Privy Council Appeal No. 13 of 1974

The Owners of the Ship " Philippine Admiral " (Philippine Flag) – – – – – – *Appellants*

v.

Wallem Shipping (Hong Kong) Limited and Another – *Respondents*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH NOVEMBER 1975

Present at the Hearing:
LORD CROSS OF CHELSEA
LORD SIMON OF GLAISDALE
LORD SALMON
LORD FRASER OF TULLYBELTON
SIR THADDEUS MCCARTHY

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong (Huggins, McMullin and Leonard JJ.) given on 26th April 1974. By it the Court allowed appeals by the respondents Wallem Shipping (Hong Kong) Ltd. and Telfair Shipping Corporation against orders made on the 14th and 17th December 1973 by Briggs C.J. setting aside, on interlocutory applications made by the Government of the Republic of the Philippines, the writs of summons and all subsequent proceedings in three actions *in rem* started in 1973 by the respondents against a ship called " Philippine Admiral ". Two of the actions (Nos. 103 and 139 of 1973) are actions brought by the first respondents (hereinafter called " Wallem ") for payment for goods supplied and disbursements made for the ship. The third (No. 106 of 1973) is an action brought by the second respondents (hereinafter called " Telfair ") for damages for breach of a charterparty relating to the ship dated 21st December 1972. In actions Nos. 103 and 139 the writ is addressed to the owners and all others interested in the ship and in No. 106 to the owners of the ship. In each case the writ was served on the Liberation Steamship Company Inc. (hereinafter called " Liberation ") a Company incorporated in the Republic of the Philippines which had been operating the ship under the terms of an agreement for its conditional sale to it by the Reparations Commission an agency of the Government of the Republic which was at all material times the owner of the ship.

The facts of the case which were not in dispute in any material particular are set out at length in the judgment of Huggins J. They may be summarised as follows. By a Treaty made in 1956 between the Republic of the Philippines and Japan the latter country agreed to make available a total sum of 550 million U.S. dollars by way of reparations for damage done to Filipino property during the Second World War. Of this sum 500 million U.S. dollars was to be provided in the form of such capital goods and services as might be requested by the Philippine Government and agreed by the Japanese Government. In 1957 a Reparations Law (No. 1789) was enacted in the Philippines which laid down the mode in which reparations payments should be procured and used. It established (1) a mission in Japan as the sole and exclusive agent of the Philippine Government to implement the Treaty by procuring reparations goods and services and (2) a Reparations Commission whose function was to administer the acquisition, utilisation and distribution of reparations goods and services. The policy of the Act was stated to be that all reparations payments should be used in such a manner as to assure the maximum possible economic benefit for the Filipino people in as equitable and widespread manner as possible. Capital goods were to be made available both for approved Government projects and also to Filipino citizens and entities wholly owned by Filipino citizens whose applications had to be accompanied by a " project study " in the prescribed form. It was laid down that the Government should not use reparations goods for the purpose of entering into competition with private industries where such industries had shown their capacity and readiness to serve the public fairly and adequately and that in general preference was to be given to private productive projects and that Government projects were only to receive preference in a limited number of cases. No goods supplied to private enterprises were to be leased, sold or otherwise disposed of to anyone other than a Filipino citizen or to an entity wholly owned by Filipino citizens, which should continue to use the goods in the projects for which they were originally intended or similar projects included in the development programme. The Commission was directed to conduct so called " end use " checks for the purpose of evaluating the actual utilisation of reparations goods and services and to make annual reports thereon to the authorities. Penalties were to be imposed on " end users " who failed to use capital goods for the purposes for which they were intended. The proceeds from the sale of reparations goods disposed of under the Act were to be placed to a Special Economic Development Fund to be used for the purposes therein specified.

Liberation applied to the Reparations Commission for the grant of an ocean going ship; its application was granted; and in 1959 the Reparations Mission entered into a contract on behalf of the Government of the Republic with a Japanese Shipbuilding Company for the construction of a vessel which—the contract stated—was being procured under the Reparations agreement for the Liberation Steamship Company of Manila. Payment was to be made by the Philippine Government to the shipbuilders—presumably out of funds made available by Japan as part of the total reparations payment. On 16th November 1960 an agreement was made in Manila between the Reparations Commission and Liberation for the conditional purchase and sale of the vessel which was then called the " Dagohoy " but was subsequently renamed the " Philippine Admiral " for a purchase price (3,434,288 U.S. dollars 89 cents) to be paid by the instalments therein set out with interest on the unpaid balance. The contract provided so far as material (1) that in consideration of the payments to be made by Liberation the Commission did " conditionally cede, transfer and convey " to Liberation the utilisation of the vessel (2) that the Commission retained title to and ownership of the vessel until it was fully paid for and (3) that Liberation would take delivery and

possession of the vessel in Japan, and put the necessary officers and crew aboard in order to operate and use her in accordance with Philippine laws recognising that the contract was subject to the provisions of the Reparations Act, and to the terms and conditions in Annex A which were made an integral part of the contract. Annex A contained (*inter alia*) the following terms:

