

D. EARNSHAW AND OTHERS (GREAT BRITAIN) *v.* UNITED STATES

*(Zafiro case. November 30, 1925. Pages 579-585.)*

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These are claims for property looted or destroyed by the crew of the *Zafiro*, on May 4, 1898, while the ship was moored alongside the wharf of the Manila Slipway Company at Cavite, engaged in coaling. The claimants were employees of the company and lived on the premises in houses belonging to the company. During the naval battle of May 1, 1898, in Manila Bay, as the wharf and premises were in the line of fire and shells were exploding about the houses, the claimants and their families went away for safety, leaving the premises in charge of Filipino watchmen and Chinese employees of the company. On May 4 the *Zafiro* was ordered to go to the Spanish coal pile at Cavite to coal, and in order to do so moored alongside the company's wharf. The evidence as to what followed is in conflict and there is much dispute as to the facts. We do not doubt that the affidavits of the watchmen and of the Chinese employees are at least somewhat exaggerated. But it is clear enough that the Chinese crew of the *Zafiro* took a substantial part in the looting of the houses of the claimants and destruction of their property, which was undoubtedly complete and thorough. Hence it becomes necessary to consider whether and how far the United States is liable for the actions of the crew.

It appears that the *Nanshan* and *Zafiro*, two British merchant vessels, were bought by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. They were not commissioned, but were registered as American vessels, and the original crews (British officers and Chinese sailors) were shipped in the American merchant service. The reason for so doing is set forth in Admiral Dewey's autobiography as follows: "We registered them as American merchant steamers, and by clearing them for Guam, then almost a mythical country, we had a free hand in sending them to English, Japanese or Chinese ports to get any supplies we might need." In other words, it was not intended that they should trade and they did not trade. They were used as supply ships and colliers; and the purpose of registering them as merchant steamers was to enable them to resort to neutral ports to obtain supplies and coal, not for general purposes of the United States, but for the specific purposes of Admiral Dewey's naval operations. An ensign and four men were placed on each and Admiral Dewey and Admiral Crowninshield each speak of the naval officers as being "in command". Admiral Crowninshield says: "The naval officer exercised control over all the movements of the ship and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew and with the ship." Ensign Pearson, now Commander Pearson, who was on the *Zafiro*, says: "My instructions were not to interfere particularly with the details of the ship's routine, but to receive the Admiral's orders for the ship and see them carried out, and to assist as much as possible and consistent with the general duty of the ship." He adds: "At the time of her purchase she was manned by British merchant officers and a crew of Chinese. With the exception of the captain and chief engineer, these officers and crew were retained on the vessel. A. M. Whitton, who had been first mate, was made captain, and W. D. Prideaux, formerly second mate, was made first mate . . . The handling and management of the Chinese crew

was left to the ship's officers, who had been with the crew in the merchant service and better understood their ways and peculiarities.”

On behalf of the United States, it is contended that the *Zafiro*, registered as a merchant ship, must be so regarded and can not be held to be a public ship for whose conduct the United States may be held liable. In support of that contention reference is made to a long line of cases as to the immunities of public ships, e.g., the *Exchange*, 7 Cranch, 116; the *Charkuch*, L. R. 4 Adm. & Eccl. 59; the *Parlement Belge*, 5 P. Div. 197; the *Guj Djemal*, 264 U.S. 90; the *Pesaro*, 277 Fed. Rep. 473; the *Attualità*, 238 Fed. Rep. 909. In addition counsel for the United States rely upon the seventh convention of the Second Hague Conference of 1907, and on the decisions of the United States Court of Claims in *Stovell v. United States*, 36 Ct. Cl. 392, and the Manila prize cases, 188 U.S. 254, in which, it is argued, the status of the *Nanshan* and the *Zafiro* was established.

We have no difficulty in distinguishing those cases from the one before us. The *Exchange* case had to do with the immunity of warships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for her action, in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. No such situation is presented in the cases cited. In the *Guj Djemal*, 264 U.S. 90, and *ex parte Hussein Lufti Bey*, 256 U.S. 616, the Turkish Government owned, possessed, and operated the vessel, but it was engaged in “ordinary commerce under charter to a private trader”. It was held that the vessel could be libeled for services and supplies. In the *Pesaro*, 277 Fed. Rep. 473, the ship was owned by the Kingdom of Italy, was in possession of the Italian Government and was manned by a master, officers, and crew employed by a department of the Government. But it “was engaged in commercial trade, carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department of the Italian Government having to do with military or naval affairs” (473-4). Even if the case before us were necessarily governed by the question whether immunity could have been claimed for the *Zafiro* in a foreign port, these decisions would not be in point. Even more is this true of the *Attualità*, 238 Fed. Rep. 909, where the crucial point, as the court decided, was to be found in the circumstance that the Italian Government was not in possession of the ship which it owned.

