

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Davis Case (on merits)

1903

VOLUME IX pp. 460-464



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

protection from them, for they were in a position and were bound in right and honor to grant it, there is certain logic in the astute contention of the learned British agent and there is grave error on the part of the officers of the Government if they demand such payment; but these wrongful demands can not change history or reverse international law.

Hence it follows that upon neither of the grounds held by the learned British agent can the losses of the claimant be considered of such a character that the National Government is bound to render him compensation for losses or injuries caused by the action of revolutionary troops; and so much of the claim is disallowed.

For that portion of the claim resting upon the action of the Government forces and authorities the umpire allows the sum of £ 492, which includes such expenses in the preparation of the claim as, in his judgment, should be allowed.

DAVIS CASE

Where goods imported into Venezuela are by mistake or misrepresentation delivered by the customs officials to others than the consignee, the consignor can not maintain a claim against the Government of Venezuela when it appears that the wrongful delivery was only possible through the negligence of the consignor.

PLUMLEY, *Umpire*:

This case came to the umpire through the disagreement of the honorable Commissioners.

The umpire finds the decisive facts to be that Lanzoni, Martini & Co., an Italian company doing business in Venezuela as railway contractors and miners, contracted with Messrs. John Davis & Son, a British firm doing business at Derby, England, on or about the 26th of February, 1901, for certain goods in the line of the claimant company, consisting of oil for miners' safety lamps, lubricating oil, miners' safety-lamp glasses, and the like, and that on the 26th of February, 1901, these goods were shipped by the claimant company to go forward to the port of Guanta, in Venezuela, for the use of the said Lanzoni, Martini & Co. These goods were to be given up to Messrs. Lanzoni, Martini & Co. by the shipping agents of the claimant company in exchange for cash against bills of lading, which later were forwarded with the accounts to Messrs. Ruys & Co., of Amsterdam, for their collection, and on the 11th of April, 1901, the Dutch steamer *Prins Willem III*, from Amsterdam, put in at the port of Guanta, bringing these goods. The certified manifest showed that these goods were sent by Messrs. Hoyman & Schurman, of Amsterdam, to Guanta, consigned to Messrs. John Davis & Son, to the order and account of said company. It further appears that Messrs. Ruys & Co., of Amsterdam, had not succeeded in obtaining the cash of Messrs. Lanzoni, Martini & Co., and it appears that this Amsterdam company, shipping agents of the claimant company, did not forward such bills of lading to any agent or representative of the claimant company in Guanta or Barcelona, or send any instructions, suggestions, or restrictive orders to the customs officer at Guanta concerning the delivery of said goods only on payment therefor or otherwise; but on the 12th of April Messrs. Lanzoni, Martini & Co. applied to the customs officer requesting a certified copy of the consular invoice received by the customs-house stating that they had received no consular invoice, but had received the commercial invoice, and declaring that the goods in question had come for them and their use.

Mr. Lanzoni corroborated his statement by reading to the customs officer, correspondence which his company had had concerning these goods. The

