was made."

The "Ovarense" arrived in the port of Freetown without any apparent circumstance of guilt attaching to her conduct. She remained there quietly. There was no restraint as to persons leaving or coming on board her. She seemed to have been in no hurry to get away. It certainly was, on the face of it, a strange thing to select

a British port for the visit of a slave-trading vessel, in order, amongst other things, to take in an excessive quantity of water, and, as alleged, with some slaves actually on board.

The general defence on the part of the owners of the "Ovarense" is that she was equipped with the object of facilitating the immigration of free labourers from the West Coast of Africa into the Portuguese island of St. Thomas, and it must be borne in mind that many of the articles are *ancipitis usus*, that is, are equally necessary for the carrying on of the guilty slave trade, and for the purpose of innocent immigration.

Slavery (even in the modified form established by a decree having the force of law of the 25th February 1869) had been abolished in St. Thomas by a law passed on the 29th of April 1875, to come into operation a year after publication.

An immigration ship would, of course, require a greater number of empty casks and a greater quantity of water than would be necessary for the crew, and the presence of some shackles on board would be no necessary indication of slave trading.

It appears that the "Ovarense," a brig of 309 tons, was chartered in September 1876 by one De Moraes for the purpose of taking immigrants to St. Thomas, and, on the 26th of December, cleared out for the port of Liberia and Sierra Leone. The Governor of St. Thomas gave the Captain a letter, addressed to the Portuguese Consul at Sierra Leone, informing him that the "Ovarense" was licensed to carry 368 freemen, or 400 men if a small half deck could be added to take water at Sierra Leone for that number. She sailed from St. Thomas, with a list of passengers signed by the proper Portuguese authority. On the 2nd of December 1876 she arrived in the harbour of Freetown, Sierra Leone. She had taken in six Kroomen at Cape

Palmas, three of whom were alleged to be slaves. On the 4th of December the captain entered his vessel at the Customs, and left with the acting Portuguese Consul the ship's papers. Early on the 5th of December Mr. Loggie came on board the "Ovarense." He paid three visits to the vessel on that day, and at the last visit seized the vessel, and brought the three Kroomen on shore.

The Portuguese Consul swears that he received all the ship's papers soon after the arrival of the vessel in harbour. His evidence is as follows:—

"The captain came to me first on the 3rd December in the morning. I never went on board the 'Ovarense.' I heard on the 5th December she had been seized. On hearing this I went to the Custom House, and from thence to the Governor I saw the collector before I went to the Governor. I went alone to the Governor officially as Consul for Portugal; it was Governor Kortright. I saw him. I had some official conversation with the Governor as to the 'Ovarense.' I had seen the Governor officially before this on the 30th November and 3rd December 1876 respecting the 'Ovarense.' After this I left his Excellency. On the 6th December I wrote a letter to his Excellency on the subject of the 'Ovarense,' and to that letter I received an answer. On the same day I wrote a second letter to his Excellency, to which I received no answer Loggie came to me about the 'Ovarense' first on the 7th or 8th December, but I am not certain on which day. He came alone. He applied to me for the papers of the 'Ovarense.' He said he had come to the Portuguese Consul, not to his friend Becaise, and wished to have the papers of the 'Ovarense' shown to him. I told him I could not show them, because he brought no authority. I told him the best thing he could do would be to apply to the Governor, and on the Governor saying he, Loggie, might see the papers, I would hand the papers to the Governor. Nothing more passed, and Loggie went away. I never told Loggie, on that or any other occasion, 'that there was no certificate as aforesaid from the 'Custom House at the place from which the said master 'cleared outwards, stating that a sufficient or any security had 'been given by the owners of such vessel that such extra 'quantity of casks and other vessels for holding liquid should 'only be used for the reception of palm oil or for other pur-'poses of lawful commerce.' I never told him a word about this. I had no conversation with him about a certificate. Loggie came to me again about the 'Ovarense'; this was about four or five days after the seizure, but I can't recollect the exact day. On this occasion he asked me to give him the

ship's papers, because his proctor wanted to see them; and that he (Loggie) would give a receipt for them. This is what he told me at first. I refused to give the papers. Loggie then said that Mr. Lewis, his proctor, would give the receipt, and that I need not be afraid. I told him I was very sorry, but that all the papers he required were in the Governor's hands; that I had handed them to the Governor, and that even if I had them I could not hand them either to himself or his proctor. Loggie did not come to me again about the 'Ovarense.' I am sure he never came to me before the 7th December to ask any information about the 'Ovarense.' I might have seen Loggie on the 3rd December, but not to speak to. I did not see him on the 4th December, and I had no conversation with him before the 7th December."

The papers lodged at the Consulate as before mentioned, and produced in evidence, were,—

1. A Royal passport, dated Lisbon, the 9th of June 1870, with 22 *visés* thereon, showing a trading of the "Ovarense" between the ports of Lisbon and Rio de Janeiro, Pernambuco, Bahia, and the Portuguese island of St. Thomé, the last *visé* being St. Thomé, the 25th of September 1876, for a voyage to the ports of Liberia and Sierra Leone.
2. The brig's articles.
3. The charter-party between the owners and Moraes to take labourers to St. Thomas from the ports of Liberia and Sierra Leone, Moraes, the charterer, binding himself to furnish water casks and water, to make a half deck for an additional number of labourers to make up 400, the "Ovarense" being computed to carry without such additional half deck, 368 persons, also to provide a person to take charge of these free labourers, and a doctor and medicine, and to pay monthly to the owners as freight one conto of reis, equal to 222*l.* 4*s.* 6*d.*
4, 5. The licenses to Moraes and the captain to import free labourers into St. Thomas already referred to.

