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JONES vs. CARDWELL noe. et.

MESSRS. Falzon Brothers purchased a machine from the Government of Malta for Lm2,000. The Government undertook the obligation of supervising the transport of the machine to, a certain factory, without, however, taking any responsibility for breakages etc. ; it was also agreed that the transport expenses were to be borne by the purchasers and that a particular Transport Firm was to be entrusted by the Government with the task. Mr. John Attard, a trustworthy Government employee, was charged with the duty of supervising the carriage of the machine. Mr. Attard, together with the employees of the Transport Company, without asking for permission used a small cart belonging to purchasers in order to convey the machine into a room of the factory of Messrs. Falzon Bros. The cart which was defective, broke down, seriously damaging the machine.

On a demand being made to the interested Government Department for payment of damages caused on account of the negligence of the Government employee, Mr. Farrugia, the Head of Department, without the proper authorization admitted outright the Government's responsibility and the Treasurer, Mr. Dimech, in spite of the lack of authorization, issued a bill of exchange payable at sight in the Government's name for Lm300 (assessed damages) against Mr. Scicluna who, was debtor to that Government Department for the sum of Lm300. Messrs. Falzon Brothers endorsed the bill in favour of Mr. Jones, who after three weeks from the date of issue fruitlessly presented the bill for payment to Mr. Scicluna. The bill had not been presented for acceptance. He, however, failed to comply with the legal terms for the drawing-up of a protest. He informed Falzon Bros. of the whole position and an assignment of all rights of action anent this matter was made by Falzon Bros. to Mr. Jones, who however declared that he did not renounce to any rights he might have according to law. Later, Mr. Jones notified the Government of the assignment.

Mr. Jones is now actioning the Lieutenant-Governor as the representative of the Government for the payment of Lm300 in virtue of the bill of exchange, once the Government is in possession of the "provvista", Mr. Scicluna having settled his debt in due course after Mr. Jones's demand, and, subsidiarily, as assignee of Falzon Brothers, for the payment of Lm300 as damages resulting from the act of a Government employee during the execution of a Government contract. In the same writ of summons an action is also instituted against Falzon Bros, subordinately to the first action, for the payment of Lm300 arising out of the cause (i.e. the original debt) for which the bill of exchange had been endorsed.

The Court before which the actions are instituted possesses civil and commercial competence.

Mr. Farrugia, Mr. Dimech, Mr. Attard and the Transport Co. have been called into the suit as interested parties.

* Reported by Victor Frendo and Joseph M. Ganado, B.A.

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Professor F. Cremona, LL.D., kindly consented to hear the case.

Counsel for Cardwell noe. : Mr. J. Desira Buttigieg.

Mr. V. Ragonesi.

Counsel for Mr. Jones : Mr. V. Borg Costanzi.

Mr. R. Staines.

Counsel for Messrs. Falzon Bros. : Mr. J. Grech, B.A.

Counsel for Transport Co. : Canon C. Farrugia,

B.Litt., D.D., B.L.Can.

Counsel for Mr. Farrugia and Mr. Dimech : Mr. C. Schembri.

Counsel for Mr. Attard : Mr. P. Saliba.

Mr. Borg Costanzi opened the case by affirming that notwithstanding that the protest had not been drawn up, his client could action the Government as the holder of the "provvista" in virtue of sec : 299. The bill bore on its face no irregularity and therefore the Government was responsible on this ground independently of any other question. As to the subsidiary demand, he submitted, the Government was legally responsible for the reason that the damage had been caused by its man datary during the performance of his duties.

Mr. Desira admitted that the Government would have been responsible if the ordinary action of redress had been exercised according to law ; but, since other persons were appearing in the suit for its integration, further questions of responsibility had to be discussed. Mr. Farrugia could not prejudice the Government because in admitting the Government's responsibility outright he was clearly abusing of his office. The same could be stated in regard to Mr. Dimech who had issued the bill without any "cause" whatsoever. Attard's duty was merely to supervise the transport and **not** to meddle with the transport as such ; he therefore exceeded the limits of his mandate and according to well-established principles of law no liability could accrue to the principal if a tort was committed by the mandatary, except in the case of existence of *culpa in eligendo*, which in this case was altogether out of the question.

Mr. Grech for Falzon Brothers said that ones the protest had not been filed within the legal term, no responsibility could arise from the enforcement. The only source of responsibility that remained was the assignment of rights, the warranty of which referred by law only to the price. No price was here mentioned, so that presumably the assignment had been gratuitous in which case, Mr. Grech submitted, there evidently arose no right of redress.

Mr. Schembri appearing for Mr. Farrugia and Mr. Dimech submitted that there was no doubt as to the Government's responsibility because the signature of the Treasurer was binding on the Government. The question whether there was any right of redress was not within the orbit of this suit and therefore he declared that he was refraining from discussing that point.

Mr. Saliba for Mr. Attard said that the latter's duty was to supervise the transport and not to see whether the means of transport were faulty or otherwise. It was up to the Company to see that suitable means be used and it was no concern of his client to enter into this merit.

Canon Farrugia said that the Company's employees had acted beyond their mandate in using a cart which had not been given to them for the purpose. Therefore their *culpa* was of a tortious character and, since *culpa in eligendo* had neither been alleged nor proved, the

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Company was not responsible in any way ; responsibility weighed on the employees personally.

Professor Cremonia delivered judgment in the following sense :

The action brought forward by Jones contained three claims which had to be considered separately : the first against the Government based on the bill of exchange ; the second also against the Government and subsidiary to the first based on the assignment made by Falzon Brothers ; the third of a subordinate nature to the first was against Falzon Brothers for the payment of Lm300 arising first of the "cause" that is, the original debt for which the bill of exchange had been endorsed.

In regard to the first claim Professor Cremona noted that it was an established principle that bills of exchange gave rise to an autonomous and independent right which, in this case, plaintiff as endorsee had acquired in respect to all the signatories of the bill and therefore also against the Government i.e. , the drawer of the bill. The action brought forward, by the plaintiff

was one of recourse for non-payment. Two pleas had been set up :

a) that plaintiff had lost the right of redress, as he failed to make the protest for non-payment ;

b) that the Government was not to be held responsible for the payment of the bill, because the bill had been issued by the Treasurer without the necessary authorization.

Professor Cremona held that both pleas were not well based at law. The law provided that the right of recourse shall revive in favour of the holder against the drawer or endorser who after the expiration of the term prescribed for the protest....., has received on account or by way of compensation, or in any other manner, the funds assigned for the payment of the bill and, without doubt, the Government did receive from Scicluna the funds assigned for the payment of the said bill. As regards the second plea there arose the question as to the Government's liability deriving from an act of one of its employees, when the act was actually in abuse or in excess of the powers granted to such employee. On the strength of the principles laid down by Bonnici and by Giorgi, which on various occasions had been applied by our Courts, it appeared that when an employee performs an act which ordinarily pertains to his official position—such as the case under review—the Government is to be considered bound to honour it, saying any right of redress against the employee "*si et quatenus*" This apart from the question whether such a plea could be set up in terms of sections 253 and 254 of the Commercial Code.

In view of the above plaintiff's first claim was allowed and as a consequence it was not necessary to consider the remaining two claims,

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A BARRISTER'S DUTY

"I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty." *Johnson*. "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a Judge." *Boswell*. "But what do you think of supporting a cause which you know to be bad?" *Johnson*. "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly ; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong and he is right.. It is his business to judge: and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion." *Boswell*. "But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?" *Johnson*. "Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk his feet." – (*Boswell: Life of Johnson*).