1965
Feb. 19,
Nov. 23,
Dec. 10.
1966
Jan. 7,
Feb. 9

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COSTAS MOURTOUVANIS & SONS LTD.
and
THE REPUBLIC OF CYPRUS THROUGH
1. MINISTER OF FINANCE
2. DIRECTOR OF CUSTOMS

[MUNIR, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS MOURTOUVANIS & SONS LTD.,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

1. MINISTER OF FINANCE,
2. DIRECTOR OF CUSTOMS,

Respondent.

(Case No. 247/63).

Customs—"Privileged goods"—Seizure—Omission to return—Condemnation or forfeiture of the goods—Customs offences and customs prosecution—The Customs Management Law, Cap. 315 (as amended by Law No. 26 of 1961, of the 23rd June, 1961) sections 2, 144, 185(1)(2)(3)(b), 186, 187, 188, 189(1) and (2), 194, 201(s), 209(o), 220, 222, 226 and 227—Recourse under Article 146 of the Constitution against respondent's omission to return to applicant goods etc. seized by respondent—Seizure lawfully and properly made in accordance with the provisions of sections 185 and 187, of Cap. 315, (supra)—Return of the said goods under section 189 of Cap. 315, (supra)—It was the failure of the applicant in not complying with the provisions of the said section 187 that the provisions of the said section 189 for the return were not set in motion—Criminal proceedings instituted by respondent against the applicant Company in relation to the said same goods—It is upon the competent Court trying the offence charged whether or not to exercise the discretion now vested in it under section 226 of Cap. 315, supra, (as construed and applied under Article 188 of the Constitution and in the light of paragraph 3 of Article 12 thereof) to order the condemnation and forfeiture of the said goods.

Administrative Law—See, also, under "Customs" above—Recourse under Article 146 of the Constitution—Time prescribed by paragraph 3 of that Article within which recourse should be filed—Provisions of the aforesaid paragraph 3 as to time are mandatory and have to be given effect to in the public interest in all cases—Even if the question is raised for

the first time at the hearing—On the other hand, the provisions such as those contained in paragraph 3 of Article 146 which limit the right of access to court, should be restrictively interpreted and applied—And in case of doubt should be applied in favour of the citizen.

Omission—Continuing omission—In the instant case the omission of the respondent complained of was a continuing omission—And it continued right up to the filing of the present recourse—Therefore, the recourse was filed within the time prescribed by paragraph 3 of Article 146 of the Constitution.

Constitutional Law—Article 146, paragraph 3 of the Constitution —It has to be: (a) given effect to in the public interest in all cases, and (b) should be restrictively interpreted as limiting the right of access to court and in case of doubt be applied in favour of the citizen—See, also, under "Administrative Law" above.

Constitutional Law—Article 12, paragraph 3 of the Constitution and the Customs Management Law, Cap. 315 (supra), sections 187 and 189—Provisions of section 187 of the said Law do not contravene the provisions of paragraph 3 of Article 12 when the said section 187 is read as it must be read, in its context, in conjunction with the provisions of section 189 thereof—Such provision as the one contained in section 187 of the statute prescribing a time limit of fifteen days from the date of the seizure of the goods for claiming the goods so seized, is a perfectly usual and proper provision relating to customs management.

Constitutional Law—Section 226 of Cap. 315 (supra) providing for the mandatory and automatic condemnation and forfeiture of goods upon conviction—In view of Article 188 of the Constitution providing that laws in force at the date of the coming into operation of the Constitution have to be applied and brought into accord with the Constitution—And in view of paragraph 3 of Article 12 that no law shall provide a punishment disproportionate to the gravity of the offence—The aforesaid condemnation or forfeiture of goods upon conviction is no longer mandatory—It is, therefore, upon the court trying an offence, the conviction on which might cause a forfeiture, to decide whether or not to exercise its discretion, vested in it now under the said section 226 as construed and applied under Article 188 and in the light of paragraph 3 of Article 12, to order condemnation and forfeiture of the goods.

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By this recourse, made under Article 146 of the Constitution, the applicant Company seeks a "declaration that the failure or omission of the respondents to return to the applicants goods and exemption certificate seized by them on or about the 2nd November, 1961 ought not to have happened"—The case arose in the following circumstances.

On the 2nd November, 1961, Customs Officers, having reason to believe that the applicant Company was in possession or control of "privileged goods" as defined by section 2 of the Customs Management Law, Cap. 315 (as amended by Law No. 26/61 of the 23rd June, 1961)*, entered the premises of the Company and, in the presence of its Managing Director, seized and carried away the disputed goods as well as 51 documents commonly referred to as "exemption certificates", in the exercise of the powers vested in them by Cap. 315 *(supra)* and in particular section 185 thereof as amended by the said Law No. 26/61. The full text of this section as well as other relevant provisions of the said statute Cap. 315 (as amended by Law No. 26/61 of the 23rd June, 1961), particularly sections 186, 187, 188, 189, 201(s), 209(o), 222 and 226 are fully set out in the judgment of the Court. "Exemption certificate" is a document consisting of three sections: the first section is an application by a "privileged person" *(supra)* for exemption from import duty; the second section consists of an endorsement made by the appropriate certifying officer of the Embassy or institution concerned and the third section signifies the approval of the Ministry of Finance for duty free import.

The disputed goods and the 51 exemption certificates continued to remain in the possession of the Customs Authorities and on the 15th March, 1962, a letter was sent to the Company offering under section 227 of Cap. 315 to compound the alleged offence with a fine of £100. Subsequently negotiations continued with a view to reac-

*" 'Privileged goods' means all goods imported, under and in accordance with any Law relating to Customs in force for the time being or with any Treaty, free of duty or upon which duty has been charged at a reduced rate or upon which duty has been charged on importation and subsequently refunded, which have been imported by or for any privileged organization or privileged person;"

'Privileged person' is also defined by the same section as including any person who is entitled to import or possess privileged goods.

hing a settlement in the matter and on the 20th March, 1963, a new offer for settlement was made by the respondent to the applicant Company. On the 29th April, 1963, the Company wrote a registered letter to the Chief Customs Officer (now Director of Customs), in which it was stated that the Company was unable to agree to the proposed settlement or to any other settlement whatever and, in which letter the return of the disputed goods in question was demanded.

The disputed goods and the exemption certificates were not returned and on the 19th December, 1963, this recourse was filed.

By section 187 of Cap. 315 *(supra)* it is provided:

> "When any vessel,..... or goods have been seized, the seizing officer or a collector shall give notice in writing of such seizure and the cause thereof to the master, owner or agent of the vessel, ...or goods, unless such master or owner be present at the seizure, either by delivering such notice to him personally or... .....,and all vessels,..... or goods seized shall be deemed to be condemned and may be sold by the Comptroller (now Director of Customs) unless the person from whom they shall have been seized or the owner shall, within fifteen days from the date of the seizure, give notice in writing to the collector at the nearest place to that where the goods were seized that he claims them;.....".

On the other hand, section 189 of Cap. 315 *(supra)* provides:-

"189(1) Whenever any vessel,.....or goods have been seized by any officer and claim to such vessel, ... or goods has been served on the collector by the person from whom such vessel,.....or goods have been seized or by the owner, the collector may retain possession of the vessel,.....or goods seized and may—

(a) without taking any proceedings for their condemnation, by notice under his hand require such claimant to institute a suit against him for the recovery of the vessel,.....or goods seized, in which case if such claimant shall not, within two months after the date of such notice, enter such suit, the vessel,.....or goods

seized shall be deemed to be condemned without any further proceedings; or

"(b) himself cause a suit to be instituted in any Court for the forfeiture of the vessel,.....or goods seized:

Provided.....

(2) If, within three months after receiving the claim, the collector has neither required the claimant to institute a suit as mentioned in paragraph (a) of subsection (1), nor himself caused a suit to be instituted as mentioned in paragraph (b) of sub-section (1), the vessel,..... or goods seized shall be handed over to the claimant".

