

Judgment of the Judicial Committee of the Privy Council on the Appeal of The Imperial Japanese Government v. The Peninsular and Oriental Steam Navigation Company, from Her Britannic Majesty's Supreme Court for China and Japan (in Admiralty); delivered 3rd July 1895.

Present:

THE LORD CHANCELLOR (LORD HERSCHELL).
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by The Lord Chancellor.*]

This Appeal raises a question of considerable importance in regard to the jurisdiction possessed by the British Consular Courts in China and Japan. The facts lie in a narrow compass.

In November 1892 a collision occurred between the Emperor of Japan's steam cruiser, "Chishima," and the "Ravenna," a steamer belonging to the Respondents, in the Gogo Shima Straits near the coast of Japan. The "Chishima" sank almost immediately, and the "Ravenna" sustained some damage.

In May 1893 the Appellants filed a petition against the Respondents in Her Majesty's Court for Japan, alleging that the disaster was due to the default and negligence of those on board the

“Ravenna” and was not attributable to any one on board the “Chishima,” and that the damage occasioned to the Appellants was \$850,000.

The Respondents in their answer alleged that those on board the “Chishima” were solely to blame for the collision; that no blame was attributable to those on board the “Ravenna”; and that they had sustained loss by reason of the collision amounting to \$100,000.

On the 6th June 1893 the Respondents moved the Court for leave to file a counter-claim in the action, by cross-petition, for the recovery of \$100,000 from the Appellants, and also for an Order that the suit and counter-claim should be heard together and that the Appellants should be required to give security (by deposit or otherwise) to abide by and perform the decision of the Court upon the counter-claim.

The learned Judge refused leave to file the counter-claim. He based his judgment upon the ground that the collision had occurred within three miles of the coast of Japan, in the territorial waters of that country; that the liability of the Emperor of Japan, as owner of the “Chishima,” for the negligent acts of the officers and crew of that vessel must therefore be regulated by the law of Japan; and that as, by that law, the Emperor of Japan was not liable for such negligent acts, no action could be maintained against him in respect of them, and consequently no counter-claim ought to be allowed, even if, apart from this objection, it would have been competent for the Court to entertain it.

On appeal Her Majesty’s Supreme Court for China and Japan reversed the Judgment of the Court for Japan, and made the Order prayed for by the Respondents.

The Chief Justice dissented from the law laid down in the Court below. Although the place

of the collision might have been within the territorial waters of Japan he thought it was "undoubtedly upon the highway of Nations," and that this being so, it must be deemed to have taken place upon the high seas where the law maritime applied, and that by the law maritime the owner of a ship doing damage to another is liable for the negligence of his servants.

In the view which their Lordships take it is unnecessary to decide the question on which the Chief Justice of the Supreme Court and the Judge of the Lower Court differed. They think it, however, right to say that they must not be regarded as sanctioning the very broad propositions affirmed by the Chief Justice which are obviously open to serious controversy.

In order to determine whether the Order made by the Supreme Court can be sustained their Lordships think it necessary to inquire into the origin of the extra-territorial jurisdiction exercised by Her Majesty's Consular Courts in Japan, and to ascertain the limits of that jurisdiction.

On the 26th August 1858 a Treaty of Peace, Friendship, and Commerce was entered into between Her Majesty and the Tycoon of Japan. This Treaty was ratified on the 11th July 1859. It provided that Japanese subjects guilty of any criminal act towards British subjects should be punished by the Japanese authorities according to the laws of Japan, and that British subjects who might commit any crime against Japanese subjects or the subjects or citizens of any other country should be tried and punished by the Consul or other public functionary authorized thereto according to the laws of Great Britain.

It also contained the following Article :—

"ARTICLE 6.

"Complaints of British subjects against Japanese.

"A British subject having reason to complain of a Japanese must proceed to the Consulate and state his grievance. The

“ Consul will inquire into the merits of the case, and do his
 “ utmost to arrange it amicably.

“ Complaints of Japanese against British subjects.

“ In like manner, if a Japanese have reason to complain of a
 “ British subject, the Consul shall no less listen to his
 “ complaint and endeavour to settle it in a friendly manner.
 “ If disputes take place of such a nature that the Consul
 “ cannot arrange them amicably, then he shall request the
 “ assistance of the Japanese authorities that they may
 “ together examine into the merits of the case and decide it
 “ equitably.”