> " 1. It is herein covenanted and agreed upon that the title to and ownership of the reparations goods subject to this contract shall remain with the Conditional Vendor until the same shall have been fully paid for, and upon the full payment of the purchase price as hereinbefore mentioned, this conditional deed of sale shall become absolute, subject only to the limitations established by Republic Act No. 1789 with respect to inspection, transfer and utilization of said reparations goods.
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> 11. Should the Conditional Vendee fail to pay any of the yearly instalments when due, or otherwise fail to comply with any of the terms and conditions herein stipulated, as provided in R.A. No. 1789, or any of the Rules and Regulations issued pursuant thereto, then this Deed of Conditional Sale shall automatically and without any further formality become ineffective and declared rescinded, and all sums so paid by the Conditional Vendee before rescission by reason thereof shall be considered as rentals and the Conditional Vendor and its agents shall then and there be free to enter into the premises where such goods are found, take possession of the same and dispose them according to law.
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> 12. It is hereby agreed, covenanted and stipulated by and between the parties hereto that should the Conditional Vendor rescind this Deed of Conditional Sale for any of the reasons stated in the preceding paragraphs, the Conditional Vendee, by these presents, obligates itself to peacefully deliver the property subject of this contract to the Conditional Vendor and in the event that the Conditional Vendee refuses to peacefully deliver the possession of the property subject of this contract to the Conditional Vendor and a suit is brought to court by the Conditional Vendor to seek judicial declaration of rescission and to take possession of the goods subject of this contract, the Conditional Vendee hereby obligates itself to pay all the expenses to be incurred by reason of such suit and in addition, obligates itself to pay as liquidated damages, penalty and attorney's fees, a sum corresponding to ten percent (10%) of the value of the goods subject of this contract.
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> 13. It is also agreed, covenanted and stipulated by and between the parties hereto that in the event that the Conditional Vendor cancels or rescinds this contract in accordance with Section 11 hereof, and the Conditional Vendor decides to sell the said reparations goods in other parties at a price less than the consideration herein stipulated, the Conditional Vendee hereby obligates itself to pay the Conditional Vendor the difference in price in concept of penalty or liquidated damages."

On 15th December 1960 the Reparations Commission was registered as sole owner of the vessel. Liberation took delivery and possession of the vessel in pursuance of the contract and proceeded to operate her in the course of its shipping business. In 1963 the Reparations Commission took action to prevent a proposed charter of the ship to an agency of the Indian Government on the ground that such a charter would violate the purpose for which the use of the ship had been entrusted to Liberation. Liberation paid a number of instalments of the purchase price but there is no doubt that by 1973 it was seriously in arrear with its payments. By

a charterparty dated 21st December 1972 the ship was chartered by Liberation to Telfair for a period of " nine months to about twelve months at charterers option ". At that time the ship was being repaired at Hong Kong and remained in that port until after the judgment of the Full Court. There was a dispute between Liberation and Telfair as to which was liable to pay for the repairs. Liberation purported to cancel the charterparty and Telfair issued a writ *in rem* (No. 106) on 2nd June 1973 for damages for breach of the charterparty. Meanwhile Wallem had on 23rd May 1973 issued a writ *in rem* (No. 103) in respect of goods supplied and disbursements made for her between January and April 1973 and on 7th September 1973 Wallem issued another writ *in rem* (No. 139) in respect of goods supplied and disbursements made for her between May and July 1973. Liberation entered appearances to all these writs as " owners " of the *Philippine Admiral.* On 4th June the ship had been arrested at the suit of Telfair in action No. 106. In the course of the next few months considerable expense was incurred by the Bailiff in maintaining the ship under arrest and as Liberation had taken no steps and seemed unlikely to be going to take any steps to procure her release the Acting Deputy Registrar of the Supreme Court applied to the Court for an order that the *Philippine Admiral* be appraised and sold and the proceeds of sale paid into Court. An order to that effect was made by Pickering J. on 8th October 1973. That order came to the notice of the Reparations Commission which on the 10th October passed a resolution in the following terms:

> " RESOLVED, in view of the proposed sale in Hongkong, allegedly in pursuance of an order of the Hongkong Supreme Court, of the reparations vessel, M/S 'Philippine Admiral' (formerly, M/S 'Dagohoy') procured for and delivered to the Liberation Steamship Co., Inc. as an end-user of the same and which proposed sale was published in the Manila newspaper, 'Bulletin Today' dated October 10, 1973, and considering that the aforesaid vessel remains the property of the Philippine Government, represented by the Reparations Commission, the same not having been fully paid for; considering further, that the published proposed sale could have been the result of the neglect and/or failure of the said enduser to operate the vessel as a good father of a family and in a bonafide manner within the framework of pertinent laws and regulations; considering also, that the said enduser has been delinquent of the payment of its obligations to the Commission and which delinquency has aggregated in the amount of P$5,322,120·04 as of October 9, 1973; considering finally, that the said enduser, has continuously failed to make even a reply to the letters and telegrams of the Commission inquiring about the status of the case against it in Hongkong and/or steps it had taken to bring the vessel to the Philippines, (1) to direct the immediate repossession of said vessel; and, (2) to direct and authorise the Legal Department, in coordination with the DBP-Repacom Action Group, to implement this resolution and to take such other steps and/or actions as may be necessary and warranted for the protection of the best interest of the Government ".

On 29th October 1973 solicitors acting for the Government of the Republic of the Philippines filed notice of motion in the Telfair action (No. 106) to apply for an order " that the writ of summons, the order for appraisement and sale dated 8th October, 1973 and all subsequent proceedings herein be set aside ". On or about the same date applications were filed by the same solicitors in four other actions (including No. 103 and No. 139) asking that the writs of summons and all subsequent proceedings be set aside. On 9th November 1973 by a Presidential Decree (No. 332), which recited (*inter alia*) that it had been shown that a majority of reparations endusers in the private sector had failed properly to utilise the reparations

goods or services received by them and to pay the amortizations thereon as they fell due thus resulting in huge arrearages to the detriment of the Philippine economy, various amendments were made to the Reparations Act of 1957. In particular the priority given to the private over the public sector was repealed and provision made for dealing with "delinquent private endusers". This decree though made before the hearing before the Chief Justice was not in fact put in evidence by the Republic at that stage but only on the appeal to the Full Court.

