

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thomas Eales Rogers v. Rajendro Dutt and others, from a Decree of the Supreme Court of Judicature at Fort William in Bengal; delivered on the 30th day of July, 1860.*

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Present :

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR EDWARD RYAN.

SIR JOHN TAYLOR COLERIDGE.

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SIR LAWRENCE PEEL.

THIS was an appeal from the Supreme Court of Calcutta. The Respondents were the Plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been and then were the owners of a steam-tug called the "Underwriter," employed for hire in towing ships to and from the port of Calcutta, and in the receipt of large profits from such employment; and that the Defendant was an officer in the Public Service of the East India Company, having the name and style of the Superintendent of Marine, and that, as such, he was invested with the chief authority and control over all the officers of the Bengal Pilot Service employed by the Company on the Hooghly River for the purpose of piloting vessels thereon to and from the said port; and that the said officers of the Bengal Pilot Service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward-bound ships; and that in consequence of the perils of the navigation, no ship

can with safety proceed inwards or outwards, or be duly navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the Defendant wrongfully and unjustly contriving and intending to injure the Plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order, addressed to the said officers of the Bengal Pilot Service, whereby he, as such Superintendent of Marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at 20,000 rupees. To this plaint the Appellant pleaded three pleas, on the first only of which, being the plea of not guilty, the question before their Lordships arises. The allegations in the inducement by way of recitals must be taken to have been admitted by the Defendant; and supposing the direct allegations which are in issue to have been proved, in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded: the point for consideration, therefore, is whether upon the evidence in the case this action is maintainable.

As their Lordships view the evidence, the facts appear to be the following:—The Bengal pilots are an organized body, under the control of the Superintendent of Marine, which office, at the time in question, was filled by the Defendant. They form by far the larger part of the Calcutta pilots, and on them devolves the almost indispensable duty of piloting vessels up and down the Hooghly to and from the sea and port of Calcutta. Tugs are constantly required for bringing vessels up; and the plaintiffs were owners of one, a steam-tug, the "Underwriter," employed in this service. For such service there are two rates of payment, one called the Government Certificate, in which the amount is regulated by a tariff according to the time employed; the other depending on the special contract between the parties. On the 20th September, 1857, when the mutiny in India was in full vigour, Her Majesty's ship "Belleisle" entered the

Hooghly, bringing troops for the public service. The captain of the "Underwriter," Henry Fox, who was seeking employment, went on board and offered to take her up. At this time a Bengal pilot was in charge of her. Fox declined to take her on the terms of the Government Certificate, and asked a much larger sum, first 3,000 rupees, and finally 2,500. The Captain, not choosing to incur the responsibility of agreeing to this demand, telegraphed once and again to Mr. Beadon, the Secretary to the Government of India, stating, on the second occasion, the demand, that his pilot required a powerful tug, and asking what amount he might offer. On the receipt of this second application, Mr. Beadon communicated it to the Defendant, with a letter stating what had passed, and concluding with these words,—“What had better be done?” The Defendant immediately went to Mr. Beadon, and gave him his opinion that the charge was exorbitant; that it was Mr. Beadon's duty to take steps to prevent such charges being made for ships coming in with troops; that the rate of charge might otherwise increase from day to day with the increasing necessities of the Government; and added, that if he left the matter to him, he would proceed to the Bankshall (the place of rendezvous for the Bengal pilots) and direct one of the officers to see the owners of the tug, and tell them that if they did not send down immediately an order to take the troops in tow, he would issue an order to the officers of the Pilot Service, strictly prohibiting them from allowing the "Underwriter" to take any ship in tow of which they had pilotage charge. To this Mr. Beadon answered, "I think you would do right;" and so left it with the Defendant to dispose of the matter. What the Defendant said he would do, he immediately did. The Government terms were still refused by the Plaintiffs, and the service was unperformed by them. Whereupon, on the 22nd September, by the directions of the Defendant, the order complained of was issued, and remained in force until the 19th October, when, by the direction of the Government, it was rescinded; and it is for the loss of employment during this interval that the action has been brought and the damages awarded.