goods were initialed "L. M. & Co.," and Mr. Lanzoni insisted that these were the initials of their company and the mark used on all their imports, and urged upon the customs officer that if his company were not furnished with the certified copy requested it would be impossible to present the manifest within the time limited by law, and the goods would be subjected to its penalties. There was not known to the customs officer in Guanta or Barcelona any mercantile house of Messrs. John Davis & Son, nor was there known to such customs officer any representative of such a company in either Barcelona or Guanta. In fact, no one applied to the customs-house on behalf of the claimant company during the four workdays' period permitted by Venezuelan law for the claiming of the goods before fines would be imposed. The customs officer believing the representations of the Messrs. Lanzoni, Martini & Co., and understanding that company to be creditable and responsible, and having in no way been placd upon his guard against said company in regard to these goods, or requested in any way to protect the interests of the claimant company, the certified copy requested was furnished, and the manifest of Lanzoni, Martini & Co. was admitted and the goods delivered to them. It further appears that through the negligence of the claimant company, or of Ruys & Co., their shipping agents of Amsterdam, there was no one in Barcelona, or Guanta, or elsewhere in Venezuela, in receipt of the bills of lading, advised on behalf of the claimant company concerning said shipment, or in any way authorized to act for them or their shipping agents until after the 4th of July of that year, on which day, as also on the 11th of July, it appears that the claimant company wrote to Messrs. Dominici & Sons, a firm established in Barcelona — the date of the receipt of the letters not appearing — inclosing to them the bills of lading and requesting them to hand over to Messrs. Lanzoni, Martini & Co., after payment, the goods in question; and it was after this date that there first appeared before the customs officer at Guanta any one acting in behalf of the claimant company, when it was ascertained by such representative that the goods in question had a long time previously been delivered to the Messrs. Lanzoni, Martini & Co., as above stated. It also appears that this latter company on then being addressed by these Venezuelan agents of the claimant company admitted that they had the goods and had used part of them and expressed their inability there to make payment, but that the debt would be cancelled or application to the company's office in Rome, Italy. These facts were duly reported by the said Dominici & Sons to the claimant company.

It further appears that the claimant company has made application both to the Barcelona house and the house at Rome of the Messrs. Lanzoni, Martini & Co. to obtain payment, and, failing to obtain such, instructed their agent in Rome to take legal proceedings in order to procure the money due them. The claimant company assert that they and their agents have used all reasonable means to obtain payment and have failed.

The laws of Venezuela concerning imported goods by the authority of the honorable Commissioner for Venezuela are as follows:

The consignee is the importer of goods shipped abroad and bound for Venezuela. Within four workdays from the time the entrance visit has been paid each one of the importers of foreign goods must present the custom-house with the copy of the certified invoice, together with a manifest in duplicate drawn in the Spanish language, fulfilling all conditions required for invoices, and containing besides the total amount of bales and their value. * * * (Law XVI (Régimen de Aduana para la importación) of the Financial Code of Venezuela, art. 91.)

It is further provided that on the expiration of the four workdays fines are to be imposed, to wit: "For the first day later 100 bolivars, and 10 more for each

following day," and if after sixty days the manifest is not presented the goods shall be treated as abandoned, and the public shall be informed fifteen days beforehand that the goods are to be sold to the highest bidder, if not claimed by the owners, and if at the end of such fifteen days the goods remain unclaimed they shall be sold at public auction with all due legal formalities, and from the moneys thus received the fiscal dues, fines, and other expenses shall be paid.

It follows, therefore, that when the Messrs. Dominici & Sons, agents of the claimant company at Barcelona, made their application to the customs officer, as hereinbefore stated, if the delivery to Messrs. Lanzoni, Martini & Co. had not been made and the law had taken its due and regular course these goods would have been sold at public auction, and there might not have been any sum remaining out of their sale. It is very improbable, in view of the nature of the goods and the lack of general local demand therefor, that there would have been any considerable sum paid for them at public auction, while the duties, the fines, and other charges would have reached a large sum.

So far as it appears to the umpire from the facts before him, the attention of the British foreign office was not called to the particulars of this claim until January 19, 1903, and it was not until the 11th day of April, that the Venezuelan Government was notified of these facts and their attention asked to the same.

From the testimony of Mr. Stephenson, the only sworn testimony in the case on the part of the claimant company, the umpire could have adduced but very few of these facts, and if his testimony had been taken literally by the umpire it would oppose some of the facts as found. But from all the testimony in the case, and largely from the testimony of the respondent Government, he has been able to obtain a connected history concerning the matters in question.

Upon the authority of the honorable Commissioner for Venezuela the umpire quotes another portion of Venezuelan law affecting the action of the customs officer:

When the importer should not receive the certified invoice, the custom-house will, on his written requisition, furnish him with a copy of the corresponding one received by it with the documents under cover and seal, so as to form the manifest.