It will be seen that no jurisdiction was, in terms, conferred by this Treaty upon the British Consul to entertain a suit where a Japanese had reason to complain of a breach of contract, or of a wrong committed by a British subject. It appears to have been in contemplation that the decision in such cases, if the matter could not be amicably arranged, should be left to a Mixed Tribunal, consisting of the Consul and certain Japanese authorities. This scheme was, however, never put into operation.

A few weeks before the treaty just referred to was made, Japan had, on the 29th July 1858, entered into a treaty with the United States of America which was ratified on the 22nd May 1860. It contained the following provision :—

“ ARTICLE 6.

“ Americans committing offences against Japanese shall be
 “ tried in American Consular Courts, and when guilty shall be
 “ punished according to American law.

“ Japanese committing offences against Americans shall be
 “ tried by the Japanese authorities, and punished according to
 “ Japanese law.

“ The Consular Courts shall be open to Japanese creditors
 “ to enable them to recover their just claims against American
 “ citizens, and the Japanese Courts shall in like manner be
 “ open to American citizens for the recovery of their just
 “ claims against Japanese.”

There was thus a clear recognition of the right of the Consular Court to exercise jurisdiction in Japan, not only in the case of offences committed by Americans against Japanese, but in the case of civil claims which Japanese might

have against American citizens. It cannot be doubted that the intention was that the jurisdiction thus conferred should be exclusive, and that American citizens should enjoy immunity from being sued, as well as from being prosecuted, in the Local Courts of Japan.

On this point the terms of the treaty entered into a few years afterwards (in October 1869) between Austro-Hungary and Japan are more precise, but the two treaties do not, in their Lordships' opinion, differ in their substantial effect. The fifth article of that treaty (so far as material) is in the following terms:—

“ All questions in regard to rights, whether of property or
 “ of person arising between Austro-Hungarian citizens residing
 “ in Japan, shall be subject to the jurisdiction of the Imperial
 “ and Royal authorities. In like manner, the Japanese
 “ authorities shall not interfere in any question which may
 “ arise between Austro-Hungarian citizens and the subjects of
 “ any other treaty power.

“ If an Austro-Hungarian citizen has a complaint or
 “ grievance against a Japanese subject, the case shall be
 “ decided by the Japanese authorities. If, on the contrary,
 “ a Japanese has a complaint or grievance against a citizen of
 “ the said monarchy, the case shall be decided by the Imperial
 “ and Royal authorities.”

It is clear that article 23 of the treaty of August 1858, which accorded to Great Britain “most favoured Nation” treatment, conferred upon this country and its subjects all the privileges and immunities secured to the United States and Austro-Hungary and their respective subjects, by the treaties to which reference has been made. There cannot, therefore, be any doubt that a British subject has a right to require that when a Japanese has a complaint or grievance against him it shall be decided, not by the Local Courts of Japan, but by the British authorities exercising in that country extra-territorial jurisdiction. On the other hand, it seems equally clear that any complaint or grievance which a British subject may have against a Japanese subject is to be decided by the Japanese Courts.

The considerations which led to these treaty stipulations, securing immunity from proceedings in Local Courts, and the substitution of the extra-territorial jurisdiction of the Courts of the Defendant's own Nation, are not in doubt. Such treaties with Eastern Nations were well known, and had been long in operation before the date of the treaty with Japan. They had their origin in a distrust of the local tribunals, and of the systems of law administered by them. Eastern ideas in these respects were completely out of harmony with the views of Western civilization. During recent years a great change has been wrought in Japan. The circumstances which gave rise to the desire for extra-territorial jurisdiction in that country are ceasing or have ceased. It is nevertheless necessary to keep in mind the conditions which existed at the time the treaties were entered into, and the objects sought to be attained by them, in order rightly to estimate their effect.

It will be convenient now to examine the precise nature of the petition by way of counter-claim which the Respondents sought, and have obtained leave to file. It is in truth a cross-action in which, as Plaintiffs, they seek to recover against the present Appellants the sum of \$100,000, the amount of the damages sustained by them, which they allege were exclusively caused by the negligent acts of those on board the "Chishima." It is not designed merely as a shield of defence in the action brought by the Appellants. It is to be used as a weapon against them. If the action by the Appellants should wholly fail the Respondents might nevertheless, by virtue of their counter-claim, obtain a judgment for \$100,000, and the Appellants have been required to give security to abide by and perform the decision of the Court on the counter-claim, so as to ensure the

Respondents obtaining the fruits of the judgment in case it should be in their favour.