On this state of facts it does not appear to their

Lordships material to consider whether the demand made on the part of the Plaintiffs was exorbitant or not, nor whether the opinion expressed by the Defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the cause, that the act complained of is to be considered as the act of the Government, and that in the part which the Defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the Plaintiffs. For if the act which he did was in itself wrongful, as against the Plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below; indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be, "the invasion of the right of the Plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling, without undue hindrance from others." No doubt an act which, *prima facie*,

would appear to be innocent and rightful, may become tortious if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house: *primâ facie* it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

The question then is whether, in this sense, the Defendant has been guilty of a wrongful act. On the one hand, the Government has frequent occasion to have vessels towed up the river, and it desires to have this done by the owners of towing-vessels on certain terms which it believes to be just; and it keeps in its service a body of pilots, who have the charge of vessels coming up the river; and it is assumed that, practically, the discretion, for the time being, of employing the particular towing-vessel that is to bring up a ship, is vested in the pilot who has her in charge. The Plaintiffs decline to deal with the Government on the terms which it desires to deal on, and in a particular case insist on what appears to the Government not only to be an unreasonable demand in itself, but likely, as a precedent, to be injurious to the public interests, if yielded to in this particular instance. If the Plaintiffs have the right, as undoubtedly they have, of prescribing what terms they please for the services they are to render, it cannot be doubted that the Government has an equal right to accept or refuse to deal with the Plaintiffs on those terms: to say, We will employ you only if you will accept such or such a remuneration. And if the prohibition complained of had been limited to pilots in charge of vessels in the public service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequences might have been to the Plaintiff's business; nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government, although the consequence would have been directly a total loss

of employment by the Plaintiffs; for their right to exercise their calling must be understood only as co-extensive with, and not as overriding, the right of the public or of individuals to deal with them or not, at its pleasure: the right to buy or to refuse to buy is as much to be regarded, as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this: it forbids the officers of the Pilot Service from allowing the "Underwriter" to take *any* ship in tow, of which they have pilotage charge, and the question is whether this difference in extent makes it, as against the Plaintiffs, wrongful. Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has organized a body of pilots; it does not appear that any law forbids the employment of a pilot who is not of that body, and, indeed, it was proved that there were other pilots exercising their calling in the port of Calcutta, on whom the Government prohibition would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or cooperate with in performing the services for the due performance of which they are enrolled and taken into its service. Supposing it had been believed that the "Underwriter" was an ill-found vessel, or in any way unfit for the service, might not the pilots have been lawfully forbidden to employ her, until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels, of all but those employed on its own account, the Government by its pilots co-operates with the Plaintiffs in the service of bringing their vessels safely into port; may it not refuse that co-operation so long as it believes the demand made by them unreasonable, and likely to be prejudicial to its own interests, that is, the interests of the public? Their Lordships think this question can admit of only one answer, and if so, the prohibition issued by the Defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the Plaintiffs.

It will be observed that their Lordships are only dealing with a case in which no malice, in the most general sense of the term, is imputed, or proved against the Defendant. It is unnecessary to consider what would have been their judgment in a case in which the Defendant had given the same advice to the Government, and done the same act towards the Plaintiffs from any indirect motive, or with direct malice against them. It is enough to say that the decision of such a case would turn on totally different principles from the present.

It will be observed also that their Lordships' reasoning identifies the act of the Defendant with the approbation of the Secretary to the Government; and they do this, not forgetting his letter to the Defendant dated on the 15th October, in which the Defendant is censured for his act, and directed to recall it; for their Lordships think that the evidence of the Defendant, uncontradicted by the evidence of Mr. Beadon, clearly establishes that the Defendant acted with his approbation. To him application had first been made for directions by the Captain of the "Belleisle," and he sought advice of the Defendant, accepted the advice which was given in good faith and could not have been withheld without breach of duty, and if so, the character of the act cannot be changed by the change of opinion subsequently manifested, or by the censure which it was thought right to inflict upon the agent.

This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. This appeal has also been very ably argued at the Bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited, either in the judgment or the argument. It seems to them that when the legal principles to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point: it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however

directly, do him harm in his interests, is not enough. The cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly, without being actionable. The present case appears to their Lordships to be no more, and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the Respondents.

J. T. C.

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