Few months after the filing of this recourse, precisely on the 25th May, 1964, criminal proceedings were instituted by the respondent against the applicant Company in relation to the said disputed goods, under section 209(o) of Cap. 315 for the "customs offences" defined therein. The full text of that part of section 209 is set out in the judgment. Section 201 of Cap 315 as amended by Law No. 26/61 provides:

"201. The following goods shall be forfeited to the Government:-

.....

(s) All privileged goods found in the possession or control of a person who is not entitled to such goods or in respect of which an offence has been committed under this Law".

Section 226 of the same statute provides:-

"226. Where the commission of any offence causes a forfeiture of any vessel, ...or goods, the conviction of any person for such offence or the judgment or decree of a Court for recovery of any penalty attached to the commission of such offence shall have effect as a condemnation of the vessel,..... *or goods in respect of which the offence is committed*".

The aforesaid criminal proceedings were still pending at the hearing of this case, having been adjourned pending the outcome of the instant recourse.

Counsel for respondent has, at the hearing of the case,

raised a preliminary issue which has not been raised in the Opposition filed by the respondent, namely, that the recourse is out of time on the ground that it has not been filed within the period of 75 days prescribed by paragraph 3 of Article 146 of the Constitution. Another issue which has been raised for the first time at the actual hearing of this recourse, this time by counsel for the applicant, is the question of the constitutionality of those provisions of section 187 of Cap. 315 *(supra)*, which provide that goods which have been seized shall be deemed to be condemned unless a claim is made to such goods within fifteen days from the date of the seizure, as being contrary to paragraph 3 of Article 12 of the Constitution (which paragraph provides that: "No law shall provide for a punishment which is disproportionate to the gravity of the offence)". With regard to the actual merits of the case and the question whether the respondent has, or had at the material time, an obligation under section 189(2) of Cap. 315 (supra) to hand over to the applicant Company the disputed goods and the 51 exemption certificates, the main issues raised by counsel for the applicant in this connection, relate primarily to the interpretation and application of section 187 of Cap. 315 *(supra)* and these issues may be summarized as follows:

(a) Whether or not a seizure, in the sense of sections 185 and 187 of Cap 315 *(supra)*, of the disputed goods has in fact taken place;

(*b*) if such seizure has taken place, the question of the failure on the part of the respondent to give notice in writing under section 187 of Cap. 315 of such seizure;

(c) if the giving of such notice of seizure is not, in the circumstances, required under that section 187, whether a valid claim to the disputed goods has been made under Cap. 315, in particular sections 187 and 189(1) thereof (supra).

The learned Justice, in dismissing the recourse:-

Held, I. As to the preliminary issue whether this recourse is out of time.

(1)(a) Counsel for the respondent submitted at the hearing that this recourse is out of time on the ground that it

has not been filed within the period of 75 days prescribed by paragraph 3 of Article 146 of the Constitution, the latest possible date to be taken for the purpose of calculating that period of 75 days being the 29th April, 1963, the date on which the applicant Company wrote the aforesaid letter demanding the return of the disputed goods, whereas this recourse has been filed on the 19th December, 1963.

(b) Leave was granted to counsel to raise this issue for the first time at the hearing and argue it, because as stated in *Joyce Marcoullides and The Greek Communal Chamber*, 4 R.S.C.C. 7, at p. 10: "The provisions of paragraph 3 of Article 146 of the Constitution are mandatory and have to be given effect to in the public interest in all cases". It was further observed in the said case (p. 10) that "in the case of *Holy See of Kitium and the Municipal Council of Limassol,* 1 R.S.C.C. 15, at p. 18, the Court proceeded to examine this issue even though having been raised originally by Respondent, it was later abandoned by him as an objection on his part."

(2)(a) I am of opinion that, inasmuch as the nature of the complaint in respect of which this recourse is made is an omission to return the disputed goods and exemption certificate and such omission was still continuing on the date on which this recourse was filed, the matter should be regarded as a continuing omission for the purposes of paragraph 3 of Article 146 (*vide Hassan Mustafa and The Republic,* 1 R.S.C.C. 44, at pp. 47-48); and I hold that this recourse is not out of time.

(b) I adopt in this connection the observation made by the Court in *Costas Neophytou and The Republic,* 1964 C.L.R. 280, at p. 290, that: "Provisions such as paragraph 3 of Article 146 of the Constitution which limit the right of access to court, should be restrictively intepreted and applied and, in case of doubt, should be applied in favour of and not against a citizen".

Held, II. With regard to the question of the constitutionality of section 187 of Cap. 315:

(1)*(a)* Counsel for applicant raised for the first time at the actual hearing of the case the question of the constitutionality of those provisions of section 187 of Cap. 315 *(supra),* which provide that goods which have been

seized shall be deemed to be condemned unless a claim is made to such goods within fifteen days from the date of the seizure *(vide* section 187 *supra)*, as being contrary to paragraph 3 of Article 12 of the Constitution which provides that "No law shall provide for a punishment which is disproportionate to the gravity of the offence". Leave was given to counsel to argue this fundamental issue of constitutionality at the hearing. Counsel for applicant argued that the application of the provisions in question of section 187, condemning goods which have been seized irrespective of the circumstances and merits of each particular case, results in effect, in imposing a punishment on the owner of the goods which may be disproportionate to the gravity of the offence which may have been committed by the owner of such goods.

(b) I agree with counsel for the respondent who argued that the provisions of section 187 of Cap. 315 should not be considered in isolation but should be considered in their context as a whole and in particular in conjuction with the provisions of section 189 of Cap. 315 *(supra)* which lay down the procedure to be followed after the seizure of the goods.

(2) In view of the express provisions of section 189 of Cap. 315 *(supra)*, whereby machinery is set up for the question of the recovery or forfeiture of the goods seized to be determined by a competent court, and as such goods are only "deemed to be condemned" if they are not claimed within the prescribed period of fifteen days from the seizure, I am of the opinion that the provisions of section 187 of Cap. 315 *(supra)* do not contravene the provisions of paragraph 3 of Article 12 of the Constitution when the said section 187 is read, in its context, in conjuction with the provisions of section 189 of Cap. 315 *(supra)*. And such provision as the one contained in the said section 187 prescribing a time limit of fifteen days for claiming the goods seized is a perfectly proper and usual provision relating to customs management. Reasoning in *Chief Customs Officer and Associated Agencies Ltd.*, 3 R.S.C.C. 36, at p. 37, *followed.*

Held, III. As to the actual merits of the case:

I am satisfied on all the evidence before me that the Customs Officers had reason to believe that the appli-

cant Company was in possession or control of "privileged goods", in the sense of section 2 of Cap. 315 *(supra)* and lawfully and properly entered the premises of the applicant Company on the 2nd November, 1961, and lawfully and properly seized and carried away the disputed goods and the exemption certificates on the said date in exercise of their powers vested in them by Cap. 315 (as amended by Law No. 26/61), and in particular by section 185 thereof *(supra)*. There can be no doubt in my view that a seizure in the sense of sections 185 and 187 of Cap. 315 *(supra)* of the disputed goods and the exemption certificates did in fact take place on the 2nd November, 1961, and that such seizure and carrying away were lawfully and properly made.

(2)*(a)* I find as a fact from the clear evidence before me that the "owner" of the disputed goods was "present", in the sense of section 187 of Cap. 315, at the aforesaid seizure and carrying away of the disputed goods and exemption certificates. The expression "owner", in respect of goods, is defined in section 2 of Cap. 315 as including *inter alia*, the "agent or person in possession of, ...or having control of, ...the goods". There can be no doubt, therefore, that as the Managing Director of the Company was present at the said seizure made in the premises of the applicant Company, it follows that the "owner", in the sense of Cap. 315, was "present at the seizure" in the sense of section 187 of the statute *(supra)*.

(b) This being so, the seizing officer or Collector of Customs did not have to give notice in writing of such seizure to the "owner or agent" of the goods under section 187 of Cap. 315 *(supra)*.

(3) Notice in writing claiming the goods was not given by the applicant Company, as it should have been, within fifteen days from the date of the seizure as required by section 187 of Cap. 315 *(supra)*. And in the absence of such formal notice the respondent did not set into motion the provisions of sub-section (1) of section 189 of Cap. 315 *(supra)* as it would, and should, have done upon the giving of such valid notice of claim under section 187.