It needs no argument to show that, if it were not set up by way of counter-claim, the British Consular Court would have no jurisdiction to entertain such an action *in invitum* against a Japanese subject. The proper *forum* would be a Japanese Court. But it is argued for the Respondents that where a Japanese is suing in the British Consular Court a counter-claim, though, in the nature of a cross-action, ought always to be allowed in respect of any claim having its origin in the circumstances which give rise to the action ; that this is necessary in order that complete justice may be done between the parties.

Their Lordships would observe that it is only in recent years that it has become the general practice to allow such counter-claims in the Courts of this Country. But, apart from this, they think the argument overlooks the limited scope of the jurisdiction which the Consular Courts are authorized to exercise. They can claim exclusive cognizance of complaints made against British subjects. The territorial Courts are precluded from adjudicating upon them. On the other hand, with claims against a Japanese subject, the Courts of the Sovereign of that Country are (unless with the consent of the Japanese and his Government) alone competent to deal. There is nothing to take away this natural right. It is indeed expressly recognised by the treaties. It is said, however, that if a Japanese chooses to sue in a British Consular Court he submits to its jurisdiction in all respects ; so that if, according to the rules by which its practice and procedure are governed, a defendant is entitled to set up a counter-claim, the plaintiff cannot escape from the obligation to submit to adjudication upon it. He has

electd his tribunal, and he must take the consequences of that election. Their Lordships think that this is altogether a false view of the situation. It is not a matter of election on his part to seek his remedy in the Court of the defendant's country. He has no choice. The defendant has obtained, by virtue of a treaty made with his Sovereign, complete immunity from process in the territorial Courts which would otherwise be open to the plaintiff. It is difficult to see on what ground a British subject can insist, when sued in his own Consular Court, that the Court shall take cognizance of and adjudicate upon a claim which he makes against a Japanese. It appears to their Lordships that it would be in violation of the treaty, and in excess of the jurisdiction which the Sovereign Power of Japan, in derogation of its Sovereign rights, has granted to the British Consular Court, if it were to yield to such a contention.

The right of the Courts of Japan exclusively to decide a case where a British subject has a claim against a Japanese rests upon exactly the same basis as the right of the British Consular Court exclusively to decide complaints and grievances against British subjects. The point is one of no small moment. If the Respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese Court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese Court would be entitled to allow a counter-claim to be made against a British subject, and to require security to be given to satisfy the counter-claim, whatever its amount and however much in excess of the claim, and to stay proceedings in the action until the security was given. The effect would be to deny the British subject any redress in the Local Court except upon the terms of his submitting

to its arbitrament a dispute which under the treaty was reserved exclusively for the determination of the British Consular Court.

Such a proceeding would, in their Lordships' opinion, be clearly inconsistent with treaty rights, and it can be no less so when it is made a condition of suing in the British Consular Court that the Japanese shall submit a claim against himself to the jurisdiction of that Court, and give security so as to enable it to render its judgment effective, in case it should be unfavourable to him.

It is argued that the view for which the Appellants contend may not only inflict a hardship upon the Respondents but give rise to considerable inconvenience. This may no doubt in some cases be true, but it is a necessary result of the immunity afforded to British subjects from suit in the Local Courts. It is the price which they must pay for this immunity. But for the treaty, they would be liable to process in the Courts of Japan. Those Courts would have complete jurisdiction to deal with the case, whether the Defendant were a British subject or a Japanese. A British subject cannot claim the advantage of being amenable exclusively to his own Consular Court, and at the same time object to the limited jurisdiction which alone it possesses.

Their Lordships have so far dealt with the case as if it were one in which Japanese subjects were the Plaintiffs. It is said that the "Imperial Japanese Government" is merely a name in which the Emperor of Japan elects to sue, and it is suggested that as the treaties do not refer to the Sovereign, but mention only Japanese subjects, the Sovereign when He sues in the British Consular Court must be regarded as voluntarily submitting Himself to the jurisdiction, and not as availing Himself of His only

remedy against British subjects. Their Lordships cannot accede to this view.

The treaties must be interpreted according to their manifest spirit and intent. In construing such instruments a too slavish adherence to the letter would be out of place, although, of course, violence must not be done to the language used. Not only are claims against British subjects to be adjudicated upon in the British Consular Court, but offences committed in Japan against Japanese subjects by British subjects, which are in truth offences against the people and Sovereign of Japan, are to be tried in the same Court. In view of this fact and of the origin of the extra-territorial stipulations, to which attention has been called, their Lordships are of opinion that it cannot have been intended that British subjects should be amenable to the Local Courts whenever any claim of a civil nature was made by the Government of Japan against a British subject.

