

fresh arbitration of a different character to the previous arbitration, although the arbitrator was the same. We think, therefore, that the finding of the learned Judge in the Court below that the present application to record the award of the second arbitration proceeding as an adjustment was a good application, was wrong, and that that arbitration having failed, the result was that the parties were relegated to their original position and the suit must continue.

It is not, therefore, necessary to deal with other issues in the case, and to decide whether a decree could be passed in terms of the award of the 18th April 1919. The appeal must be allowed and the suit must continue. The appellant to have his costs throughout from the plaintiff and defendants Nos. 2, 3 and 4.

Decree reversed.

J. G. R.

PRIVY COUNCIL.

THE KARA DENIZ.

[On Appeal from the High Court at Bombay, Admiralty and Vice-Admiralty
—In Prize.]

*Prize Court—Ship—Owner naturalized neutral—Commercial domicile in
Enemy country—Burden of proof.*

In prize proceedings for the condemnation of a steamship seized in Bombay harbour shortly after the declaration of war between Great Britain and Turkey, the ship was claimed by the appellant, a naturalized Persian subject who, down to the outbreak of war, had a commercial domicile at Constantinople. The Judicial Committee, affirming a decision of the Prize Court at Bombay, held that the ship was liable to condemnation as enemy property, since the appellant had not discharged the burden of proof, which lay upon him, of showing that he had proved an intention, or taken steps, such as would have the effect of divesting him of his commercial domicile in Turkey.

Judgment of the High Court (in Prize) affirmed.

Present:—Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Arthur Channell.

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v.

BHOGILAL
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APPEAL (No. 127 of 1921) from a judgment and decree of the High Court, in Prize, delivered on June 12, 1919 (reported in I. L. R. 44 Bom., p. 61).

By the judgment appealed from the steamship "Kara Deniz" was condemned as good and lawful prize on the ground that at the time of her seizure she belonged to an enemy of the Crown.

The appellant, Socrates Atychides, who was claimant in the prize proceedings, was born at Constantinople and had carried on business there all his life. About 1911, he had become a naturalized Persian, after which the ship which he owned flew the Persian flag, but he continued as before to carry on his business at Constantinople.

On August 15, 1914, he entered into an agreement to purchase the "Kara Deniz" from a Turkish company. The ship arrived at Bombay on August 19, 1914, flying the Turkish flag, and with Turkish officers and crews. On August 25, the Persian flag was hoisted and the name of the ship purported to be changed, but the port officer refused to recognize the alleged change of nationality and name, as no ship's papers were produced. On November 5, 1914, war was declared between Great Britain and Turkey, and on November 19, 1914, the ship was seized.

In proceedings in the Prize Court, Bombay, for the condemnation of the ship as prize, the appellant claimed her together with damages.

The cause was tried by Macleod C. J. on February 22, 1915, when the appellant and other witnesses gave evidence. On March 11, 1915 the learned Chief Justice delivered a preliminary judgment, holding that it was proved that according to the Municipal law of Persia and Turkey the transfer of the "Kara Deniz" on

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August 15, 1914 was complete ; that under Article 57 of the Declaration of London 1909 the neutral or enemy character of a vessel must be determined by the flag she is entitled to fly, irrespective of the personal status of the owner, but that there was considerable justification for the respondent's contention that there was a strong inference that an arrangement had been made between the appellant and the vendors that the latter should retain control of the vessel after the transfer, which was merely effected in order to allow of the vessel reaching the nearest Turkish port under the Persian flag. His Lordship, therefore, directed that the cause should stand over *sine die* to enable the appellant to produce further evidence in support of the *bona fides* of the alleged transfer.

No further proceedings were taken until April 1919, when in view of the report of the Judicial Committee in *The Proton*⁽¹⁾ the respondent moved that the case be set down for further hearing on the question whether the "Kara Deniz" should not be condemned as lawful prize on the ground that at the date of the capture the domicil of the appellant was Turkish.

On June 9, 1919 the learned Chief Justice gave judgment. He found that at the outbreak of war the appellant had his commercial domicil in Turkey, that he had shown no intention of removing that domicil to a neutral country but, on the contrary, had declared his intention of returning to Turkey as soon as he could in order to attend to his business. Upon a consideration of the authorities the Chief Justice accordingly condemned the ship as good and lawful prize.

