

To/

Okuma Shigenobu, Okurakio Domo

I have examined the draft of a contract which Hudson Malcolm & Co, of Yokohama, and Malcolm Hudson & Co, of London, propose to make with the government of Nippon.

I do not know whether these two firms are composed of the same individuals, or whether there may not be one or more partners in the London house who are ^{not} members of the Yokohama house. If the members are precisely the same, there seems to be no advantage in mentioning the two firms. If they are not the same, then this government ought to have some evidence of the authority of the partners in Nippon, to bind those members of the London house, who do not belong to the house in Yokohama.

The contract is, in substance, that the two firms will sell, to this government, ~~some~~ an unfinished man-of-war steamer, which does not belong to either of the firms, but does belong either to the government of Brazil, or to Dugdeon & Co, the ship builders, who are constructing it for Brazil. Whether the ship in its incomplete state belongs to Brazil or belongs to builders, depends upon the contract between them; of which we know nothing.

It is true that the contractors, Hudson Malcom & Co, Malcom Hudson & Co speak of them ^{as} "acting as agents of Messrs J & W Dugdeon & Co, shipbuilders". If it were true that the contractors have the authority of the shipbuilders to act as their agents in the sale of the

steamer, and if it is also true that the ship, in its incomplete state, is the property of the builders, then this government may obtain a good title to the ship. If either of these conditions is wanting, then all that the government gets is the right to bring a law-suit against Hudson, Malcom & Co.

I think it is tolerably evident that Hudson Malcom & Co are not the agents of the ship builders.

I infer this from the Telegram which they propose to send to the London House, in which they say that "£ 261, 825 will be paid in a month after receipt of your telegram stating that the contract has been settled with Dugdeon".

If they had Dugdeon's authority, they

could sell, without reference, to ~~the~~
him (Dudgeon). They go on to say "You
must prevent the ship being sold
to any one, as we have sold her"⁴
Of course if they have sold her - that
is if they have authority to transfer the
property & title, she could not be sold
to anybody else - People might indeed
make a bargain to sell her - what lawyers
call an executory contract, but all that
could result would be that the person
who thought he had bought, would
get - not the ship - but the right to
damages for not performing the contract
to sell - It is tolerably plain
that Hudson Malcolm & Co are merely
Brokers, speculating upon their
chance of buying the ship, by induc-
ing Dudgeon & Co to violate their agreement
with the Brazilian government - a

very immoral proceeding — and of pocketing a commission of about \$60,000 for very little more work than sending a telegram or two.

Suppose however that Rippon does actually obtain the property and title to an unfinished ship, the position then is this: this government will proceed to build, to equip and to arm a man of war in a harbor of Great Britain.

This is all well enough, so long as Nippon is not at war with any state with which Great Britain is ⁱⁿ peace.

~~Suppose~~ The ship is to be finished in February 1875 — Suppose that at ^{any} time before the ship is actually finished and has been delivered by the builders to the agents of this government, war should break out between this Empire

and China. This government will then be found constructing, equipping or arming a man-of-war capable of carrying on hostilities, and designed to carry on hostilities, against the subjects of China, and their property. It is the duty, unquestionably, of Great Britain not to permit the finishing of such a ship for such an object, or at least not to permit such a ship to go out from her jurisdiction and control until the war shall ended, or until Great Britain shall have adequate ample security that the ship shall not be used for hostilities against a friendly power.

The § 8th section of "The Foreign Enlistment Act, 1870" (British) after inflicting penalties upon the builder and confiscation of the ship, built in violation of neutrality, carefully provides for the

exact ~~fourth~~ case, I have mentioned - that is for the case where the construction of the ship began in time of peace, and was therefore lawful and innocent - but where war commences before the ship is delivered to the belligerent government. It provides that the builder shall not be liable to any of the penalties imposed by the law, if he satisfies these conditions:

- 1st On a proclamation of neutrality he must give full information about the contract to the Secretary of State.
- 2 He must give such security, and permit to be taken such measures, as the Secretary of State, for assuring that such ship shall not be despatched delivered or removed without the license of Her Majesty until the termination of such war.

A subsequent section, the 23rd, authorizes the Secretary of State, when he is satisfied that there is reasonable and probable cause for believing that a ship within Her Majesty's dominions is about to be taken beyond the limits of such dominions, or is about to be despatched contrary to the law — to issue his warrant to seize and search the ship and to detain it, until it has been condemned or released by *pro cess* of law or by giving security that the ship shall not be employed contrary to the law.

As the British government has very recently paid \$15,500,000 for the negligence of its agents in respect detaining the Alabama, the Florida, and the Shenandoah, that government and its officers may be expected to be quite vigilant to prevent another viola-

tion of neutrality. The Brazilian government, and its agents in England, will, of course, be anxious and watchful that they shall not be deprived of the ship. ~~which~~ It is quite possible that, without any reference to the neutrality law, an English Court would compel Budgeon & Co. to finish the ship & to deliver it to Brazil, not allowing them to pay damages & violate their contract.

I am bound to say however that I do not know of any thing in the circumstances or prospects of Brazil, at present, which would justify a Court in such a course. But if Brazil were, to day, in the same position as Lisbon - that is where, according to the proposed Telegram "war is imminent" then I think the Court would decide that Brazil should have the ship itself, and

could not be compensated, by any money damages, for waiting till a new ship could be built.

For these reasons it seems to me essential to the interests of this government that Hudson Malcolm & Co should take upon themselves the risk and duty of putting the ship into the possession of Nippon in some place where that possession can not be disturbed by British law.

For that purpose I suggest the adding, to Article 1st of the Contract, words like these:

"The parties of the second part also agree to deliver the ship above mentioned to ~~at~~ such persons or persons as the Imperial government of Japan may appoint and at such place beyond the limits of Her Britannic Majesty's dominions as ~~the~~ such Imperial governme

ment may designate".

It will also be proper to add to the last article, words like these:

"If the parties of the first second part shall fail to make delivery of the ship as provided in the first article, even though such failure should result from a detention of the ship by the authorities of the United Kingdom of Great Britain and Ireland, then this contract shall be void and the parties of the second part shall, on demand, repay to the party of first part all monies which shall have been advanced to them"

This would be perfectly reasonable, inasmuch as the ~~said~~ contractors would have the power of indemnifying themselves by performing their contract with Brazil, which in all probability has made large payments upon the vessel —

三三三
由
鐵
櫃
內
取
出

It ought to be made perfectly clear,
whether Hudson & Malcolm & Co are binding
Dudgeon & Co, and not binding them-
= selves, or whether they are binding only
themselves and not binding Dudgeon & Co.
I have interlined a few words, in the begin-
ning of the Contract the effect of which
is to bind all three firms, if in fact Hudson
& Malcolm & Co have authority to represent
Dudgeon & Co.

I think that it is advisable for
the ship to remain the property either of Dud-
geon & Co, or of Brazil, until it is actually
delivered to Japan. I have therefore not
recommended any change of the Contract
in this respect. Respectfully submitted
Sept 4. 1874 E. Pollock Smith

三三三
由
鐵
櫃
內
取
出