Their Lordships have dwelt at length upon the effect of the Treaty provisions, because they regard these as determining the question in controversy between the parties.

Much argument was expended on the terms of the Orders in Council relating to the administration of justice in the Consular Courts of China and Japan and to the rules made thereunder. Attention was specially called to Article 54 of the Order in Council of 1865, which provides that the Supreme Court shall be a Vice-Admiralty Court, and shall have all such jurisdiction as for the time being belongs to Vice-Admiralty Courts in Her Majesty's possessions abroad; and to Article 127 of that Order, which empowers the Judge to frame rules *inter alia* for the regulation of cross-suits and the admission of counter-claims. Reliance was also placed on Article 47 of the Order in

Council of 1881 (as amended by the Order in Council of 1886) which provided *inter alia* that a counter-claim or cross-suit was not to be brought or instituted in the Court against a plaintiff, being a foreigner, who had submitted to the jurisdiction, by a defendant except by leave of the Court first obtained.

The effect and scope of this Article is by no means clear, and was the subject of much discussion by the learned Counsel who argued this case. What is "a submission to the jurisdiction" by a plaintiff, who is a foreigner, within the meaning of this Article, is no doubt open to controversy. Their Lordships do not find it necessary to express any opinion upon the arguments addressed to them in relation to the construction of the Orders in Council. It is clear that these could not operate to confer a jurisdiction upon the British Courts in Japan wider than was acquired by Treaty. If indeed an Order in Council in terms prescribed something which was inconsistent with the Treaty, it may be that the Consular Judge would be bound to conform himself accordingly, and that the party aggrieved would have to seek redress through the diplomatic intervention of his Government. But no such difficulty arises in the present case. There is no necessary conflict between the Treaty rights and any of the provisions of the Orders in Council. They may all have full effect given to them without stretching the Consular jurisdiction beyond its legitimate Treaty limits.

The fourth Article of the Order in Council of 1865 provides that "All Her Majesty's jurisdiction exercisable in China or in Japan for the judicial hearing and determination of matters in difference between British subjects or between foreigners and British subjects . . . shall be exercised under and

“ according to the provisions of this Order and
“ not otherwise.”

It will be observed that it only purports to prescribe how the jurisdiction exerciseable is to be exercised. What jurisdiction the Court possesses must be determined *ab extrá*. Moreover a counter-claim can only be brought against a British subject by leave of the Court, and it would obviously not only not be imperative on the Court to grant such leave but would be wrong to grant it where it was sought by means of it to bring within the jurisdiction of the Court a matter which by treaty was outside its jurisdiction.

While their Lordships are of opinion that the counter-claim ought not to be allowed, the views they have expressed will not interpose any obstacle to the Respondents using every means of defence to the Appellants' claim. If they can show that the “ Chishima ” was alone to blame, or that the “ Ravenna ” was not to blame, they will succeed in defeating it. If it should appear that both vessels were to blame a question of some difficulty may arise. It is clear that the Plaintiffs, according to the law administered in the Admiralty Court, could recover in that case no more than one half of the damage they have sustained. It is further clear that if there were a cross-suit upon which the Court was competent to adjudicate the damage sustained by both vessels would be ascertained, and each would bear half of the total loss.

In a case in the Supreme Court of China and Japan, before Sir Edmund Hornby, that learned Judge having found both vessels to blame ordered (although there was no counter-claim) that the damages sustained by both vessels should be referred to the Registrar, and that each should bear half the total loss, remarking

that he did this under his equitable jurisdiction. It is presumed that the effect of this Order was not to make any sum payable to the Defendants, but merely to diminish *pro tanto* the claim of the Plaintiffs.

In the Admiralty Court of this Country, where in an action a decree was pronounced that both vessels were to blame, and it was impossible for the Defendant by reason of the Plaintiff being a foreigner to prosecute a cross-action against him, the Court has withheld the payment of the moiety of the damage sustained by the Plaintiff's ship until he submitted to the deduction of a moiety of the damage sustained by the other ship. (*The Seringapatam* 3 William Robinson 38.)

Whether, in the present case, supposing both vessels should be found to blame, the Court could properly adopt either of these courses, it would be altogether premature to decide at the present time.

Their Lordships will humbly advise Her Majesty that the Order appealed from should be reversed and the Order of Her Majesty's Court for Japan restored, and that the Respondents should pay the costs here and in the Supreme Court.

