Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Papayanni and others v. *the Russian Trading Company (ship "Laconia" and ship "Colchide"), from the Supreme Consular Court of Her Britannic Majesty at Constantinople; delivered 5th August*, 1863.

Present:

LORD KINGSDOWN.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR EDWARD RYAN.

IN considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations.

This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt that as a matter of right no State can claim jurisdiction of any kind within the territorial limits of another independent State.

It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on Treaty or engagements of similar validity. Such, indeed, were factory establishments for the benefit of trade.

But though according to the laws and usages of European nations a cession of jurisdiction to the subjects of one State within the territory of another, would require, generally at least, the sanction of a

Treaty, it may by no means follow that the same strict forms, the same precision of Treaty obligation, would be required or found in intercourse with the Ottoman Porte.

It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one State in the dominions of another, you would amongst European nations look to the subsisting Treaties, but this mode of incurring obligations or of investigating what has been conceded is matter of custom and not of natural justice.

Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a Treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States.

Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence where there must be full knowledge.

We, having considered the materials before us, entertain no doubt that, so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed the objection, if any such could properly be urged, should come from the Ottoman Government rather than a British suitor, who, in this case, is bound by the law established by his own country.

The case may, in some degree, be assimilated to the violation of neutral territory by a belligerent; the neutral State alone can complain.

We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States.

It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts; then in the progress of time commerce increasing, and various nations having the same interest in abstaining from resort to the tribunals of

Mussulmans, &c., recourse was had to Consular Courts, and by degrees the system became general.

Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent.

The principles are fully explained in the celebrated Judgment of Lord Stowell in the case of the "Indian Chief" (4 Rob.), to which we have very recently referred.

Though the Ottoman Porte could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to one such Power any jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort.

There is no compulsory power in an English Court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign, and thereby submit himself to its jurisdiction.

This case is provided for by the 6 & 7 Vict., cap. 94.

The first section of that Act recites that, "by Treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction, within divers countries and places out of Her Majesty's dominions; and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent upon the laws of this realm;" and enacts that "Her Majesty may exercise any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have, within any country out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." The effect of this section is that the jurisdiction of the British Consul in the Ottoman Empire became, within the limits within which it existed by usage or sufferance, liable to be regulated by Order

in Council. Now the Order in Council dated the 27th August, 1860 (Appellant's case, page 7), recites among other matters that :—

"Her Majesty has had and now has power and jurisdiction in the Ottoman dominions, and that it is expedient to *revise and consolidate* the provisions of the former Orders, and to make further provision for the due exercise of Her Majesty's power and jurisdiction aforesaid, and for the more regular and efficient administration of justice and the better maintenance of order among all classes of Her Majesty's subjects and of persons enjoying Her Majesty's protection resident in or resorting to the dominions of the Sublime Ottoman Porte."

The 64th section of the Order provides that—

"64. The Supreme or other Consular Court, according to its respective jurisdiction, original or appellate (as the case may require), and in conformity with the rules relating to suits between British subjects and appeals therein, may hear and determine any suit, proceeding, or question of a civil nature instituted, taken, or raised by a British subject against a subject of the Sublime Ottoman Porte, or a subject or citizen of any other State in amity with Her Majesty, or by a subject of the Sublime Ottoman Porte, or a subject or citizen of any other State in amity with Her Majesty against a British subject:

"Provided that the subject of the Sublime Ottoman Porte, or the subject or citizen of such other State as aforesaid, obtains and files in such Court the consent in writing of the competent local authority on behalf of the Sublime Ottoman Porte or of the Consul of such other State (as the case may be) to his submitting, and does submit, to the jurisdiction of the Supreme or other Consular Court, and, if required, gives security to the satisfaction of the Court, by deposit or otherwise, to pay fees, damages, costs, and expenses, and abide by and perform any such decision as may be given by the Supreme or other Consular Court originally or on appeal (as the case may require)."

The Plaintiff in this case has complied with these conditions, and has thereby submitted himself in this suit to the jurisdiction of this Court. The Court has no jurisdiction over him except by his consent. It could not have entertained the cross action unless by his submission to its authority, and it has compelled him to give that consent by refusing to proceed in the action which he has instituted against the original defendants unless he consented to do justice by appearing to the cross action which they desired to institute against him. He has thought fit to comply with these terms, and he does not now complain of them, and it would be singular

if the party who himself is by law subject to this tribunal could raise an objection that the Court had no right to exercise the jurisdiction which at his instance it has enforced against his adversary.

The general right of the Court to entertain the suit under these circumstances is perfectly clear, and to throw any doubt upon it would be to subvert all the principles upon which justice is administered amongst the subjects of Christian Powers in this and other countries of the East.

Hitherto we have spoken of jurisdiction in its general sense, and have stated our conclusion that for a case of collision in the Sea of Marmora some legal proceeding would belong to the Consular Court. Now we must inquire further whether it was competent to the Court to proceed as if it were invested with the authority of a Vice-Admiralty Court. We think that question must be solved by reference to the usage which has prevailed; the usage respecting the arrest of vessels, the proceeding *in rem*.

So far as we can ascertain from the information furnished to us, there appears to have been one case of collision—possibly more, but there is proof of one only.

The Consular Judge, however, states that proceedings *in rem* have been customary, and especially in causes of bottomry. Now causes of bottomry, where the ship is arrested, are clearly proceedings *in rem*, usually of Admiralty jurisdiction. We think that by the very extensive and comprehensive terms used, such a jurisdiction, whether to be called by that name, has been conferred upon the Consular Court, and if in bottomry we can discover no reason why it should not exist in causes of collision: the same considerations of convenience, the same necessity for obtaining justice, subsist in both cases.

It is not necessary to declare that the Court possessed full Admiralty jurisdiction; it is sufficient to express our concurrence with the Consular Judge that with respect to proceedings *in rem*, the causes of action occurring within given limits, and the usage of so treating cognate causes, such as bottomry cases, justify him in the course he has pursued on the present occasion, and therefore we must uphold the jurisdiction.

There is, however, another question which required our serious attention. There was a cross action in addition to the original action. The Judge found both parties to blame, and he ordered that the damage sustained by each should be added together, and each party pay one-half. The effect on the present occasion would be a loss to the Laconia of about 20,000*l.*: but it is not to the effect we must look; we must direct our attention to other considerations.

Had the rule prevailing at common law been adopted, each party would have had to bear his own loss.

Opinions may differ, and indeed do differ, as to what course is most consonant to justice. This question we are not called upon to decide; but what we haveto decide is, when the proceeding is *in rem*, what ought to be the rule? What was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction *in rem*? Could it be intended to constitute a jurisdiction *in rem* with a common law remedy? We think that no such anomaly could be intended, and therefore concur in the view of the Consular Court.

We regard the recent Order in Council, by which a certain Admiralty jurisdiction is expressly given, not as creating such jurisdiction, but only as expressing more distinctly and with greater detail the authority which had been already conferred by former Orders.

It now becomes their Lordships' duty to state the determination at which they have arrived upon the merits of the case. After the most careful and anxious consideration of every part of the evidence and of every point in the argument, their Lordships concur in the intimation given by the learned Judge of the Court below, that "under the circumstances it would seem a simple, and perhaps it would be the right course, to say neither party has proved his case." That is the decision which their Lordships have adopted, and they will therefore humbly recommend to Her Majesty that the Judgment of the Supreme Consular Court be reversed, and that both actions be dismissed, each party paying their own costs throughout, and that the monies deposited be given up and the securities vacated.