(4) I am of the opinion that it is possible, depending on the facts and circumstances of each particular case, that the application of the provisions of the said section

187 of Cap. 315 alone, without setting into motion the provisions of section 189 of the statute *(supra)*, might result in the forfeiture and condemnation of goods in circumstances which might offend against the letter and spirit of Article 12, paragraph 3 of the Constitution *(supra)* in the circumstances of that particular case. In view, however, of the fact that a Customs prosecution has been instituted, since the filing of this recourse, under Cap. 315, (still pending) and in view of the fact that a competent Court will thus be in a position under the relevant provisions of the statute construed and applied in accordance with Article 188 of the Constitution, to decide on the issue of the condemnation and forfeiture of the disputed goods in the light of paragraph 3 of Article 12 of the Constitution *(supra)* I do not consider it necessary to hold, as I might otherwise have done, that, having regard to all the facts and circumstances of this case (and notwithstanding the fact that technically the disputed goods might be said to have been "deemed to be condemned" under the provisions of section 187 of Cap. 315, *supra,* in view of the omission of the applicant Company to give written notice of claim within the prescribed period of fifteen days so as, to enable the setting into motion of the machinery laid down in section 189 of Cap. 315), the respondent should now set into motion the said machinery laid down in section 189(1) of Cap. 315 *(supra)*, because, as I have said, the same issue concerning the relationship of any forfeiture and condemnation to the gravity of any offence of which the applicant Company may be found to have committed will now be determined before a competent Court in the Customs prosecution now pending as aforesaid in accordance with the provisions of Article 12, paragraph 3 of the Constitution *(supra)*.

(5) I am of opinion that the respondent was under no obligation to return the disputed goods under the provisions of sub-section (2) of section 189 of Cap. 315 *(supra)*, not only because "the claim" mentioned in the said subsection refers, in my opinion, to "the claim" which should have been made within the prescribed period of fifteen days of the date of the seizure under section 187 *(supra)*, but also because I am satisfied that it was, all along, intended by the respondent to institute a Customs prosecution in connection with the disputed goods within the pe-

riod of three years laid down in section 222 of Cap. 315, and because the disputed goods, and particularly the labels thereon marked "DUTY FREE", would obviously have been required as exhibits in such Customs prosecution.

(6) With regard to the 51 "exemption certificates" which were seized and retained, I am of opinion that they are clearly personal to the privileged persons in respect of whom they have been issued, that they are not transferable or negotiable and that the property in those documents rests in the aforesaid privileged persons. Therefore any claim to such "exemption certificates" can only be made by or on behalf of those privileged persons.

Recourse dismissed.
No order as to costs.

Per curiam: (1) A perusal of the relevant provisions of Cap. 315 *(supra)* will whow that under that statute proceedings for the condemnation of goods which have been seized thereunder and in respect of which an offence appears to have been committed may be instituted either by the procedure laid down in sub-section 1 of section 189 of Cap. 315 *(supra)* or by the institution of a Customs prosecution as described in section 220 of Cap. 315 *(supra)* in respect of the offence which appears to have been committed against the said statute. It is not in dispute that criminal proceedings were instituted in relation to the disputed goods on the 25th May, 1964, and which are still pending having been adjourned pending the outcome of this recourse, and I am of opinion that such criminal proceedings are a "Customs prosecution", in the sense of sections 220 and 222 of Cap. 315, instituted within the period of three years prescribed by section 222 of Cap. 315.

(2) Section 226 of Cap. 315 *(supra)* provides that the conviction of any person for an offence the commission of which causes a forfeiture (and in this respect *vide* section 201(s) of Cap. 315, *supra)* "shall have effect on a condemnation of the .....goods in respect of which the offence is committed".

Although the provisions of section 226, when originally enacted, were mandatory and provided for the automatic condemnation of the goods in question upon conviction, the provisions of the said section, when construed and applied with necessary modifications under Article 188 of the Constitution to bring them into conformity with the Constitution, must be construed, in view of paragraph 3 of Article 12 of the Constitution *(supra)*, as giving the court trying such offence a discretion whether or not such a conviction shall be followed by a forfeiture or condemnation of the goods in question *(vide* in this connection *District Officer, Nicosia and Hji Yiannis,* 1 R.S.C.C. 79, at p. 82 and *Gendarmerie and Yiallouros,* 2 R.S.C.C. 28, at p. 29, which have been followed in subsequent cases). Therefore, the court trying an offence the commission of which might cause a forfeiture would have a discretion now under section 226 of Cap. 315 *(supra)*, construed and applied as aforesaid, whether or not to order forfeiture and condemnation.

Cases referred to:

Hassan Mustafa and The Republic, 1 R.S.C.C. 44, at p. 48, *followed;*

Costas Neophytou and The Republic, 1964 C.L.R. 280, at p. 290, *followed*;

Chief Customs Officer and Associated Agencies Ltd., 3 R.S.C.C. 36, at p. 37, *reasoning followed;*

District Officer Nicosia and Hji Yiannis, 1 R.S.C.C. 79, at p. 82, *adopted;*

Gendarmerie and Yiallouros, 2 R.S.C.C. 28, at p. 29, *adopted.*

Recourse.

Recourse against the decision of the Respondents not to return to the applicants goods and exemption certificates seized by the Respondents on/or about 2.11.61.

G.M. Pikis, for the Applicant.

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COSTAS MOURTOUVANIS & SONS LTD
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THE REPUBLIC OF CYPRUS THROUGH
1 MINISTER OF FINANCE
2 DIRECTOR OF CUSTOMS

M Spanos, Counsel of the Republic, for the Respondent

Cur. adv vult

The following judgment was delivered by —

MUNIR, J By this recourse, which is made under Article 146 of the Constitution, the Applicant seeks a "declaration that the failure and/or omission of the Respondents to return to the Applicants goods and exemption certificates seized by the said Respondents on/or about 2/11/61 ought not to have happened"

The Applicant is a limited liability company (hereinafter in this judgment referred to as "the Applicant Company") carrying on business in Nicosia, under the name of "Costas Mourtouvanis & Sons Ltd", as, *inter alia*, importers of, and dealers in, intoxicating liquors, spirits and food-stuffs

Before dealing with the facts of this Case, it is relevant to note at the outset that the Customs Management Law, Cap 315, was amended by Law 26/61 which was promulgated in the Gazette of the Republic on the 23rd June, 1961 The amendments made to Cap 315 by Law 26/61 related, *inter alia*, to regulating and controlling "privileged goods", which are defined by section 2 of Law 26/61 as follows —

> " 'privileged goods' means all goods imported, under and in accordance with any Law relating to Customs in force for the time being or with any Treaty, free of duty or upon which duty has been charged at a reduced rate or upon which duty has been charged on importation and subsequently refunded which have been imported by or for any privileged organization or privileged person,"

"Privileged person" is also defined by section 2 of Law 26/61 as including any person who is entitled to import or possess privileged goods The powers of entry and search of premises and the seizure and carrying away of goods contained in section 185 of Cap. 315 was extended, by the insertion of a new subsection (3) in the said section 185 by section 8 of Law 26/61, to privileged goods. Furthermore, the provisions of section 201 of Cap. 315, relating to forfeited goods, was extended, by section 11 of Law 26/61, to privileged goods and the provisions of section 209 of Cap 315, relating to

customs offences, was likewise extended, by section 14 of Law 26/61, to unauthorized dealings, etc., in privileged goods. The material parts of the text of these amendments, and other relevant provisions of Cap. 315, are set out in full later on in this judgment.