On 14th December 1973 Briggs C.J. made an order setting aside the writs and all subsequent proceedings in the four actions (including No. 103 and No. 139) other than the Telfair action and on 17th December he made a similar order in the Telfair action (No. 106). The grounds of his judgment may be summarised as follows: (1) He rejected a submission made on behalf of the Republic of the Philippines that by reason of the terms on which "endusers" were bound by the Reparations Law to use Reparations goods the *Philippine Admiral* was operating in the public service of the Philippines. She was—the judge held—engaged in ordinary commercial transactions any profits from which went to Liberation. The only direct benefits which the people of the Philippines derived from them came from the instalments of purchase price. But he held (2) following *The Porto Alexandre* [1920] P.30—that the fact that the ship in question was being used for ordinary commercial purposes did not exclude the application of the doctrine of sovereign immunity and (3) that as the Government was the owner of the ship and furthermore had an immediate right to her possession by reason of Liberation's default under the contract of conditional purchase the doctrine applied notwithstanding that the Government was not in possession of the ship and had not been operating her itself for commercial purposes.

The respondents appealed from this judgment to the Full Court, which on 26th April 1974 unanimously reversed it and dismissed the applications by the Republic to have the writs set aside and the actions stayed.

The grounds for the decision as contained in the leading judgment given by Huggins J. may be summarised as follows: (1) There was nothing in the Presidential Decree of 9th November 1973 to affect the conclusion reached by the Chief Justice—with which the Full Court agreed—that the *Philippine Admiral* must be regarded as an ordinary trading vessel and not a vessel employed in or destined for the public service of the Philippines. (2) *The Porto Alexandre* did not govern this case since there the Portuguese Government was in possession of and operating the ship whereas here Liberation was in possession of the ship and had been operating it for its own commercial purposes. (3) The case was similar on its facts to the case of *Republic of Mexico v. Hoffman* 324 U.S. 30 decided by the Supreme Court of the United States in 1945, where the ship belonged to the Mexican State but was in the possession of private charterers and the Court held that the doctrine of sovereign immunity did not apply. The fact, assuming it to be a fact, that the Republic of the Philippines had an immediate right to possession of the ship by reason of Liberation's breaches of the conditional sale contract did not affect the position.

After the decision of the Full Court the Government of the Republic of the Philippines in order to secure the release of the ship pending an appeal to this Board procured a Bail Bond to be filed in the sum of 5,000,000 Hong Kong dollars and on 27th May 1974 the Full Court released the *Philippine Admiral* from arrest and discharged the order of Pickering J. made on 8th October 1973 for her appraisement and sale.

The argument before the Board fell under three heads. First and foremost whether the Board should follow the decision in *The Porto Alexandre*. Secondly whether, if the Board should decide not to follow

that decision, the *Philippine Admiral* ought nevertheless to enjoy immunity because it could not properly be regarded as a mere trading ship. Thirdly whether, if the Board should consider that it ought to follow the decision in *The Porto Alexandre*, that decision covered this case having regard to the fact that it was not alleged that the Government of the Philippines was liable on any of the contracts in respect of breach of which the actions had been brought and that although it was the legal owner of the vessel it had not had possession or control of it at any material time.

On the first question their Lordships were referred by Counsel to a great number of cases decided in the Courts of this country and in various other jurisdictions, to several International Conventions and to the views expressed by several academic writers on International Law. They will refer in this judgment to so much of this material as appears to be particularly relevant. The story begins with the famous judgment of Marshall C.J. in *The Schooner Exchange* (1812) 7 Cranch 116. A trading vessel belonging to the plaintiffs had been seized on the high seas by persons acting on the orders of the Emperor Napoleon, taken to France, confiscated under the "Rambouillet decrees" and fitted out as a French vessel of war. She had been driven by stress of weather into the port of Philadelphia and the plaintiffs had issued a writ *in rem* claiming to have her restored to them. Marshall C.J. delivering the judgment of the Supreme Court held that a vessel of war of a foreign State with which the United States was at peace and which the Government of the United States allowed to enter its harbours was exempt from the jurisdiction of its Courts. It was submitted in argument that if a Sovereign engaged in trade he would enjoy no immunity in respect of his trading operations; but the judgment left that question open.

The case of a trading vessel was considered by Sir Robert Phillimore in *The Charkieh* (1873) L.R. 4 Adm. & Ecc. 59. The owners of the *Batavier* instituted Admiralty proceedings *in rem* against the *Charkieh* and her freight for damages arising from a collision between the two ships in the Thames. The *Charkieh* was one of a fleet of six or seven trading vessels, which had previously belonged to a private company but had been bought by Ismail Pasha, the Khedive of Egypt. She had been sent to England for repairs and to lessen expenses she had brought a cargo with her. At the time of the collision she was under charter to a British subject and advertised to carry cargo to Alexandria. Sir Robert held that the Khedive was not entitled to the privileges of a sovereign prince; but that even if he had been he would have lost such immunity by assuming the character of a trader. By sending the ship to trade here he must be considered to have waived any privilege which might otherwise attach to the vessel as property of a Sovereign. It appears from several passages in his judgment that Sir Robert distinguished proceedings *in rem* from proceedings *in personam* and did not think that it followed that because no suit could be brought against the Sovereign personally no proceedings *in rem* could be brought against property of his used by him in trade.

Next comes *The Parlement Belge* ((1879) 4 P.D. 129 and on appeal (1880) 5 P.D. 197). She was a packet owned by the King of the Belgians, officered and manned by persons in his employ and flying the Belgian pennant, which carried mails and also passengers and their luggage between Ostend and Dover. Sir Robert Phillimore before whom the case came at first instance adhered to the opinion which he had expressed in *The Charkieh* that a vessel even though owned by a Sovereign and manned by his servants was not entitled to immunity if she was engaged in commerce as in his view the *Parlement Belge* was. His decision was reversed on appeal and the judgment of the Court of Appeal—delivered by Brett L.J.—has sometimes been taken as saying that a Sovereign can claim immunity for vessels owned by him even if they are admittedly

being used wholly or substantially for trading purposes. In their Lordships' view the judgment does not lay down that wide proposition at all and they agree with the analysis of it made recently by MacKenna J. in the case of *Swiss Israel Trade Bank v. Government of Salta and another* [1972] 1 Lloyd's Rep. 497. The judgment certainly lays down two propositions: (*a*) that a foreign Sovereign cannot be sued *in personam* and (*b*) that an action *in rem* cannot be brought against his ship if she is being used substantially for public purposes—as the King of the Belgians said, and in the view of the Court rightly said, was the case of the *Parlement Belge*. But the question whether a state-owned vessel admittedly used wholly or substantially for mere trading purposes would be immune was left open.