In the admirable opinion of Judge Mack in the *Pesaro*, 277 Fed. Rep. 473, 481, it is said: “If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily, not upon her ownership, but upon the nature of the service in which she is engaged and the purpose for which she is employed.” We agree. But if we carry this out and say that the liability of the State for her actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed, it is obvious that the case before us differs radically from all those which have been cited and on which the United States relies.

It may be conceded that the *Zafiro* does not meet all the requirements of “a converted merchantman” under convention VII of the Second Hague Conference of 1907. But the purpose of that convention was to distinguish

converted merchantmen from privateers and to give them a proper status as ships of war; not to cover such a case as that presented here.

As to the Manila prize cases, 188 U.S. 254, and *Stovell v. United States*, 36 Ct. Cl. 392, we think, when looked at critically, they go to sustain liability of the United States. One of the findings of the Court of Claims, affirmed by the Supreme Court of the United States, was: "The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew" (188 U.S. 280). Another finding was: "the duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan* . . . but not to interfere with the internal management and discipline of the ship and such things as loading and unloading cargo" (id. 281). The question involved in those cases was whether the merchant officers of the *Nanshan* and *Zafiro* were entitled to prize money for ships taken in the battle of Manila. The District Court held that "the *Nanshan* and the *Zafiro*, not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in such conditions as to be able to render effective aid if required, are not entitled to share in any of the prize money". (id. 282-3). The Court of Claims "held on the facts that the *Nanshan* was not at the battle of Manila in such a condition as to enable her to render effective aid if required; that she was performing the functions of a collier, to be protected instead of to act aggressively" (id. 282). These findings were approved and adopted. They are far from showing that the *Zafiro* at the time in question was a mere merchant ship for whose actions the United States would not be responsible.

From all the evidence we are of opinion that the *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered so as to make the United States responsible, and to consider how far the United States would be chargeable for want of supervision by those who had or should have had the crew in charge under the circumstances.

It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and, on the other hand, bodies of straggling and marauding soldiers not under the command of an officer, or marauding sailors not under command or control of officers. Hayden's case, 3 Moore, International Arbitrations, 2985; case of Terry and Angus, Id. 2993; Mexican Claims, Id. 2996-7. These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In Donougho's case, 3 Moore, International Arbitrations, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the posse became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In *Rosario & Carmen Mining Company's* claim, id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself "to restrain the violence of such an excited body of men". In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not

use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican claims, 3 Moore, International Arbitrations, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof (see also Porter's case, *Id.* 2998). And in the case of Dunbar & Belknap, *id.* 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

In the case before us, we think the officers were not actually present at the houses when the looting was done. After members of the crew brought some of the property upon the vessel, and one of the officers found where it came from, he went to the houses and took away some articles in order to preserve them for the owners. This is evidently what the Chinese witnesses have in mind when they charge the officers with looting; for one of the officers tells us that when he found the Chinese so interpreted his good offices, he desisted for the sake of good order. After the matter was drawn to the attention of the naval officers, the vessel was searched and the articles found on board were returned to the claimants. But the damage had been done. Moreover, Captain Whitton's statement that he "stopped anything he saw coming on board" gives the impression that he did not stop with sufficient promptitude the taking of things on land before they could come on board, after he found that plundering was going on. Without regard to this point, however, we feel that there was no effective control of the Chinese crew at the time when the real damage took place. When the *Zafiro* was tied up alongside the company's wharf, where the houses were, the naval officer and the merchant captain went off to look at the Spanish batteries, leaving the crew in charge of the first mate. The latter gave half of the crew leave to go ashore. Captain Whitton says significantly: "You know what Chinese are, especially these times." To let this crew go ashore where these houses were, with no one in charge of them, at a time when plunder and pillage were certain—and plunder and pillage by the Filipinos had been observed by all the officers—seems to us to have been highly culpable.

It was said in argument that a government is not responsible for what its sailors do when on shore leave. But we cannot agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of government. Here the Spaniards had evacuated Cavite, and no one was in control except as the Navy controlled its own men. The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body. In Jeanneaud's case, 3 Moore, International Arbitrations, 3001, the unusual circumstances were dwelt upon. Here also what might have been proper enough under other circumstances became culpable under those which actually obtained. Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a

substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.

We award as follows: to D. Earnshaw, \$4,392 (Mexican); to A. Young, \$1,306.50 (Mexican); to G. Gilchrist, \$458 (Mexican).

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