The uncontested facts of this Case are that on the 2nd November, 1961, *i.e.* about four months after the promulgation of Law 26/61, two Customs Officers, namely, Mr. Kyrillos Ioannou and Mr. Philippos Spyrou, on instructions received from the Chief Customs Officer (now Director of Customs), visited and entered the premises of the Applicant Company in Nicosia and carried away to the Customs House, Nicosia, certain quantities of intoxicating liquors which were marked with the words "DUTY FREE" (hereinafter referred to as "the disputed goods"). A list of the disputed goods is contained in *Exhibit 7*, which is the original of a statement signed by the late Costas Mourtouvanis, "For and on behalf of Costas Mourtouvanis & Sons Ltd.," as Managing Director thereof. (The late Costas Mourtouvanis was, until the time of his death, the Managing Director of the Applicant Company). Mr. Costas Mourtouvanis commences his statement at Exhibit 7 with the following words:—

> "The following quantities of intoxicating liquors have been seized to-day from our stores the 2nd day of November, 1961, by Customs Authorities headed by Mr. Kyrillos Ioannou jointly with Mr. Philippos Spyrou; on instructions from the Chief Customs Officer:—".

At the end of the list of the disputed goods the following declarations are made by Mr. Costas Mourtouvanis in *Exhibit 7*:—

> "We hereby declare that the import duty on all above goods has been paid in full and the above goods are in our possession as a result of our delivering duty paid goods against exemption certificates prior to the method of stamping these goods 'DUTY FREE', which was our statement on first instance to the aforementioned Officers, when we were asked by them if we held in our possession 'DUTY FREE' goods.
>
> Furthermore we declare that we have never sold 'Duty free' goods to non-privileged persons which can be ascertained from our stock-Book and other re-

cords which we hold at your disposal".

The aforesaid Customs Officers, at the same time and place, also found and carried away from the premises of the Applicant Company 51 documents which are commonly referred to as "exemption certificates". Each of these documents consists of three sections: the first section is an application made by a privileged person concerned for exemption from import duty and wharfage dues; the second section consists of an endorsement made by the appropriate certifying officer of the Embassy or institution concerned and the third section signifies the approval of the Administrative Officer of the Ministry of Finance for duty free importation. These composite documents are hereinafter, for convenience, referred to as "exemption certificates", i.e. the name by which they are commonly known. One of the 51 exemption certificates was put in as *Exhibit 10*, and the remaining 50 were put in, as a bundle, as *Exhibit 12*. The date of approval on these 51 exemption certificates range from August, 1961, to the 1st November, 1961, i.e. the date immediately preceding the date on which the disputed goods and exemption certificates were carried away by the Customs Authorities. The original of a list, showing the quantities of intoxicating liquors to which the exemption certificates *(Exhibits 10 and 12)* relate, and signed by Mr. Andrew C. Mourtouvanis, who was then a Director of the Applicant Company, "For and on behalf of Costas Mourtouvanis & Sons Ltd.," was produced and put in as *Exhibit 8*. *Exhibit 8* is prefaced by the following statement:—

> "The following list, dated 2nd November, 1961, concerns Exemption Certificates in our possession of which the corresponding quantities of intoxicating liquors have already been delivered, duty free, to privileged persons, as shown on each certificate".

On the 15th November, 1961, the late Costas Mourtouvanis, Managing Director of the Applicant Company, made a statement *(Exhibit 13)* to Mr. Philippos Spyrou, Customs Officer, in which Mr. Costas Mourtouvanis reiterated the explanations which he had earlier made in his statement of the 2nd November, 1961 *(Exhibit 7)*.

The disputed goods and the exemption certificates continued to remain in the possession of the Customs Authorities and on the 15th March, 1962, a letter was addressed to

the late Mr. Costas Mourtouvanis *(Exhibit 5)* offering to compound the said offence with a fine of a £100 within 15 days of the date of the said letter. Subsequently negotiations continued with a view to reaching a settlement in the matter, and a meeting was held during March, 1963, between the parties concerned and their legal advisers. On the 20th March, 1963, as a result of discussions which had taken place, the Respondent made the following offer for a settlement to the Applicant Company, which is recorded in the following terms in paragraph 9 of the facts relied upon by the Applicant Company in support of its Application:—

"*(a)* The applicants to lose all their rights represented by the exemption certificates.

(b) Respondents to deliver the goods seized to the applicants in production of fresh exemption certificates.

(c) The fine of £100 to be reduced to £50".

On the 29th April, 1963, Mr. Andrew C. Mourtouvanis, who had in the meantime succeeded his late father as Managing Director of the Applicant Company, wrote a registered letter to the Chief Customs Officer (now Director of Customs) on behalf of "Costas Mourtouvanis & Sons Ltd." *(Exhibit 6)* in which he stated that "we are unable to agree to the proposed settlement of our dispute, or to any other settlement whatever" and in which the return of the disputed goods in question was demanded. The receipt of *Exhibit 6* was acknowledged by the Director of Customs by a card dated the 30th April, 1963, *(Exhibit 9)*.

The disputed goods and the exemption certificates were not returned and on the 19th December, 1963, this recourse was filed

Counsel for Respondent has, at the hearing of this Case, raised a preliminary issue which had not been raised in the Opposition which had been filed by the Respondent, namely, that this recourse is out of time on the ground that it has not been filed within the period of 75 days prescribed by paragraph 3 of Article 146 of the Constitution. Leave was granted to counsel for Respondent to raise this issue for the first time at the hearing and to argue it and consequently counsel for Applicant was given the opportunity to consider his reply on this issue because, as stated by the Supreme Constitutional Court in *Joyce Marcoullides and The Greek*

Communal Chamber (4 R.S.C.C. p. 7, at p.10), "the provisions of paragraph 3 of Article 146 are mandatory and have to be given effect to in the public interest in all cases". It was further observed in the said case (p.10) that "in the case of the *Holy See of Kitium and The Municipal Council of Limassol*, 1 R.S.C.C., p. 15 at p.18, the Court proceeded to examine this issue even though having been raised originally by Respondent, it was later abandoned by him as an objection on his part".

Counsel for Respondent submitted that even if the latest possible date is taken for the purpose of calculating the period of 75 days under paragraph 3 of Article 146, namely, the 29th April, 1963, the date on which the Applicant Company wrote *Exhibit 6*, rejecting the offer made by Respondent and demanding the return of the disputed goods, then the filing of the recourse on the 19th December, 1963, was long after the period of 75 days from the said date had expired.

Counsel for Applicant, on the other hand, submitted that this recourse was not out of time because the recourse was in respect of a continuing omission, namely, the continuing failure or omission of the Respondent to return the disputed goods and the exemption certificates. In support of his argument on this point counsel for Applicant cited the case of *Hassan Mustafa and The Republic* 1 R.S.C.C. p. 44 at pp. 47-48, where a distinction had been made between a non-continuing omission and an omission which is of a continuing nature.

I have given this issue careful consideration and I am of the opinion that, inasmuch as the nature of the complaint in respect of which this recourse has been made is an omission to return the disputed goods and the exemption certificates and such omission was still continuing on the date on which the Application in this Case was filed, the matter should be regarded as a continuing omission for the purposes of paragraph 3 of Article 146 of the Constitution and I accordingly hold that this recourse is not out of time. In this connection I adopt the observation made by the Court in *Costas Neophytou and The Republic*, 1964 C.L.R. 280 at p. 290 that "provisions such as paragraph (3) of Article 146, which limit the right of access to court, should be restrictively interpreted and applied and, in case of doubt, should be applied in favour of and not against a citizen".

Another issue which has been raised for the first time at the actual hearing of this recourse, this time by counsel for the Applicant, is the question of the constitutionality of those provisions of section 187 of Cap.315, which provide that goods which have been seized shall be deemed to be condemned unless a claim is made to such goods within fifteen days from the date of seizure, as being contrary to paragraph 3 of Article 12 of the Constitution. Notwithstanding the fact that this issue was not raised in the Application (though a reference is made to Article 12 in the heading of the Application) leave was given to counsel for Applicant to argue this fundamental issue of constitutionality at the hearing and counsel for Respondent was given the opportunity to consider his reply thereto during a lengthy adjournment of the hearing. Counsel for Applicant submitted that the provisions of section 187 of Cap. 315, whereby goods, etc., seized by the Customs Authorities "shall be deemed to be condemned" unless a claim to such goods, etc., is made within fifteen days from the date of seizure, contravene the provisions of paragraph 3 of Article 12 of the Constitution which provides that "No law shall provide for a punishment which is disproportionate to the gravity of the offence". Counsel for Applicant argued that the application of the provisions in question of section 187, condemning goods which have been seized irrespective of the circumstances and merits of the case, (such as the quantity and value of the goods involved, the nature of the conduct of the owner of the goods which has resulted in seizure, etc.) results, in effect, in imposing a punishment on the owner of the goods which may be disproportionate to the gravity of any offence which may have been committed by the owner of such goods.