The proposition that a Sovereign cannot be sued *in personam* has been reaffirmed in many subsequent cases. Thus in *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149—a suit for breach of promise of marriage alleged to have been made by a Sovereign—Lord Esher M.R. said at page 159 that there was an absolute and unqualified rule which precluded the Court from exercising jurisdiction over the person of any Sovereign. In *Compania Mercantil Argentina v. United States Shipping Board* (1924) 131 L.T. 388, which was an action *in personam* brought to recover freight overpaid to the Shipping Board which operated a merchant fleet for ordinary commercial purposes, the action failed because the Board was held to be a Department of State. Again in *Baccus S.R.L. v. Servicio Nacional del Trigo* [1957] 1 Q.B. 438, where the defendants were a corporate body formed for the purpose of importing and exporting grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government, though the Court of Appeal was divided on the question whether the defendants were properly to be regarded as in substance a Department of State none doubted for a moment that if they were to be so regarded they were entitled to immunity. See also *Thai-Europe Tapioca Services Ltd. v. Government of Pakistan*, a case decided by the Court of Appeal after the arguments in this appeal had been concluded, and reported in *The Times* for 16th July 1975. The only possible exceptions to the generality of the rule that no proceedings *in personam* can be brought against a Sovereign or a Sovereign State or a body which is a Department (or equivalent to a Department) of a Sovereign State of which there is any trace in the English authorities brought to their Lordships' attention are (A) the case of an action relating to immovable property in the jurisdiction of the State in which the action is brought which was left open in *Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] A.C 318 at p. 343 and (B) the " trust fund cases ", in which the Court has not been deterred from administering a trust subject to its jurisdiction by the fact that a Sovereign claims an interest in it. If the Sovereign does not choose to appear and argue its case the Court will decide on the conflicting claims as best it can in its absence.

Their Lordships will now revert to the question of sovereign immunity in actions *in rem* against ships owned by or in the possession or control of a Sovereign and refer to the English cases on that subject up to and including *The Porto Alexandre* on which the appellants placed particular reliance. *The Scotia* [1903] A.C. 501 was an action *in rem* to recover remuneration for salvage services. She was a ferry-boat built in this country for the Government of Canada and intended to be used to connect one part of a railway owned by the Government with another. The services in question were rendered to her while she was crossing the Atlantic from England to Canada. The Privy Council rejected the submission of the plaintiff that the *Scotia* was at the time of the salvage services still in the possession and control of her builders

and held that the case fell within the general rule that the Crown could not be impleaded in its own Courts. That case, which was, of course, decided before the Crown Proceedings Act 1947, does not in their Lordships' opinion throw any light on the question at issue in this case. *The Jassy* [1906] P. 270 concerned a vessel which according to a statement made by the Roumanian diplomatic representative in this country and communicated to the Court via the Foreign Office was the property of the King of Roumania and employed by him for public purposes of the State, including the carriage of mail, passengers and cargo in connection with the national railways. She had been involved in a collision with a Greek steamship in the Black Sea and was subsequently arrested in Liverpool at the suit of the owners of that vessel. The case was indistinguishable from *The Parlement Belge*, which was followed. The *Gagara* ([1919] P. 95) was a merchant ship bought by the plaintiffs in 1914 and registered in their names at Petrograd under the Russian merchant flag. In 1918 the Bolshevik government declared her to be national property, loaded her with a cargo of wood and sent her on a voyage to Copenhagen. In the course of her voyage she put in at Reval where she was seized by the Estonians, registered as of Estonian nationality and the property of the Estonian Republic and sent to London under a new master with a cargo to be delivered to the Estonian representative here. When she arrived here the plaintiffs issued a writ against her. The argument both before Hill J. and the Court of Appeal was directed entirely to the question whether or not having regard to the terms of the Foreign Office Certificate the Estonian National Council could properly be regarded as a Sovereign State. The question whether the ship was being used for merely trading purposes and that immunity should be refused on that ground was not taken at all.

Next comes *The Porto Alexandre* [1920] P. 30, which is the sheet anchor of the appellants' case. The ship, which was the property of the Portuguese Government, was being employed by it in ordinary trading voyages earning freight. In September 1919 she loaded a cargo of cork shavings for carriage to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to the Portuguese Import and Export Company Limited. She ran aground in the Mersey; salvage services were rendered to her by three Liverpool tugs; and a writ *in rem* was issued on behalf of the owners, masters and crews of the tugs against " the owners of the Portuguese steamship *Porto Alexandre* her cargo and freight ". Unconditional appearance was entered for the cargo owners but appearances under protest for the owners of the ship and the freight. Hill J. held with regret that although the *Porto Alexandre* was being used in ordinary commerce he was bound by the decision in *The Parlement Belge* to set aside the writ so far as concerned the ship and the freight though the action could continue against the cargo owners. The Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) affirmed his decision with a marked lack of enthusiasm on the same ground—namely that the case was indistinguishable from *The Parlement Belge*, which was binding on them. For the reasons which they have already given their Lordships cannot agree that the decision in *The Parlement Belge* obliged the Court of Appeal to decide *The Porto Alexandre* as it did. In *The Parlement Belge* the Court of Appeal said that the Court could not exercise jurisdiction over " the public property of any State which is destined for its public use "; but it did not say that a state-owned vessel engaged wholly or substantially in ordinary commerce must be regarded as property " destined to its public use ". It was careful to leave that point open.