1922, July 5:—*Mirza Khan* for the appellant contended on the facts that the appellant had terminated

⁽¹⁾[1918] A. C. 578.

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his commercial domicile in Turkey; and that the ship had been improperly detained at Bombay before war with Turkey commenced.

Sir Leslie Scott, S. G. and *Hon. Geoffrey Lawrence* for the respondent, the Secretary of State for India in Council, were not called upon.

The judgment of their Lordships was delivered by

LORD SUMNER:—Although their Lordships do not find it necessary to call upon the Crown for any argument, they must not be understood to cast the smallest slight upon the argument which has been advanced to them on behalf of the appellant in so doing. Indeed, they wish to say that great assistance has been rendered to them by the brevity, the clearness and the good judgment which Mr. Mirza has displayed on behalf of his client; but their Lordships have come to the conclusion that there is no ground made out upon which they can interfere with the condemnation which was pronounced in the Court below.

The case is a claim in prize for the condemnation of the "Kara Deniz." It has been heard on two occasions. On the first the learned Chief Justice found that the formalities of the transfer to the claimant appeared to be complete, but he had doubts, which the circumstances certainly seem to have warranted, whether the transaction might not have been a collusive one entered into for the purpose of assisting the Turkish Government, then an enemy of His Majesty, and accordingly the case was adjourned to give the claimant the opportunity of calling further evidence upon that point. Subsequently the case came on again, and a decree of condemnation was pronounced upon the ground that the claimant had, at the time of the capture and continuously thereafter, a commercial domicile in

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Constantinople, and that he had never formed any intention, or taken any steps, which had the effect of divesting him of that commercial domicile and adopting some other. If the decision that he had not done so, and had therefore retained his Turkish commercial domicile, was correct, it is not contended before their Lordships that the condemnation was not properly pronounced.

The question is one of fact, and depended in the first instance upon the evidence given as to the acts and intentions of the claimant. He was by race a Greek. He was a member of the Orthodox Greek Church, but was born in Constantinople a Turkish subject. About three years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before. In partnership with a Turkish subject he traded as a manager of shipping, and, in co-ownership sometimes with Turks and sometimes with Germans, and in one or two cases without any co-owners, he was owner of a number of vessels trading principally in the Black Sea, where they carried the Russian mails, and through the Suez Canal and down the Red Sea, where they engaged in the pilgrim traffic to Mecca. This business he carried on up to the very eve of the outbreak of the war between Turkey and Great Britain. He happened then to be in the Piræus in consequence of some trouble which one of his vessels, the "Teheran," had got into. The imminence of war must have been obvious to him, as it was to everybody else, because his vessels had been employed in transporting troops for the Turkish Government, a service which they had rendered in time of peace for some years, but now were called on to render upon an exceptionally large scale.

In the autumn of 1914 mines had been laid in the Dardanelles, the traffic through the Straits was no

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longer conducted in the ordinary mode of times of peace, and it could hardly have been a surprise to him when, at the Piræus, he learned that war had formally begun. He took an early opportunity of removing from the immediate area of war his wife and children, and brought them to Piræus. His Turkish partners he left in Constantinople. His material interests were, there, because his ships, except the "Teheran" and the "Kara Deniz," were in the hands of the Turkish Government, and his undertakings therefore continued as before in Constantinople, though they were seriously hampered, and perhaps brought to a standstill, by the war. He next devoted himself to the fortunes of the "Kara Deniz," which he had bought in the previous August. It may be assumed for present purposes that everything connected with the purchase was done in good faith, but she was a vessel at that time on passage eastwards, and reached Bombay before he had been able to communicate with the captain for the purpose of taking the formal steps necessary to change her flag and to establish her as a Persian vessel. She reached Bombay flying the Turkish flag, under the command of a Turkish captain, with a Turkish crew; she had no register on board, but in other respects she was documented as a Turkish vessel. He accordingly went to Bombay himself for the purpose of trying to terminate her stay at Bombay, for the authorities insisted that before the change of ownership could be recognised the register must be produced and put into regular order. His intention was to forward the vessel to a destination, which he says had been pre-arranged, Busra.