6. The letter from the Governor of St. Thomas to the Portuguese Consul here also already referred to.

If Mr. Loggie before resorting to the serious step of seizing the ship had taken the ordinary precaution of consulting the ship's papers and communicating with reference to them with the Consul and the captain, he could not have failed to see that she was licensed to import free labourers, which would account for the articles found in her, and that he would not be justified simply from the fact that such articles were on board her in seizing this foreign vessel "as being "engaged in or fitted out for the slave trade "within British jurisdiction." With regard to the allegation that the brig herself was constructed and furnished or fitted out to carry slaves, the ship's papers and the charter-party would have shown, and there seems to have been no reasonable ground for disbelieving them, that she was chartered and intended to carry immigrants, and was not engaged in the slave trade. And, even if the original seizure could be justified, the subsequent detention of the vessel was wholly inexcusable.

Much stress was laid upon the presence on board the vessel of the three Kroomen alleged to be slaves, and the information concerning them which had been given to the seizor, as constituting reasonable grounds for the suspicion that she was a slaver. Their Lordships are of opinion that the appeal cannot be maintained on this ground. They have already observed that the seizor had the means, which he neglected, of informing himself of the true character of the vessel, and of the true condition of those Kroomen. Had he done so, and had even all the evidence which was afterwards given on his part touching those Kroomen been present to his

mind (which it was not), all that he could reasonably have inferred was that the men in question had been, in some sort, kidnapped on board, with the object of carrying them to St. Thomas (an island where slavery had ceased to exist) as free labourers imported under the immigration law then prevailing. But such an inference, or belief, would not have justified the seizure or detention of the vessel under the treaty, or "The Slave Trade Act, 1873," such supposed kidnapping, however reprehensible, being for a purpose other than that "of consigning the men to slavery." It may be that the immigration law of St. Thomas may not be sufficiently stringent, or that its provisions may not be duly observed; but defects in the law, or breaches of its provisions by Portuguese subjects, however deplorable, though they might be properly made the subject of diplomatic remonstrance to the Portuguese Government, are not grounds for seizing a vessel under the Portuguese flag as a slaver within the meaning of the treaty and the statute. In saying this their Lordships are assuming that on this part of the case the evidence given for the seizor was more credible than that opposed to it. That, however, was not the conclusion of the Judge below, and their Lordships are not prepared to say that he was wrong. The evidence taken altogether certainly afford grounds for the conclusion that the story of the kidnapping was a malicious fiction, got up by one of the other Kroomen who had been charged by Moraes with theft, and put under confinement.

There remains for consideration the 4th section of the 36 & 37 Vict., c. 88. That section is as follows:—

"Where any of the particulars mentioned in the first schedule to this Act are found in the equipment or on board of any vessel visited, seized, or detained in pursuance of this act, such vessel shall, unless the contrary be proved, be deemed to

be fitted out for the purposes of and engaged in the slave trade, and in such case, even though the vessel is restored, no damages shall be awarded against the seizor under this Act in respect of such visitation, seizure, or detention, or otherwise upon such restoration."

Much argument was addressed to their Lordships as to the effect and meaning of the terms contained in this section, and the case for the Appellants was mainly, though by no means entirely, rested upon it, it being contended that the words "no damages shall be awarded" contained an enactment of positive law, which, whether harsh or not, left no option to the Court upon the matter, unless indeed the proviso at the close of the section rendered the enactment inapplicable to this foreign vessel. The words of that proviso have been most carefully considered by their Lordships, they are as follows:—

"Provided that this section shall not extend to the vessel of any foreign State, except so far as may be consistent with the treaty made with such State."

This provision contains a plain proposition of international law, with respect to the general effect of the law of one foreign State upon the vessel of another.

It has been contended, however, that Portugal has, by treaty with England, consented that the particular articles mentioned in the first schedule of this statute, when found on board a Portuguese vessel in port, shall be considered as *primâ facie* evidence of her being engaged in the slave trade. But upon a careful examination of the Portuguese treaties, their Lordships are of opinion that this consent on the part of Portugal relates only to vessels upon the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. All the provisions in the treaties point to this conclusion. The visitation is to be conducted by a naval officer whose rank is carefully specified, and with a view formerly of bringing

in the vessel for adjudication before a Court of Mixed Commission, and now of sending her to the nearest or most accessible Portuguese colony, or handing her over to a Portuguese cruiser, if one be available in the neighbourhood of the capture. Their Lordships are of opinion, therefore, that this 4th section cannot be extended to a Portuguese vessel lying in British waters, inasmuch as it is not consistent with the treaty made with that State.

Upon the whole, it appears to their Lordships that the learned Judge of the Court below came to a right conclusion, both as to the facts and the law applicable to them, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

Printed at India Office, 7/5/80.—(100.)

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