In 1926 the point decided in *The Porto Alexandre* came before the Supreme Court of the United States in the case of *The Pesaro* (1925) 271 U.S. 562. That was a proceeding *in rem* against

the *Pesaro* on a claim for damages arising out of a failure to deliver goods accepted by her at a port in Italy for carriage to New York. On the vessel being arrested the Italian Government asked that the suit be dismissed on the ground that the vessel was owned, possessed and controlled by it and was employed by it in the carriage of merchandise for hire in the service and interest of the whole Italian nation as distinguished from any individual member thereof. The Court after referring to the case of *The Schooner Exchange* said,

> " We think the principles [there stated] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

In the course of its judgment the Court referred to *The Parlement Belge* and *The Porto Alexandre* and a later case, *The Jupiter* [1924] P.236, in which *The Porto Alexandre* was followed, as showing the attitude of the English Courts in the matter.

On 10th April 1926 a Convention was signed at Brussels between over 20 States, including the United Kingdom, for " The Unification of certain Rules concerning the Immunity of State-owned Ships ". Article 1 of that Convention was in the following terms:

> " Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment."

It will be observed that that article covers not only actions *in rem* but also actions *in personam*. The Convention, though ratified by a number of the signatories, has not yet been ratified by this country.

Their Lordships turn next to the well known case of *The Cristina* [1938] A.C. 485. She was a trading ship registered at Bilbao and when that port was occupied by the insurgents in June 1937 the Government of the Spanish Republic issued a decree requisitioning all vessels registered there. The *Cristina* was then on the high seas but when she reached Cardiff the Spanish Consul there replaced the master and those of the officers and crew who were thought to be in sympathy with the insurgents with persons well affected to the Government. The owners issued a writ *in rem* claiming to have possession of the vessel as her owners, which the Spanish Government moved to set aside as infringing its sovereign immunity. It is clear both from the arguments of Counsel before the Appellate Committee, which are fully reported in Volume 60 of Lloyd's List Reports 147, and from the speeches of the Law Lords that the question whether a Sovereign State can claim immunity in an action *in rem* against a ship employed by it solely for trading purposes was never in issue at all. It was abundantly clear that the Government requisitioned the ship in order to assist it in putting down the rebellion and that in its hands she was in the fullest sense " *publicis usibus destinata* ". What the plaintiffs were saying was that the English Courts ought not to give effect to a decree which requisitioned a Spanish vessel when it was outside Spanish territorial waters and had been implemented by high handed and probably tortious acts on the part of the Spanish Consul in the port of Cardiff. All five Law Lords agreed that as the

vessel was in the *de facto* possession and control of the Spanish Government when the writ was issued the writ impleaded a foreign Sovereign State and must be set aside. The case is, however, noteworthy in two respects. First for the statement of the doctrine of sovereign immunity by Lord Atkin in the following words—so often repeated in subsequent cases:

> " The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the Courts of a country will not implead a foreign Sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the Sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control."

The second respect in which the case is noteworthy is for the division of opinion among the Law Lords on the question, which did not arise for decision at all, whether the decision in *The Porto Alexandre* was right. Lord Atkin clearly thought that it was for he added to the passage quoted above the following words:

> " There has been some difference in the practice of nations as to possible limitations of this second principle—as to whether it extends to property only used for the commercial purposes of the Sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

Lord Wright concurred in that view. He cited a number of the cases to which reference has already been made including *The Pesaro* and *The Porto Alexandre* and concluded:

> " In view of what I regard as the nature and purpose of the possession held by the respondent of the *Cristina,* it is not necessary to express a final opinion on the question; but as at present advised I am of opinion that these decisions of the United States Supreme Court and of the Court of Appeal correctly state the English law on this point ".

Lord Maugham, on the other hand, took a different view. He pointed out—rightly as their Lordships think—that the Court of Appeal in *The Parlement Belge* never said that ships belonging to a foreign Government even if used for purely commercial purposes were entitled to immunity and he doubted whether the decision in *The Porto Alexandre* was right. In support of his approach he referred to the Brussels Convention of 1926 mentioned above. Lord Thankerton agreed with Lord Maugham that *The Parlement Belge* did not decide that a state-owned merchant ship engaged solely in ordinary trading was entitled to immunity and both he and Lord Macmillan reserved their opinions as to whether *The Porto Alexandre* was rightly decided.

A case involving the effect of the same decree of the Spanish Republican Government as was relied on in *The Cristina* came before the Supreme Court of the United States in the same year—see *The Navemar* (1938) 303 U.S.68. There the Court—though on the facts it was perhaps not necessary for it to do so—reaffirmed its earlier decision in *The Pesaro* saying (p. 74):

> " Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of Admiralty of the United States."