Counsel for Respondent, on the other hand, submitted that the provisions of section 187 of Cap.315 should not be considered in isolation but should be considered in their context as a whole and in particular in conjunction with the provisions of section 189 of Cap. 315 which lays down the procedure to be followed after the seizure of the goods. Counsel for Respondent submitted that the provisions of paragraphs *(a)* and *(b)* of sub-section (1) of section 189 contain adequate safeguards which enable either the person claiming the goods or the Customs Authorities to have the matter brought before a competent court with a view to having the question of the ultimate forfeiture and condemna-

tion of the goods determined by the appropriate court. The provisions of section 189 of Cap. 315, in the submission of counsel for Respondent, adequately safeguard the rights of the citizen and the matter thus being left to the competent court to decide ensures that forfeiture and condemnation does not take place automatically and does not amount to a punishment disproportionate to the gravity of the offence, in contravention of Article 12(3) of the Constitution.

I agree with counsel for Respondent that, in considering this issue of the constitutionality of the provisions in question of section 187 of Cap. 315 which has been raised by counsel for Applicant, all the relevant provisions of Cap. 315, which relate to seizure of goods, etc., and the procedure to be followed after such seizure, should be considered as a whole, and for this purpose, it might be convenient, at this stage, to set out in full the relevant provisions of Cap. 315 relating to this matter. These provisions are sections 185, 186, 187, 188, 189, 201(s), 209(o), 222 and 226 of Cap. 315, as amended by Law 26/61. The following are the material provisions of the above-mentioned sections:—

"Officers may search premises for smuggled goods

185.(1) Any officer or police officer may at any time, without a search warrant, enter and search any premises or place if he has reason to believe that smuggled or prohibited goods are to be found therein, and may seize and carry away any such goods found therein.

(2) It shall be lawful for such officer, in case of resistance, to break open any door and to force and remove any other impediment or obstruction to such entry, search or seizure:

Provided that the right to enter and search shall not be exercised in respect of a dwelling house unless a search warrant for that purpose shall first have been obtained.

(3)—*(a)* The powers of entry and search contained in sub-sections (1) and (2) of this section shall also be exercisable in relation to any premises or place:

(i) in the occupation or custody of a person not entitled to privileged goods and in which the officer or police officer has reason to

believe that privileged goods are to be found; or

(ii) upon which the officer or police officer has reason to believe that there is a person who is not entitled to privileged goods and who is in possession or control of privileged goods; or

(iii) occupied by or in the custody of any privileged organization or privileged person, upon which the officer or police officer has reason to believe that there are any privileged goods which are either possessed in contravention of any provisions of the Treaty of Establishment or of any Law or which are possessed with the object of being used or disposed of for an unlawful purpose.

(b) The powers of seizure and carrying away contained in sub-sections (1) and (2) of this section shall also be exercisable in relation to any privileged goods found in any premises or place entered and searched as in paragraph *(a)* of this sub-section provided".

"Power to seize vessels, goods, etc. forfeited.

186. (1) Any officer, police officer, or .... may seize any forfeited vessels, means of conveyance or goods upon land or water, or any vessels, means of conveyance or goods which he has reasonable cause to believe are forfeited.

(2) All seized goods shall be taken to the nearest Custom house and shall be placed in such place of security as the collector shall direct".

"Notice of seizure.

187. When any vessel, means of conveyance or goods have been seized, the seizing officer or a collector shall give notice in writing of such seizure and the cause thereof to the master, owner or agent of the vessel, means of conveyance or goods, unless such master or owner be present at the seizure, either by delivering such notice to him personally or by letter addressed to him and transmitted by post to, or delivered

at, his last known place of abode or business, and all vessels, means of conveyance or goods seized shall be deemed to be condemned and may be sold by the Comptroller (now Director of Customs) unless the person from whom they shall have been seized or the owner shall, within fifteen days from the date of seizure, give notice in writing to the collector at the nearest place to that where the goods were seized that he claims them; but if any goods so seized shall be of a perishable nature or shall be live animals, they may forthwith be sold by the collector".

"Seized vessel or goods may be returned on security

188. The Director of Customs may authorize any vessel, means of conveyance or goods seized to be delivered to the claimant on his giving security to the satisfaction of the Director of Customs to pay their value in case of condemnation".

"Procedure after seizure of goods.

189. (1) Whenever any vessel, means of conveyance or goods have been seized by any officer and claim to such vessel, means of conveyance or goods has been served on the collector by the person from whom such vessel, means of conveyance or goods have been seized or by the owner, the collector may retain possession of the vessel, means of conveyance or goods seized and may —

(a) without taking any proceedings for their condemnation, by notice under his hand require such claimant to institute a suit against him for the recovery of the vessel, means of conveyance or goods seized, in which case, if such claimant shall not, within two months after the date of such notice, enter such suit, the vessel, means of conveyance or goods seized shall be deemed to be condemned without any further proceedings; or

(b) himself cause a suit to be instituted in any Court for the forfeiture of the vessel, means of conveyance or goods seized:

Provided that where goods seized shall be perishable goods or live animals which have been sold by the collector action shall, under paragraph *(a)* of subsection (1) be limited to the recovery of the value realised at such sale thereof, and any judgment, under paragraph *(b)* of subsection (1) in favour of a defendant, shall not be for a sum in excess of the value realized at the sale of any such seized perishable goods or live animals.

(2) If, within three months after receiving the claim, the collector has neither required the claimant to institure a suit as mentioned in paragraph *(a)* of subsection (1), nor himself caused a suit to be instituted as mentioned in paragraph *(b)* of subsection (1), the vessel, means of conveyance or goods seized shall be handed over to the claimant".

"Forfeited goods.

201. The following goods shall be forfeited to the Government:—

. . . . . .

(s) All privileged goods found in the possession or control of a person who is not entitled to such goods or in respect of which an offence has been committed under this Law".

"Other customs offences.

209. Any person who—

. . . . . .

(o) not being entitled to privileged goods, knowingly and with intent to defraud the public revenue or evade any Law relating to Customs in force for the time being, acquires possession of, carries, keeps, conceals or is in any way concerned in dealing with privileged goods".

"Limitation of Customs prosecutions.

222. Customs prosecutions may be instituted at any time within three years next after the date when the offence was or appears to have been committed".

"Conviction to operate as a condemnation.

226. Where the commission of any offence causes a forfeiture of any vessel, means of conveyance or goods, the conviction of any person for such offence or the judgment or decree of a Court for recovery of any penalty attached to the commission of such offence shall have effect as a condemnation of the vessel, means of conveyance or goods in respect of which the offence is committed".

The constitutionality, *vis-a-vis* Article 12(3) of the Constitution, of another provision of Cap. 315, namely, section 144 thereof, was considered in *Chief Customs Officer and Associated Agencies Limited* (3 R.S.C.C. p. 36). That section provides that unless the master or owner of an aircraft or vessel or the agent thereof, account, to the satisfaction of the Collector, for dutiable goods included in the report of such aircraft or vessel then the customs duty thereon shall be paid on demand. It was alleged in that case that the said section 144 was unconstitutional because it contravened the provisions of Article 12(3) of the Constitution. The Supreme Constitutional Court held (at p.37) that there was nothing in section 144, as such, which was contrary to, or inconsistent with, paragraph 3 of Article 12 of the Constitution and that it was a "perfectly usual and proper provision relating to customs management".

