LEGAL STATUS OF STATE-OWNED SHIPS EMPLOYED IN TRADE

Included in the provisional list of subjects prepared by the League of Nations committee of jurists on the codification of international law, at its recent meeting at Geneva, upon which international agreement is regarded by the committee as most desirable at the present moment, we find the following: "Legal status of ships owned by the state and employed in trade." [1] The desirability of agreement on this question has lately become urgent in consequence of the acquisition, during or following the late war, by many states, through capture, requisition, construction or purchase, of large numbers of merchant vessels which are being employed today, wholly or in part, directly or indirectly through charter to private companies or individuals, as ordinary carriers of commerce. The attempt to bring suits in contract or tort or for the recovery of damages or salvage against such vessels has raised the question of the immunity of vessels of this kind from judicial process, attachment and other legal actions to which privately-owned ships are liable. The question has recently been raised before the courts of the United States, Great Britain, Belgium, France, Germany, Italy, and Egypt, and, with rare exceptions, the courts have held that they have no jurisdiction to entertain such actions, or if they have, no jurisdiction to enforce their judgments by attachment or other legal processes.[2] The English and American courts have based their decisions, in the main, on the authority of the *Parlement Belge*, decided by the English Court of Appeal in 1880,[3] which decision was itself based on considerations of comity and respect which one state is said to owe to another independent sovereign. In a number of instances the courts have taken occasion to dwell upon the inconvenience and even hardships of a rule which exempts from judicial process large numbers of merchant vessels which, though owned by the state, are employed as ordinary carriers of passengers and freight, and they have evidently felt regret at being obliged to hold that such vessels are not subject to the jurisdiction of the courts.[4] Some of them have pointed out

[1] Monthly Summary of the League of Nations, April 1925, p. 105; Finch, this JOURNAL, 19: 535.

[2] I have reviewed the decisions in an article entitled "Immunities of State-owned Ships Employed in Commerce," British Year Book of International Law, 1925, pp. 128 ff.

[3] L. R. 5 P. D. 197.

[4] See notably the remarks of Judge Mack in the case of the *Pesaro* (1921), 227 Fed. Rep. 473, who declared that immunity should not be given to government-owned vessels employed in ordinary times as common carriers; that it was wrong to deprive injured parties of their common and well-established legal remedy of bringing suits against such vessels, and that the pursuit of such remedies was not "incompatible with the public interests of any nation or with the respect and deference due to a foreign Power." And he added: "It is certain that the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be considered novel or revolutionary."

See also the observations of the United States Circuit Court of Appeals in the case of the *Attualita* (1919), 238 Fed. Rep. 909. Compare also the observations of Lord Justice Scrutton in the case of the *Porto Alexandre* (1920), L. R. 30; of Mr. Justice Hill in the same case, and of Judge Hough in the case of the *Maipo* (1919), 259 Fed. Rep. 367.

that the diplomatic remedy, which alone is available in the absence of judicial recourse, ordinarily involves long delays, additional expense and often uncertain results.

But while some of the courts clearly disapprove the rule of immunity, the English and American courts, in particular, have taken the position that the rule is an established principle of international law and that it does not belong to the courts to alter it. That can be done only through the diplomatic channel by common agreement among states. It is a fair question to raise, however, whether there is any such established rule of international law. The rule is admitted to have been made by the English Court of Appeal in the case of the *Parlement Belge*, and there is nothing but an almost superstitious respect for the doctrine of *stare decisis* which obliges the American and English courts to stand by the earlier decision. It may also be observed that the *Parlement Belge* was primarily a mail packet, was officered by commissioned officers of the Belgian navy and carried passengers "only subserviently" to its main service of transporting mail for the Belgian Government, whereas many of the vessels to which immunity has been accorded by the recent decisions were employed exclusively in private trade and were officered and manned by men who had no connection with the navy. Sometimes, indeed, they were not operated by the state, but by private individuals or companies to whom they were chartered. It may not be amiss to observe, finally, that at the time the rule of immunity was laid down by the English Court of Appeal in the *Parlement Belge* there were no extensive fleets owned and operated by governments in private trade; the present practice of states was unknown and undreamed of, and had it been foreseen, it is not improbable that the courts would have adopted a different view as to the immunity of such vessels. Under these circumstances, is it really necessary to hold, as the English Court of Appeal in the recent case of the *Porto Alexandre* affirmed it to be, that the courts are "concluded" by the decision in the *Parlement Belge* rendered forty-five years ago when the situation and practice were wholly different from what they are today?

It is submitted that the decision of Sir Robert Phillimore in the *Charkieh* [5] (1873) that a merchant vessel owned by a sovereign and employed in ordinary commercial trade was not entitled to immunity from an action for damages occasioned by a collision, is more in accord with sound policy and expediency. There was, he said, no principle of international law, no decided case and no dictum of jurists which authorized a sovereign to assume the character of a private trader and, when he incurs an obligation to a private subject, to throw off his disguise and plead his immunity as a sovereign. But this decision was overruled by the English Court of Appeal in the case of the *Parlement Belge*, and the latter decision has recently been

[5] L. R. 4 Adm. and Ecc. 59.

followed by the Court of Appeal in the cases of the *Porto Alexandre* (*supra*) and the Compania Mercantile Argentina *v.* United States Shipping Board (1924),[6] and by the American courts.[7]