Their Lordships' attention was not called to any later English case in which the question on which there was a difference of opinion among the Law Lords in *The Cristina* has been discussed. There have been several cases in which Lord Atkin's formulation of the doctrine of immunity has been applied to forms of property other than ships—notably the *Dollfus Mieg* case [1952] A.C. 582, which related to some gold bars to which two foreign Sovereign States had an immediate right to possession. But that case has relevance to the third head of the argument rather than to the question whether *The Porto Alexandre* was rightly decided. The only other English authority to which their Lordships will refer at this point is *Sultan of Johore v. Abubakar Tunku Aris Bendahar* (*ubi supra*). The Sultan, who was recognised by His Majesty's Government as an independent Sovereign, had obtained from a Court set up in Singapore by the Japanese during the period of their occupation of Malaya a decree to the effect that he was the owner of certain immovable property in Singapore. After the war an ordinance was passed enabling any person aggrieved by such a decree to apply to the appropriate Court to have it set aside or to be given leave to appeal from it. The Sultan's son and other persons claiming that they were aggrieved by the decree made an application under the ordinance to which they made the Sultan respondent. He thereupon applied to have the proceedings stayed. The Board held that the application under the ordinance should be treated as a continuation of the proceedings started by the Sultan himself before the Japanese Court and that he must be treated as having submitted to the jurisdiction. This made it unnecessary for their Lordships to decide whether or not proceedings relating to the title to immovable property in the jurisdiction of the Court constituted an exception to the general rule that a foreign independent Sovereign cannot be " impleaded " in our Courts. They did however take occasion to say that in their opinion there had not been finally established in our law any absolute rule that a foreign independent Sovereign cannot be impleaded in our courts in any circumstances. In this connection they said that a great deal of the reasoning in *The Parlement Belge* would be inexplicable if there was such an absolute rule and referred to the reservations made by the majority of the Law Lords in *The Cristina* as to a Sovereign's ships engaged in ordinary commerce.

There is no doubt—as was indeed conceded by Counsel for the appellants—that since the Second World War there has been both in the decisions of Courts outside this country and in the views expressed by writers on International Law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a State which are done " *jure imperii* " and acts done by it " *jure gestionis* " and accords the foreign State no immunity either in actions *in personam* or in actions *in rem* in respect of transactions falling under the second head.

The first indication of this change of view to which their Lordships would refer is the *Republic of Mexico v. Hoffman* 324 U.S. 30 decided by the United States Supreme Court in 1945. In that case the owner and master of the *Lottie Carson*, an American fishing vessel, filed a suit *in rem* in the District Court for Southern California against the *Baja California* for collision damage, and the Mexican Ambassador claimed that proceedings should be stayed on the ground that the *Baja California* was owned by and in the possession of the Republic of Mexico. On examination of the facts it appeared that the vessel was the property of the Republic of Mexico but that by a contract between the Republic and a private Mexican corporation it was being operated by the corporation for a term of five years in private freighting ventures. The officers and crew were selected, controlled and paid by the corporation and for the

use of the vessel the corporation agreed to pay the Government 50 per cent of the net profits earned by her but undertook to bear all losses. The Supreme Court rejected the claim to immunity on the ground that the vessel was not in the possession or control of the Mexican Government. The majority of the judges expressed no view as to the correctness of the decision in *The Pesaro*; but Mr. Justice Frankfurter (in whose opinion Mr. Justice Black concurred) said that it was unsatisfactory to allow the decision in cases of this sort to turn on the presence or absence of possession by the foreign Government. He agreed with the view expressed by Lord Maugham in *The Cristina* that there should be no immunity for ships owned and operated by the foreign State for ordinary trading purposes and thought that *The Pesaro* had been wrongly decided. It is to be noted that all the judges agreed that in cases in which immunity from suit is claimed on behalf of a foreign Government it is the duty of an American Court to ascertain, if it can, the view of the Department of State with regard to the particular claim or the policy adopted by the Department to claims of that character and act in accordance with it. " It is not " said the Supreme Court " for the Courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognise ". In that case the State Department had certified that it recognised that the Mexican Government was the owner of the vessel but had refrained from certifying that it recognised ownership by a foreign Government without possession as a ground for immunity. It did not appear from the cases that a claim of immunity in such circumstances had ever been allowed.

The next landmark in the shift of opinion above mentioned to which their Lordships would refer is a letter—the so-called " Tate letter "—addressed on 19th May 1952 by J. B. Tate, the Acting Legal Adviser of the State Department, to the then Acting Attorney-General of the United States notifying him of a change in the policy of the Department of State with regard to the granting of sovereign immunity to foreign Governments. The letter first refers to what it describes as two conflicting concepts of sovereign immunity. According to the classical or absolute theory a Sovereign cannot without his consent be made a respondent in the Courts of another Sovereign, while according to the newer or restrictive theory immunity is only recognised with regard to acts done " *jure imperii* " as opposed to acts done " *jure gestionis* ". The letter goes on to list those countries whose Courts accept the absolute or the restrictive theory respectively—including in the former class the United States itself and the British Commonwealth—pointing out that in many of the countries whose Courts still applied the absolute theory academic writers tended to support the restrictive theory and that a number of those countries were in fact parties to and had ratified the Brussels Convention of 1926. It refers to the fact that the United States itself does not claim immunity from suit in foreign Courts where it would not be entitled to do so according to the restrictive theory, and says that it will hereafter be the policy of the State Department to follow the restrictive theory of sovereign immunity when considering the claims of foreign Governments for the grant of such immunity. It concludes as follows:

> " It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.
>
> In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all

requests by foreign governments for the grant of immunity from suit and of the Department's action thereon."

It was not suggested by Counsel on either side that their Lordships should seek the help of the Foreign and Commonwealth Office in deciding this appeal by ascertaining which theory of sovereign immunity it favours. But it is not perhaps wholly irrelevant to observe that the later American case of *Rich v. Naviera Vacuba* (1961) 197 F. Supp. 710 suggests that if the Courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient. In that case a merchant ship owned by the Republic of Cuba sailed from Cuba in August 1961 with a cargo of sugar. The master and some of the crew, wishing to seek political asylum in the United States, sailed the ship into American territorial waters, where she was taken into custody by the Coast Guard. Thereupon a number of persons issued writs *in rem* against her to enforce various claims. The United States Government gave an assurance to the Government of Cuba that if the latter declared the vessel to be its property, requested her return and provided men to take the place of those members of the crew who wished to stay in the United States, the ship would be released. These conditions were fulfilled and a plea of sovereign immunity as a bar to the various actions was made by the Attorney-General on behalf of the Republic of Cuba. The plaintiffs submitted that the vessel was an ordinary trading vessel engaged in commerce and that the executive was now going back on the policy of the Tate letter. The Court however allowed the plea of sovereign immunity saying that "no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations." See also in this connection *Isbrandstein Tankers v. President of India* (1971) 446 F. (2nd Series) 1198.