In view of the express provisions of section 189 of Cap.315, whereby machinery is set up for the question of the recovery or forfeiture of goods, etc., which have been seized to be determined by a competent court, and as such goods, etc. are only "deemed to be condemned" if they are not claimed within the prescribed period of fifteen days, I am of the opinion that the provisions of section 187 of Cap. 315 do not contravene the provisions of paragraph 3 of Article 12 of the Constitution when the said section 187 is read, in its context, in conjunction with the provisions of section 189 of Cap. 315. In order to prevent the summary condemnation, under section 187 of Cap. 315, of goods which have been seized, all that the person from whom such goods have been seized, or the owner thereof, has to do is to set in motion the provisions of section 189 of Cap. 315, merely by giving notice in writing, within the prescribed period, that he claims such goods, and thus have the question of recovery or forfeiture of such goods determined by a competent court. I have considered whether

it is reasonable, necessary or proper for provisions such as those contained in section 187 of Cap. 315 to prescribe a time limit of fifteen days for the making of such a claim or, indeed, to provide for any time limit at all and I have come to the conclusion that, having regard to the nature of the matter which is sought to be regulated by legislation such as Cap. 315, which relates to customs management, it is reasonable, proper and necessary in the circumstances, to prescribe such a time limit and, as in the case of section 144 of Cap. 315, I am of the opinion that such provision is a perfectly usual and proper provision relating to customs management.

With regard to the actual merits of the case and the question of whether the Respondent has, or had at the material time, an obligation under section 189(2) of Cap. 315 to hand over to the Applicant Company the disputed goods and the exemption certificates, the more fundamental issues which have been raised in this connection by counsel for the Applicant relate primarily to the interpretation and application of the provisions of section 187 of Cap. 315, and these issues may be summarized as follows:—

(a) whether or not a seizure, in the sense of section 187 of Cap. 315, of the disputed goods has in fact taken place;

(b) if such seizure has taken place, the question of the failure on the part of Respondent to give notice in writing under section 187 of Cap. 315 of such seizure;

(c) if the giving of such notice of seizure is not, in the circumstances, required under section 187, whether a valid claim to the disputed goods has been made under Cap. 315.

Counsel for Applicant has submitted that no seizure has in fact taken place under section 187 and that, in any event, because no written notice of such seizure was given to the Applicant Company, the Applicant Company was not under any obligation to claim the goods within the fifteen days prescribed by the said section 187, and, further, that a valid claim was in fact made to the disputed goods by virtue of the statement made by the then Managing Director of the Applicant Company, Mr. Costas Mourtouvanis, on the 15th November, 1961 *(Exhibit 13)* and by the letter written to the Chief Customs Officer (now Director of Customs) by Mr.

A. C. Mourtouvanis on the 29th April, 1963 *(Exhibit 6)*. In the submission of counsel for Applicant, therefore, the making of such a claim to the disputed goods made it obligatory on the Respondent to set into motion the procedure laid down in section 189 of Cap. 315.

Counsel for Respondent, on the other hand, has submitted that a valid seizure had taken place in the sense of section 187 of Cap. 315 and the fact that such a seizure has taken place, he submitted, is also evident from the very wording of *Exhibit 7* itself, which has been signed by the late Costas Mourtouvanis, as Managing Director of the Applicant Company, in which it is actually stated by Mr. Costas Mourtouvanis that the disputed goods "have been seized". Counsel for Respondent further submitted that no written notice of the seizure was given to the Applicant Company under section 187 of Cap. 315 because such notice was only necessary if the owner of the goods was not present at the seizure. Counsel for Respondent submitted that as the Managing Director of the Applicant Company, the late Costas Mourtouvanis, was present, on behalf of the Applicant Company, at the seizure, no written notice of the seizure was required to be given to the Applicant Company under section 187. Counsel for Respondent also submitted that no valid claim to the disputed goods had been made by the Applicant Company under section 187 of Cap. 315 within fifteen days of the date of seizure of the disputed goods.

I have given careful consideration to the respective submissions made by both counsel on these issues and I have come to the conclusion that the disputed goods and exemption certificates were lawfully and properly seized by the Customs Officers in question from the premises of the Applicant Company on the 2nd November, 1961, in exercise of the powers conferred by the provisions of section 185 of Cap. 315, and particularly sub-section (3) of the said section 185, as amended by section 8 of Law 26/61. It will be observed that paragraph *(b)* of the new sub-section (3) of section 185 of Cap. 315 (the full text of which has been given earlier in this judgment) makes the powers of seizure and carrying away contained in sub-sections (1) and (2) of the said section 185 "exercisable in relation to any privileged goods" (as defined in section 2 of Cap. 315, as amended by section 2 of Law 26/61) found in the premises or place entered and searched under the said section 185. I am satisfied on all the evidence

before me that the Customs Officers in question had reason to believe that the Applicant Company was in possession or control of "privileged goods", in the sense of section 2 of Cap. 315, and lawfully and properly entered the premises of the Applicant Company on the 2nd November, 1961, and lawfully and properly seized and carried away the disputed goods and the exemption certificates on the said date in exercise of the powers vested in them by Cap. 315, and in particular by section 185 thereof. There can be no doubt, in my view, from the evidence before me, and in particular from *Exhibits 7 and 8*, that a seizure, in the sense of sections 185 and 187 of Cap. 315, of the disputed goods and exemption certificates did in fact take place on the 2nd November, 1961, and that such seizure and carrying away was lawfully and properly made.

Having found that the seizure of the disputed goods and exemption certificates was lawfully and properly made under the provisions of section 185 of Cap. 315, I find as a fact, from the clear evidence before me, that the "owner" of the disputed goods was "present", in the sense of section 187 of Cap. 315, at the seizure of the disputed goods on the 2nd November, 1961. It is not in dispute that the goods were carried away in the presence, *inter alia*, of the late Mr. Costas Mourtouvanis, the then Managing Director of the Applicant Company, who, as will be seen from *Exhibit 7*, acknowledged such seizure in writing having signed the formal statement *(Exhibit 7)* as Managing Director "For and on behalf of Costas Mourtouvanis & Sons Ltd." It is interesting to note, in this connection, that the expression "owner", in respect of goods, is defined in section 2 of Cap. 315 as including, *inter alia*, the "agent or person in possession of,....or having control of, ... the goods".

There can be no doubt, therefore, in my opinion, that as the said Managing Director of the Applicant Company was present at the seizure which was made in the premises of the Applicant Company, it follows that the "owner", in the sense of Cap. 315, was "present at the seizure" in the sense of section 187 of Cap. 315 and it was proper for the Respondent to regard the "owner" of the disputed goods as having been so present at the seizure thereof in the sense, and for the purposes, of Cap. 315. This being so, I agree with counsel for Respondent that the seizing officer or Collector of Customs did not have to give notice in writing of such seizure to the

"owner or agent" of the disputed goods under section 187 of Cap. 315. In any event I fail to see how the Applicant Company could have been prejudiced by the omission of the seizing officer or Collector of Customs to give such written notice of such seizure to "the owner or agent" when at the time of such seizure the Managing Director of the Applicant Company himself, in addition to being present at the seizure, signs a written document actually acknowledging such seizure and thus clearly indicating, in my view, that he, as Managing Director of the Applicant Company, had due notice of such seizure.

Even if the seizure had not taken place in the presence of the "owner" in the sense of section 187 of Cap. 315 (as I have found it has) and even if the Respondent were to have been at fault in not giving written notice of seizure (and I have found that the Respondent was not so at fault), then I am of the opinion that there is nothing in section 187 of Cap. 315 to prevent the person from whom the goods in question have been seized or the owner thereof from claiming the goods by giving notice in writing to the Collector of Customs, as required by section 187 of Cap.315 within fifteen days from the date of seizure, or, at any rate, at least within fifteen days from the date on which such person or owner came to know of the seizure in the event of the seizure not having taken place in the presence of the owner (which is not the case here or in the event of written notice not being given when it should have been (which is also not the case here). In other words, I am of the opinion that the failure of one party to perform the duties imposed on him under section 187, that is to say, a failure to give written notice of seizure (if such written notice had been required and I have found that in this case it was not) does not absolve the other party, that is to say, the person who is claiming the goods seized, from performing his duties under the said section, that is to say, from giving written notice of his claim within the prescribed period.

