

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. James Carlin (ship 'Salvador'), from the Vice-Admiralty Court of the Bahamas; delivered 28th June, 1870.*

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Present:—

LORD CAIRNS.

SIR JAMES W. COLVILLE.

THE JUDGE OF THE HIGH COURT OF  
ADMIRALTY.

SIR JOSEPH NAPIER.

THIS is an appeal from the decision of the Vice-Admiralty Court of the Bahamas, upon an information filed on behalf of the Crown before that Court under the Foreign Enlistment Act, with regard to the ship 'Salvador,' and seeking her confiscation.

The clause in the Foreign Enlistment Act which has to be considered is the seventh. It has frequently been remarked that the interpretation of that clause is attended with some difficulty, mainly owing to the great quantity of words which are used in the clause; but endeavouring for the moment to set aside the verbiage of the clause, it is obvious that, in order to constitute an offence under it, five propositions must be established. In the first place, the ship, which in other respects is found to be acting within the meaning of the clause, must be acting without the leave and licence of the Sovereign of this country. That is the first element of the charge under the clause. The second is this, the ship must be equipped, furnished, fitted out or armed, or there must be a procuring, or an attempt or endeavour to equip, furnish, fit out, or arm the ship. The third is that the equipping, furnishing, fitting out, or arming of the ship must be done with the intent or in order that the ship or vessel shall be employed in the service of some "foreign prince, state, or potentate, or some "foreign colony, province, or part of any province or

“people, or of any person or persons exercising, or  
 “assuming to exercise any powers of government in  
 “or over any foreign state, colony, province, or part  
 “of any province or people.”

Then the fourth element in the charge is this, there must be an intent to employ the ship in one of two capacities, either “as a transport or store-ship against any prince, state, or potentate;” or “with intent to cruise or commit hostilities against any prince, state, or potentate.” I pause for the purpose of observing that the words are not very happily chosen which represent her as being employed “as a transport or store-ship against any prince, state, or potentate;” but it is clear, open as the words may be to criticism, that the intent is that the ship should be employed in one of the two capacities I have mentioned, and not only so, but employed “against,” that is in the way of aggression against some foreign prince, potentate, or state. This should be done, as I have already said, against some prince, state, or potentate, “or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country.” And the fifth element is that this foreign state or potentate, and so on, should be one with whom the Sovereign of this country should not then be at war.

Those are the five elements which go to make up the whole charge under the seventh clause.

Now, with regard to the first which I have mentioned, the absence of leave and licence on the part of her Majesty, no question arises.

With regard to the second, namely, that there must be an equipping, furnishing, fitting up, or arming, or a procuring, or an attempt to do so, no question can arise in this case when we read the evidence of Mr. Dumaresq, the Receiver General and Treasurer of the Island, who states the condition in which he found the ship, and the preparations made on board of her, which seem to their Lordships to amount to a fitting out or arming, or an attempt to do so, within the meaning of this clause. The learned Judge of the Vice-Admiralty

Court seems to have entertained no doubt himself upon this part of the case.

I pass over the third element which I mentioned, for the moment, in order to say that upon the fourth and fifth heads to which I have referred there can also be no doubt entertained, as it seems to their Lordships; and here again, no doubt was entertained by the learned Judge of the Court below. It is quite clear that the ship was intended to be used as a transport or store-ship against a prince, state, or potentate with whom her Majesty is not now at war. She was to be used obviously as a transport or store-ship for the purpose of conveying to Cuba men and materials; and in that way to do the duty of a transport ship, and so to inflict injury upon the Spanish Government, who at that time were, and are now, the lawful authority having the dominion over Cuba. Here, again, no doubt was entertained by the learned Judge in the Court below, and no doubt could be entertained by any one who looks at the evidence of Mr. Dumaresq, to whom I have already adverted, and also the evidence of Mr. Butler, at page 24, both of whom state what the report was which was made to themselves by Carlin, the master of this vessel, as to her conduct when she went to the coast of Cuba,—how she landed all the men she had on board, plainly for the purpose of taking part in the insurrection which was going on in Cuba,—how they abandoned the ship when they saw a Spanish ship of war in sight,—how they were prepared to set fire to their ship if the Spanish ship approached them,—and how afterwards, when they found that they were unnoticed, they took possession of the 'Salvador' again, and brought her back to Nassau.

That leaves uncovered only the third element of charge in this clause, and it is upon that alone that the learned Judge of the Vice-Admiralty Court entertained any doubt.

The third element is, that the ship must be employed in this way in the service of some "foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or

“part of any province or people.” It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a foreign prince, state, or potentate, or foreign state, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign state, whether it be the potentate, who has the absolute dominion, or the Government, or a part of the province or of the people, or the whole of the province or the people acting for themselves, that is sufficient. But by way of alternative, it is suggested that there may be a case where, although you cannot say that the province or the people, or a part of the province or people are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise powers of government in the foreign colony or state, drawing the whole of the material aid for the hostile proceedings from abroad; and therefore, by way of alternative, it is stated to be sufficient if you find the ship prepared or acting in the service of “any person or persons exercising, or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people;” but that alternative need not be resorted to if you find the ship is fitted out and armed for the purpose of being employed in the service of any foreign state or people, or part of any province or people.

Upon that the observation of the learned Judge was this:—“We have no evidence of the object of the insurrection, who are the leaders, what portion of Cuba they have possession of, in what manner this insurrection is controlled or supported, or in what manner they govern themselves. How, therefore, can I say that they are assuming the powers of Government in or over any part of the island of Cuba?”

Now, it appears to their Lordships that the error into which the learned Judge below fell, was in confining his attention to what I have termed the second alternative of this part of the clause, and in disregarding the first part of the alternative. It may be (it is not necessary to decide whether it is so or not) that you could not state who were the person or persons, or that there were any person or

persons exercising, or assuming to exercise powers of government in Cuba, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the clause; but their Lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the clause, because their Lordships find these propositions established beyond all doubt,—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents.

Those propositions being established, as their Lordships think they clearly are established, both by the evidence of Mr. Dumaresq and Mr. Butler, to which I have already referred, and further, by the evidence of the three witnesses, Loinaz at page 36, Wells at page 7, and Mana at page 25, their Lordships think that the requisitions of the 7th clause in this respect are entirely fulfilled, and that the case is made out under this head, as it is upon all other heads of the clause.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decision of the Vice-Admiralty Court should be reversed, and that judgment should be pronounced for the Crown, according to the prayer of the Information.

It has been intimated to their Lordships, that on the 7th of February, there was a decree by their Lordships for the appraisal and sale of the vessel. She has been sold, and the net proceeds, £163. 4s. 8d., paid into Her Majesty's Commissariat chest in the Bahamas. The Colonial Government, it appears, have incurred expenses to the amount of £145. 5s. 10d. in keeping the vessel while she was under arrest, and they claim to be reimbursed those expenses out of the proceeds of the sale. That, of course, will be proper, and if it is necessary to make that part of this Order, it will be done.