According to the Tate letter the countries of the world were then fairly evenly divided between those whose Courts adhered to the absolute theory and those which adopted the restrictive; but there is no doubt that in the last twenty years the restrictive theory has steadily gained ground. According to a list compiled by reference to the various text books on International Law and put before their Lordships by agreement between the parties there are now comparatively few countries outside the Commonwealth which can be counted adherents of the absolute theory. It is not altogether clear whether or not the Republic of the Philippines is one of them.

The only other cases to which their Lordships think it necessary to refer are two recent Canadian cases: the first, *The Canadian Conqueror* (1962) 34 D.L.R. (2nd) 628; the second, *Republic of Congo v. Venne* (1971) 22 D.L.R. (3rd) 669.

The facts in *The Canadian Conqueror* were that the vessel was one of seven ships which in August 1958 were bought from a Canadian steamship company by a Cuban bank. The bank on 19th August 1958 entered into a Lease Purchase Agreement with the plaintiff company—("Flota")—providing for the operation of the ships by Flota under a demise charter containing an option to Flota to purchase them. In October 1958 Flota alleged that the bank had broken the agreement in various respects and that it was no longer binding on it. From that time it appears that Flota ceased to operate the vessels. On 9th June 1959 the vessels were acquired by the Republic of Cuba from the bank. At that time and ever since they had been anchored in the harbour of Halifax, Nova Scotia, and were under the

control of the Cuban Government. On 4th August 1960 Flota issued a writ *in rem* against the ships claiming damages for breach of the agreement of 19th August 1958 and the Republic of Cuba applied by motion to set the writ aside. The judge of first instance refused to accede to the application but his judgment was reversed on appeal and on a further appeal to the Supreme Court that Court unanimously held that the claim to immunity should succeed. Ritchie J., in whose judgment four other judges concurred, carefully refrained from accepting the views expressed by Lord Atkin and Lord Wright in *The Cristina* as to the immunity of state-owned trading ships. Indeed he made it clear that he preferred the view expressed by Lord Maugham. But he decided in favour of the claim to immunity because the plaintiffs had failed to show that the vessels which were owned by and in the control of the Republic of Cuba were going to be used by it for ordinary trading purposes. The Republic had made no use of them since it acquired them; they were available to be used for any purpose which the Government of Cuba might select; and they ought to be regarded as " public ships of a sovereign state " at least until such time as some decision was made by the Sovereign State in question as to the use to which they were to be put. Locke J., who was the only other judge to deliver a judgment and with whose judgment one other judge agreed, based his judgment on the same grounds as those adopted by Ritchie J.—namely that the ships were in the possession of the Republic of Cuba and that there was no evidence as to the use to which the Republic intended to put them. He expressed no opinion on the question whether the doctrine of immunity extended to property used purely for the commercial purposes of the Sovereign.

In *Republic of Congo v. Venne* the respondent alleged that he had been employed by the Government of Congo acting through its duly accredited diplomatic representatives in Canada to prepare plans for the construction of the Congo National Pavilion for the 1967 exhibition in Montreal. The Government eventually decided not to construct the pavilion and refused to pay the respondent fees, for which he brought an action. The lower courts rejected the Government's plea of sovereign immunity but the Supreme Court allowed the plea by a majority of seven to two. Ritchie J., delivering the majority judgment declined—as he had declined in the case of *The Canadian Conqueror*—to express a concluded opinion as to whether or not the doctrine of sovereign immunity applied to commercial transactions. He held that the transaction in question was not a commercial transaction but a contract made by the Government in the performance of a public act of state. Laskin J. on the other hand, delivering the minority judgment, expressed the view that the " absolute " theory of sovereign immunity was " spent " and that the transaction in question was not on the evidence covered by the restrictive theory.

Finally their Lordships must refer to the Convention on State Immunity signed at Basle on 16th May 1972 by a number of member States of the Council of Europe. The United Kingdom was a signatory to the Convention itself—though not to the protocol added thereto—but has not yet ratified it. The preamble runs as follows:

> " The member States of the Council of Europe, signatory hereto.
>
> Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;
>
> Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts;
>
> Desiring to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State;

Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field,

Have agreed as follows:".

The Convention contains a number of provisions precluding Contracting States from claiming immunity in various types of proceedings *in personam* brought against it in the Courts of another Contracting State but Article 30 provides that it is not to apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels. The Explanatory Report presented to Parliament with the Convention explains that the purpose of Article 30 is to exclude matters covered by the Brussels Convention of 1926 which is in force between a number of the member States of the Council of Europe. The importance of the 1972 Convention in relation to the question which their Lordships are called upon to answer is that it shows that the fact that Her Majesty's Government in the United Kingdom has never ratified the 1926 Convention cannot be taken to indicate that it has any doubt as to the wisdom of the provisions contained in it.