But the view of Sir Robert Phillimore was approved by the Belgian Court of Cassation in 1903, which affirmed that a foreign state is exempt from suit only when it is acting in its capacity as a sovereign public power, and not when it is engaged in ordinary trade or commerce.[8] The Italian courts enunciate the same principle.[9] The Egyptian Mixed Court of Appeal, in 1920, likewise declined to follow the recent decisions of the English courts, and took jurisdiction of a damage suit brought against a vessel owned by the English Crown but the operation of which as an ordinary carrier of commerce had been entrusted to a private individual.[10]

It may also be observed that the Government of the United States, recognizing the anomaly of a situation in which large numbers of government-owned merchant vessels engaged in ordinary trade are exempt from suits by injured private parties, announced in April 1924, that it would not, except in special cases, claim immunity from arrest or other special advantages for ships operated by or on behalf of the Shipping Board when engaged in commercial pursuits and that they would be permitted to be subject to the laws of foreign countries which apply under otherwise like conditions to privately-owned merchant ships foreign to such countries.[11]

It is submitted that this represents a common sense view of the matter and is in accord with the opinion of many jurists, who lay down the principle that when a state goes into the business of operating on a large scale merchant vessels in ordinary commerce, it should be subject to the same legal liabilities as private common carriers are, and those who sustain losses or injuries in consequence of the operation of such business should be permitted to enforce their claims for reparation by the ordinary legal processes

[6] 93 Law Journal Reports, 816.

[7] See the remarks of Judge Mayer in the *Maipo* (1918) 252 Fed. Rep. 627, to the effect that the decision in the *Charkieh* case has been overruled.

[8] 31 Clunet (1904), 417. But the Belgian court, while asserting jurisdiction over state-owned vessels engaged in ordinary commerce and entering judgments for damages against them in certain cases, declined to go further and issue a *saisie conservatoire* or writ of attachment to compel the payment of the judgment. See the cases cited by Rippert in 34 *Rev. Int. du Droit Maritime*, p. 20. The French courts adopted the same procedure in several cases involving suits against American Shipping Board vessels. See the cases of the *Englewood*, the *Hungerford* and the *Glenridge*, 32 *ibid.* (1920–21), 345, 599, and 602; 33 *ibid.*, 763; 46 Clunet, 747, and 47 Clunet, 621.

[9] 15 Clunet (1888), 289 and an article by Gabba, 15 *ibid.*, 180 ff.

[10] Case of the *Sumatra*. Text of the decision in 33 *Rev. Int. du Droit Maritime*, 167. See also the decision of the Egyptian Court of Appeal (1912), 24 *Bul. Aegypt. de Lég. et de Jurispru.*, 330.

[11] Instruction of the Department of State of March 5, 1924, to American diplomatic officials accredited to maritime Powers. Released to the press April 19.

that are available to them when the owners are private persons, instead of being required to invoke the diplomatic intervention of their governments.[12]

If the present rule of immunity, which makes no distinction between public vessels owned and operated by the state and ships owned and operated by it in private trade, is an established principle of international law and can therefore be altered only by international agreement reached through diplomatic negotiation or conference, as many courts assert to be the case, that should be done. The selection by the committee of jurists on codification, of this question as one upon which international agreement is urgently desirable, was most timely, and it is to be hoped that it may propose a rule that will prove acceptable to the community of states. The existing rule as applied by the courts is anomalous, out of harmony with actual conditions, and contrary to modern conceptions of the responsibility of the state.

J. W. GARNER.

CHINA AND THE POWERS

The relations of China with the other Powers during the last few months have assumed such an ominous aspect as to make it necessary for the Government of the United States to issue a public declaration of its policy in relation to Chinese affairs. The Secretary of State, the Honorable Frank B. Kellogg, utilized the occasion of his address before the annual meeting of the American Bar Association at Detroit on September 2, 1925, to make clear the attitude of the American Government. He declared that the policy of the United States "may be said to be to respect the sovereignty and territorial integrity of China, to encourage the development of an effective stable government, to maintain the 'open door' or equal opportunity for the trade of nationals of all countries, to carry out scrupulously the obligations and promises made to China at the Washington Conference, and to require China to perform the obligations of a sovereign state in the protection of foreign citizens and their property." [1]

The events which have led to the present situation started on May 30th last when a number of Chinese were killed and wounded by the foreign police of the International Settlement at Shanghai who attempted to break up a

[12] Compare in this sense Nielsen "Law and Practice of States with Regard to Merchant Vessels," this JOURNAL, Vol. 13, pp. 17 ff.; Walton, "State Immunity in the Laws of England, France, Italy and Belgium," *Jour. of Soc. Comp. Leg.* Ser. 3 (1920), Vol. II, pp. 252 ff., Rippert, 34 *Rev. Int. du Droit Maritime*, pp. 17 ff.; von Bar, *Rapport*, in 11 *Annuaire de l'Inst. de Droit Int.* 414 ff.; Despagnet, *Droit Int. Privé*, Sec. 179; Weiss, *Traité de Droit Int. Privé*, Vol. V. pp. 87 ff.; and Matsunami, *Immunity of State Ships* (1924). Compare also the Draft International Regulations on the Competence of Courts in Suits against Foreign States, Sovereigns or Heads of States (1891), *Resolutions of the Institute of International Law*, p. 91; and the resolutions of the International Maritime Committee adopted at its recent conferences at London and Gothenburg.

[1] Press notice of the State Department, Aug. 31, 1925.