I do not consider that the formal cautioned statement made by the late Mr. Costas Mourtouvanis to Mr. Philippos Spyrou, who was investigating the matter, on the 15th November, 1961 *(Exhibit 13)* constitutes, or can properly be regarded as constituting, "notice in writing to the collector" that the Applicant Company was claiming the goods in the sense of section 187 of Cap. 315. With regard to the letter

written by Mr. A.C. Mourtouvanis to the Chief Customs Officer (now Director of Customs) on the 29th April, 1963 *(Exhibit 6)*, it is true that in the said letter a return of the disputed goods is demanded, but the said letter, which it might have been possible to regard as a written notice claiming the disputed goods, was not written within the period of fifteen days prescribed by section 187 of Cap. 315.

It will be seen, therefore, that notice in writing claiming the goods was not given by the Applicant Company, as it should have been, within fifteen days from the date of seizure as required by section 187 of Cap. 315. In the absence of such formal notice of claim within the prescribed period the Respondent did not set into motion the provisions of sub-section (1) of section 189 of Cap. 315 as it would, and should, have done upon the giving of such valid notice of claim under section 187.

In the meantime, however, an offer was made by the Respondent, under section 227 of Cap. 315, on the 15th March, 1962, by letter addressed to the late Mr. Costas Mourtouvanis *(Exhibit 5)*, to compound the offence alleged to have been committed by the Applicant Company. This offer was followed a year later, that is to say, in March, 1963, by negotiations between the parties for a settlement of the matter which proved to be unsuccessful and which culminated in the aforesaid letter of the 29th April, 1963 *(Exhibit 6)* demanding the return of the disputed goods.

Mr. Christou, the Collector of Customs attached to Customs Headquarters, Famagusta, has stated in evidence that the main object of the Respondent in seizing the disputed goods and exemption certificates was to keep them as exhibits for the purposes of any possible Customs prosecution in relation to the disputed goods which it might subsequently have been decided to institute and that the disputed goods were in fact kept at the Customs House, Nicosia, in a place set aside for the custody of valuable articles and court *exhibits*.

A perusal of the relevant provisions of Cap. 315 will show that under Cap. 315 proceedings for the condemnation or forfeiture of goods which have been seized thereunder and in respect of which an offence appears to have been committed may be instituted either by the procedure laid down in sub-section (1) of section 189 of Cap. 315 (the full text of

which has been given earlier in this judgment) or by the institution of a Customs prosecution as described in section 220 of Cap. 315 in respect of the offence which appears to have been committed against Cap. 315. It should be noted in this connection that section 222 of Cap. 315 (the full text of which has been given earlier in this judgment) provides that Customs prosecutions may be instituted at any time within three years after the date when the offence was or appears to have been committed. It is not in dispute that criminal proceedings were instituted by the Respondent in relation to the disputed goods on the 25th May, 1964, and I am of the opinion that such criminal proceedings being a "Customs prosecution", in the sense of sections 220 and 222 of Cap. 315, were instituted within the period of three years prescribed by section 222 of Cap. 315.

Section 226 of Cap. 315 (the full text of which has been referred to earlier in this judgment) provides that the conviction of any person for an offence the commission of which causes a forfeiture "shall have effect as a condemnation of the ..... goods in respect of which the offence is committed". Although the provisions of section 226, when originally enacted, were mandatory and provided for the automatic condemnation of the goods in question upon conviction, the provisions of the said section, when construed and applied with necessary modifications under Article 188 of the Constitution to bring them into conformity with the Constitution, must be construed as giving the court trying such offence a discretion whether or not such a conviction shall be followed by a forfeiture or condemnation of the goods in question (*vide* in this connection *District Officer Nicosia and Hji Yiannis*, 1 R.S.C.C., p. 79 at p. 82 and *Gendarmerie and Yiallouros*, 2 R.S.C.C., p. 28, at p. 29 which have been followed in subsequent cases). Therefore, the court trying an offence the commission of which might cause a forfeiture would have a discretion under section 226 of Cap. 315, construed and applied as aforesaid, whether or not to order forfeiture and condemnation.

If it is found in the criminal proceedings which have been instituted on the 25th May, 1964, in relation to the disputed goods, and which are still pending, and which I am informed have been adjourned pending the outcome of this recourse, that an offence has in fact been committed under Cap. 315 in connection with the disputed goods then it will be for the

Court trying such offence to decide whether or not to exercise the discretion vested in it under section 226 of Cap. 315 (as construed and applied under Article 188 of the Constitution) to order the condemnation of the goods (just in the same way as a Court deciding an issue under either paragraph *(a)* or paragraph *(b)* of sub-section (1) of section 189 of Cap.315 would have done had the procedure laid down in the said section 189 been followed upon the giving of a written notice of claim by the Applicant Company within the period prescribed by section 187 of Cap. 315), and in considering the issue of condemnation the trial Court will no doubt bear in mind, in accordance with the letter and spirit of Article 12(3) of the Constitution, the gravity of any offence of which the Applicant Company may be convicted and decide whether the condemnation of all, or any part of, the disputed goods seized would be in proportion, or disproportionate "to the gravity of the offence" of which the Applicant Company might be convicted.

I have come to the conclusion, having regard to all the circumstances of this Case, that it was through no fault of the Respondent that the provisions of section 189 were not set into motion at the appropriate time (as they no doubt would have been if the Applicant Company had itself complied with the provisions of section 187 of Cap. 315) and that this was due to the failure of the Applicant Company to comply with the provisions of the said section 187 within the prescribed period as it should have done, in my view, irrespective of the attempts being made in the meantime to compound the alleged offence or otherwise to arrive at a settlement in the matter.

As counsel for Respondent has submitted, quite rightly in my opinion, when he argued the issue of the constitutionality of section 187 of Cap. 315, the said section 187 should not be considered in isolation but in conjunction with section 189, and it is because of the provisions of section 189, which follow upon the provisions of section 187, that I have held earlier in this judgment that the provisions of section 187, when read in conjunction with section 189, are not unconstitutional. It follows from this that counsel for Respondent would appear to concede that section 187 if improperly applied by itself and without setting into motion the machinery of safeguards laid down in section 189, would contravene the provisions of paragraph (3) of Article 12 of the Consti-

tution. As I have said, I think that counsel for Respondent has quite properly taken this view and I am of the opinion that it is possible, depending on the facts and circumstances of each particular case, that the application of the provisions of section 187 of Cap. 315 alone, without setting into motion the provisions of section 189 of Cap. 315, (albeit due to the wrongful omission of the person who subsequently claims the goods in not giving the notice of claim in writing within the prescribed period of fifteen days laid down by section 187) might result in the forfeiture and condemnation of goods in circumstances which might offend against the letter and spirit of Article 12(3) of the Constitution in the circumstances of that particular case. In this Case it is stated in evidence that the value of the disputed goods, duty paid, is in the region of £700 and it appears, therefore, that condemnation of the disputed goods could result in a "punishment" which might be disproportionate to the gravity of any offence which the Applicant Company might be found by the competent court to have committed. I have, therefore, considered whether the proper course for the Respondent to have adopted in this Case, when a formal demand for the return of the disputed goods was made on behalf of the Applicant Company by the letter of the 29th April, 1963 *(Exhibit 6)* (notwithstanding the fact that such demand was made after the lapse of the period of fifteen days prescribed by section 187), would not have been for the Respondent to set into motion even belatedly one or other of the two procedures laid down in paragraphs *(a)* and *(b)* of sub-section (1) of section 189 of Cap. 315 in order for the question of the forfeiture and condemnation, or the return to the owner, of the disputed goods could be determined by the competent court under the said section 189(1). In view, however, of the fact that a Customs prosecution has been instituted, since the filing of this recourse, under Cap. 315, and in view of the fact that a competent court will thus be in a position, under the relevant provisions of Cap. 315, as construed and applied in accordance with Article 188 of the Constitution, to decide on the issue of the condemnation and forfeiture of the disputed goods, I do not consider it necessary to hold, as I might otherwise have done, that, having regard to all the facts and circumstances of this case (and notwithstanding the fact that technically the disputed goods might be said to have been "deemed to be condemned" under the provisions of section 187 of Cap. 315, in view of the omission of the Applicant

Company to give written notice of claim within the prescribed period so as to enable the setting into motion the machinery laid down in section 189 of Cap. 315), the Respondent should now set into motion the said machinery laid down in section 189 (1) of Cap. 315, because, as I have said, the same issue concerning the relationship of any forfeiture and condemnation to the gravity of any offence of which the Applicant Company may be found to have committed will now be determined before a competent court in the Customs prosecution which is now pending.