Their Lordships turn now to consider what answer they should give to the main question raised by this appeal—whether or not they should follow the decision of the Court of Appeal in *The Porto Alexandre*. There are clearly weighty reasons for not following it. In the first place, the Court decided the case as it did because its members thought that they were bound so to decide by *The Parlement Belge* whereas—as their Lordships think—the decision in *The Parlement Belge* did not cover the case at all. Secondly, although Lord Atkin and Lord Wright approved the decision in *The Porto Alexandre* the other three Law Lords who took part in the *Cristina* case thought that it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce. Moreover this Board in the case of the *Sultan of Johore (ubi supra)* made it clear that it considered that the question was an open one. Thirdly, the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. Lastly, their Lordships themselves think that it is wrong that it should be so applied. In this country—and no doubt in most countries in the western world—the State can be sued in its own Courts on commercial contracts into which it has entered and there is no apparent reason why foreign States should not be equally liable to be sued there in respect of such transactions. There is of course no clear cut dividing line between acts done "*jure imperii*" and acts done "*jure gestionis*" and difficult border line cases may arise. *The Republic of Congo v. Venne* is an example of such a case and others are given in the text books on International Law (see *e.g.* Oppenheim 8th ed. vol. I. p. 274 note 2; Brownlie 2nd ed. pp. 323/325; Greig (1970) pp. 217/218; O'Connell 2nd ed. vol. 2 p. 845). But similar difficulties arise under the "absolute" theory, for there one has to decide whether the defendant—if not the foreign State itself—is or is not so closely connected with it as to make the action in substance one against the foreign State—a difficulty which caused a division of opinion in the Court of Appeal in *Baccus S.R.L. v. Servicio Nacional del Trigo* (*supra*). The only reason for following *The Porto Alexandre* which appears to their Lordships to have much weight is that to apply the "restrictive" theory to actions *in rem* while leaving actions *in personam* to be governed by the absolute theory would produce a very illogical result. The rule that no action *in personam* can be brought against a foreign Sovereign State on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to

be the law even by Lord Maugham in *The Cristina.* It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so, and Counsel for the respondents did not suggest that the Board should cast any doubt on the rule. So Counsel for the appellant could and did argue with force that granted that the restrictive theory was to be preferred the Courts should leave it to the Government to ratify the 1926 and 1972 Conventions and to introduce the legislation necessary to make them part of our law and should not tamper with the law as so far declared in England by applying the restrictive theory to actions *in rem.* But their Lordships—while recognising that there is force in that argument—are not prepared to accept it. Thinking as they do that the restrictive theory is more consonant with justice they do not think that they should be deterred from applying it so far as they can by the thought that the resulting position may be somewhat anomalous. For these reasons they propose not to follow *The Porto Alexandre.*

The question then arises whether the *Philippine Admiral* can properly be regarded as a mere trading vessel or was at the relevant time for one reason or another a ship "*publicis usibus destinata*". In order to answer that question one must consider both the past history of the vessel in question since she became the property of the foreign State and also the use to which she is likely to be put by that State in the future. Throughout her life the *Philippine Admiral* has been operated as an ordinary merchant ship earning freight by carrying cargoes and their Lordships agree with the judges in both Courts below that the fact that Liberation was subject with regard to her to the provisions of the Reparations Law and the contract with the Commission does not mean that she was not to be treated as an ordinary trading ship for the purposes of the doctrine of sovereign immunity when these proceedings started and also when the claim to stay them was made.

It is, of course, possible that a foreign Sovereign might base a claim to immunity for a trading vessel on its alleged intention to use her in the future for some different, and undoubtedly public, purpose. If such a claim were made the Court would be faced with several difficult questions *e.g.* whether it would require any evidence of the intention over and above its mere assertion; whether the fact that it was formed in order to defeat the plaintiffs' claim would be a relevant consideration; and at what time such a claim would have to be formulated to be listened to at all. It is, however, unnecessary for their Lordships to consider any such questions in this case for the Republic of the Philippines does not even assert that the *Philippine Admiral* will not continue to be used as she has always been used—that is to say as a trading vessel—though the recent Presidential decree makes it perhaps likely that she will be so employed by the Government rather than by private individuals. The appellants naturally relied in this part of the case on the decision of the Supreme Court of Canada in *The Canadian Conqueror.* Their Lordships do not find it necessary to express either agreement or disagreement with that decision; for it is clearly distinguishable from this case on its facts. The vessels in question in that case had not been put to any use by the Cuban Government since it had acquired them; they were available for use by that Government in any way it chose; and having regard to the political conditions obtaining in Cuba at that time it was by no means improbable that they would be used for other than purely commercial purposes. Here on the other hand one has use for commercial purposes for many years while the Government was the owner and no reason whatever to suppose that such user is going to change after the Government has retaken possession from Liberation. In the result therefore their Lordships are of the opinion that the appeal should be dismissed and that the appellants should pay to the respondents their costs of it. They will humbly advise Her Majesty accordingly.

In the view that their Lordships have taken on the first two points the third point—namely whether if they had thought it right to follow *The Porto Alexandre* the appeal should nevertheless be dismissed—does not arise; but as it was fully argued they think it right to say that had they thought that they should follow *The Porto Alexandre* they would have advised that the appeal should be allowed. It is true that the Republic of the Philippines was not in possession or control of the *Philippine Admiral* at any relevant time and that it was not liable on any of the contracts for the breach of which the actions were brought; but the Republic was the legal owner of the vessel and what is more an owner with an immediate right to possession. In the *Dollfus Mieg* case, where the bars were in the possession of the Bank and the arguments were conducted on the footing that the plaintiffs were their owners and that the foreign Sovereigns had no title to them, the foreign Sovereigns succeeded in having the action against the Bank for detinue or conversion of the bars stayed on the ground that an order in favour of the plaintiffs would have interfered with the immediate right to possession of the bars which they had under the contract of bailment to the Bank. There can be no difference for this purpose between gold bars and a ship and had their Lordships not thought that the fact that the *Philippine Admiral* was an ordinary trading ship took her outside the scope of the doctrine of sovereign immunity they would have held as the Chief Justice held that the Republic of the Philippines was entitled to have the actions stayed.

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In the Privy Council

THE OWNERS OF THE SHIP
"PHILIPPINE ADMIRAL"
(Philippine Flag)

v.

WALLEM SHIPPING (HONG KONG)
LIMITED and Another

DELIVERED BY
LORD CROSS OF CHELSEA

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