Under these circumstances the burden of proof was upon him to satisfy the learned Chief Justice that the commercial Turkish domicil, which he had certainly retained up to the time when war broke out, had been altered. He might have stated that it was his intention

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definitely to give it up, and not to resume business in Constantinople at all. As to that he made statements in evidence before the learned Chief Justice which negatived any such intention, because he said in cross-examination, "I shall go back as soon as the Dardanelles are open. It is immaterial to me whether war is going on or not. I want to go to look after my business. I was afraid of the safety of my wife and family, as they were Greeks." It is true that in re-examination he said, "I do not want to trade there while war continues. If I got to Constantinople I would try and get my ships to Piræus," and it is suggested that what he really meant was that he expected that very shortly, not only would Constantinople be in the hands of the British forces, but apparently would have been annexed to the British Empire and have become a British possession. No grounds are shown for so far-reaching an anticipation as that, but at any rate he gave this evidence before the Chief Justice, who formed his own opinion as to it. Cogent grounds would be needed to alter the conclusion drawn by him from the oral evidence which the appellant gave, in spite of the fact that he spoke Greek, and that it seems doubtful whether the interpreter thoroughly understood Greek, while the Court did not at any rate profess to understand that language. Every act of Mr. Atychides at the time was consistent with the intention to retain his commercial domicile at Constantinople, and is inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the "Kara Deniz" to a Turkish port, although he was not able to show that there was any particularly pressing commercial object in sending her to Busra, where no cargo was engaged, where no agent had been appointed and where, so far as appears, there was no trade to be expected. He continued to act exactly as before, so far as their Lordships know. It

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may be said that there was very little that he could do with his business in Constantinople, he being in the Piræus and his ships being in the hands of the Turkish Government; but still the matter rested with him, and on appeal their Lordships think it is impossible to dissent from the conclusion which the learned Chief Justice arrived at in that state of the evidence, namely, that the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey, as he had been before. That being so, it has not been argued before their Lordships that the condemnation should not stand.

There were other claims raised at the first trial, the nature of which appears to have been that it was contended that the ship had been detained by the Government at Bombay either without legal authority or in the unreasonable exercise of a legal authority, and under such circumstances as to warrant the claimant in the prize proceedings making a claim for damages for detention of the vessel. It may be that, if the ship had been released in the prize proceedings, he might have a claim for something of the kind, but what claim in prize he could have as an alternative to a claim for the release of the vessel and consistently with her condemnation does not appear.

On the first occasion, either by arrangement or in the discretion of the learned Chief Justice, those questions do not seem to have been tried; on the second occasion it was unnecessary to try them because the vessel was condemned, and there it was conceived the matter ended. It has been contended before their Lordships by counsel for the appellant, first of all that there is such a grievance, and secondly that it is one upon which their Lordships ought to pass an opinion in the appellant's favour. It is quite clear that, sitting in

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appeal, their Lordships could not investigate this matter for the purpose of giving a decision themselves, if it was never passed upon at Bombay before a Court there and after proper examination of the facts in Court, and their Lordships are clearly of opinion that no ground whatever has been made out for giving the appellant any relief in that connection. If he has any such rights he should prosecute them in Bombay.

Their Lordships are very far from encouraging any supposition that he has such rights. Counsel frankly admitted that the case must be, not that there was illegal behaviour on the part of the port officials, but that they acted unreasonably in exercising legal rights for a long time instead of accepting the representation diplomatically made on behalf of the claimant, and it was contended that the object was the indirect one of getting an opportunity of condemning a Persian vessel as Turkish if war should break out between Great Britain and Turkey. A charge of bad faith like that, which has never been investigated, still less supported, is one as to which it is unnecessary to say anything further.

Their Lordships, therefore, think that there is no ground whatever for interfering with the condemnation pronounced by the Chief Justice of Bombay, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant : *Mr. C. J. Canning.*

Solicitor for respondent : *Treasury Solicitor.*

Appeal dismissed

A. M. T.