This might be the convenient place in my judgment to point out that, in my opinion, the Respondent was under no obligation to return the disputed goods under the provisions of sub-section (2) of section 189 of Cap. 315, not only because "the claim" mentioned in the said sub-section (2) of section 189 refers, in my opinion, to "the claim" which should have been made within the prescribed period of fifteen days of the date of the seizure under section 187, but also because I am satisfied that it was, all along, intended by the Respondent to institute a Customs prosecution in connection with the disputed goods within the period of three years laid down in section 222 of Cap. 315, and because the disputed goods, and particularly the labels thereon marked "DUTY FREE", would obviously have been required as exhibits in such Customs prosecution.

In the course of his argument of this Case counsel for Applicant has invited the Court, *inter alia*, to find that the Respondent was acting under a misconception of fact in that it was thought by the Respondent, as counsel for Applicant submitted, that the owner of the goods seized was the late Mr. Costas Mourtouvanis personally, and not the Applicant Company. Counsel for Applicant has asked me to draw this inference from the fact that the document *(Exhibit 5)* offering to compound, under section 227 of Cap. 315, the alleged offence in question was addressed to "Mr. Costas Mourtouvanis" personally and not to the Applicant Company. I cannot accept this contention and I am satisfied from the evidence before me, and in particular from the evidence of Mr. Christou, and also as is clear from the address on the acknowledgement of receipt of the letter *Exhibit 6* by the card *Exhibit 9*, that Respondent was fully aware that the owner of the disputed goods was not the late Mr. Costas Mourtouvanis but was in fact the Applicant Company and

to which, for example, *Exhibit 9* was addressed.

As to a submission made by counsel for Applicant that the Respondent was acting under a misconception as to the law applicable, that is to say, because on the aforementioned form offering to compound the alleged offence under section 227 of Cap. 315, *(Exhibit 5)*, which was written and completed in the Greek language, the reference to the relevant paragraph of section 209 of Cap. 315 was given as the Greek letter "(ε)" instead of the English letter "(o)" which is the letter of the paragraph immediately following the paragraph lettered "(n)". Thus, in the Greek text of section 209, as amended by section 14(2) of Law 26/61, the Greek lettering of the new paragraph which follows the paragraph lettered "(n)" in the English text is the letter "(ξ)" (*vide* the Greek text of Law 26/61 as published in the Gazette of the 3rd June, 1961). I am, therefore, satisfied that when the document *Exhibit 5* was filled in, in Greek, (a copy of which has subsequently been typed and put in evidence as *Exhibit 5* in this Case) the letter "(ξ)" has inadvertently been typed as the letter "(ε)" instead of the letter "(ξ)". A mere glance at paragraph "(e)" of section 209 of Cap. 315 in the English text will indicate that that paragraph (which deals with bill headings and foreign invoice papers) has no relevance whatsoever to this Case. This being so, I cannot accept the contention that the Respondent was labouring under a misconception as to the law applicable merely because a typographical error may have been made in the copy of a document, when referring to the Greek text of the provision in question, between the Greek letter "(ξ)" and the Greek letter "(ε)".

With regard to the 51 exemption certificates which were seized and retained by the Respondent *(Exhibits 10 and 12)*, as explained earlier in this judgment these documents comprise three separate sections consisting of (1) an application for exemption from import duty and wharfage dues made by the privileged person; (2) the Embassy or other institutional endorsement by a certifying officer; and (3) the approval of the Administrative Officer of the Ministry of Finance for the exemption applied for. It is clear, on the face of them, that these documents are made out specifically in the name of a particular privileged person and in respect of a specified quantity and description of goods and are approved by the Ministry of Finance in respect of such privileged person and such specified privileged goods. This being so, the docu-

ments in question are clearly, in my opinion, personal to the privileged person in respect of whom they have been issued and they are not, as testified by Mr. Christou, transferable or negotiable. As also explained by Mr. Christou in his evidence they are liable to cancellation by the authority which has approved them and they are spent after the goods in respect of which they have been issued have been supplied to the particular privileged person referred to in the document in question. Although it is not in dispute that the 51 exemption certificates may have come lawfully into the possession of the Applicant Company and lawfully possessed by it for as long as the said Applicant Company was acting as the agents of the privileged persons in respect of whom such exemption certificates were issued, I am of the opinion that the property in such documents never passed to, and did not at any time vest in, the Applicant Company having regard to the nature and contents of such documents and any claim to such exemption certificates can, in my view, only properly be made by, or on behalf of, the privileged person in respect of whom such documents have been issued. It is in evidence, and not disputed by counsel for Applicant, that some of the privileged persons in respect of whom some of the 51 exemption certificates had been issued had already left the Island at the time the exemption certificates were taken by the Respondent from the Applicant Company, or, at any rate, by the time the matter was investigated by the Respondent. I am of the opinion, having regard to all the facts and circumstances of this Case, that the documents in question could properly be taken possession of and retained under the provisions of section 194 of Cap. 315, as being a document required to be produced under the said Law (*i.e.* in a Customs prosecution under Cap. 315), in the sense of section 194 of Cap. 315, and that, in any event, it was proper for the Respondent, in the circumstances, to take possession of, and retain, the 51 exemption certificates for the purpose of using them as exhibits for the Customs prosecution which it was proposed to institute against the Applicant Company and which was eventually so instituted on the 25th May, 1964. This being so, I am of the opinion that the Respondent had no duty to return to the Applicant Company the 51 exemption certificates which were removed from the premises of the Applicant Company on the 2nd November, 1961, and lawfully and properly retained under Cap. 315.

1965
Feb. 19,
Nov. 23,
Dec. 10,
1966
Jan. 7,
Feb. 9
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COSTAS MOURTOUVANIS & SONS LTD.
and
THE REPUBLIC OF CYPRUS THROUGH
1. MINISTER OF FINANCE
2. DIRECTOR OF CUSTOMS

In view of the conclusions to which I have come in this judgment I do not think it is necessary for me to deal further, or in any greater detail, with any of the other submissions made by counsel for Applicant or counsel for Respondent.

In the result I am of the opinion, for all the reasons given above, that the Respondent had no obligation, pending the investigation of the matter and the outcome of the anticipated Customs prosecution which had since been instituted, to return to the Applicant Company the disputed goods and the exemption certificates which were seized and carried away from the premises of the Applicant Company on the 2nd November, 1961, and I am further of the opinion that the question of the forfeiture and condemnation of the disputed goods, or any part thereof, or their return to the Applicant Company is a matter coming within the province of the competent court which will hear and determine the Customs prosecution in question which was instituted on the 25th May, 1964, and which is now pending in respect of the said disputed goods and it will be for that court, in determining the punishment to be imposed in respect of any offence which such court may find the Applicant Company to have committed, to determine whether or not the disputed goods, or any part thereof, should be forfeited and condemned having regard to the gravity of such offence, if any. Should the competent court trying the offence in question acquit the Applicant Company of such offence or, in the event of a conviction, should such court decide, in the circumstances, that is not proper or feasible to order the forfeiture and condemnation of the disputed goods, then the Respondent would have to return the disputed goods to the Applicant Company and in the event of its being unable to do so it will, of course, be open to the Applicant Company to seek the appropriate remedies which may then be open to it.

This Application cannot, therefore, succeed and it is hereby dismissed accordingly. In the circumstances I do not propose making an order as to costs.

Application dismissed. No order as to costs.