In the judgment of the umpire the customs officer at Guanta was led into error, not unnatural, by Messrs. Lanzoni, Martini & Co., largely, if not wholly, through the fact that no one appeared acting on behalf of the claimant company, and therefore the statements of Messrs. Lanzoni, Martini & Co. that they were the importers in fact were easily given credence. The umpire is satisfied that the legal duty of the customs officer was to deliver the goods to the consignees or their lawful order only, and that in delivering the goods to anyone else except to the consignees, or their order, there was a clear mistake; but as this case turns in the judgment of the umpire upon other grounds it is not necessary to pass upon the responsibility of the Government of Venezuela for such mistake. The negligence of the claimant company and of their agents is in justice and in equity more important, and in the opinion of the umpire is in fact decisive. Upon the facts found in this case, had matters taken their ordinary and due course under the laws of Venezuela, there would have been none of these goods in the Guanta customs-house at the time of the first inquiry made thereat by the claimant company in the latter part of July, or early August, 1901. They would all have been disposed of lawfully at auction to the highest bidder, and out of the proceeds of such sale there would have been paid all of the legal charges of the Venezuelan Government connected with the importation, the warehousing, the advertising, the selling of the goods in question, and the legal penalties attaching to the delay. The most that could have been at that time in the hands

of the Government would have been the remainder, if any, after satisfying these legal charges. In the judgment of the umpire there would have been no remainder. It is, therefore, inequitable to now claim of the respondent Government full payment for these goods which were lost wholly through the negligence of the claimant company. For, as the umpire has just stated, if these goods had not been delivered to Lanzoni, Martini & Co. they would have been sold under operation of Venezuelan law before the claimant company appeared at the custom-house through their agents Dominici & Sons.

From these facts the umpire holds that it was negligence on the part of the claimant company under all the facts in this case to not forward the bill of lading with the goods to a responsible Venezuelan resident agent, and that this negligence was the real and primary cause of the conditions which followed, and the least that can be said is that this negligence was directly and proximately contributory to the injuries complained of.

It was still greater negligence to allow more than three months to elapse before forwarding such bills of lading and securing local representation in its behalf.

Again, to justly and equitably charge the respondent Government with the official misconduct of its customs officer there should have been prompt notice to the Venezuelan Government of the claim for indemnity and the facts concerning the claim, so that the respondent Government, if otherwise liable, could have availed itself of its remedy against Lanzoni, Martini & Co. (a) through subrogation, (b) through the bond of its custom officer, or (c) through the property of the customs officer himself; and to delay notice for two years after the happening of the event upon which the claim is based is in itself gross negligence on the part of the claimant company. Upon the theory of the liability of the respondent Government there was such remissness of duty toward it on the part of the claimant company as amounts to laches in justice and equity.

Negligence is:

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. (Bouvier, vol. 2, p. 478, citing Cooley on Torts, 630.)

The absence of care according to circumstances. (*Ibid.*)

Such an omission by a reasonable person to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. (*Ibid.*)

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. (*Ibid.*, citing 95 U. S., 441.)

See Bouvier under the head "Negligence" for further quotations.

Laches is:

Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time; the neglect to do that which by law a man is obliged or in duty bound to do. Unlike a limitation, it is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; *an inequity founded upon some change in the condition or relation of the property of the parties.* (Bouvier, vol. 2, p. 101, citing as to the last part of the quotation 10 U. S. Ap., 227; 145 U. S. (Sup. Ct.), 386.) (*Italics the umpire's.*)

It has been said to involve the idea of negligence: the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. (Bouvier, vol. 2, p. 101.)

The case, therefore, in justice and equity, should be decided wholly without reference to the actions of the customs-house officer at Guanta, which action, under the circumstances disclosed in this case, could have done the claimant company no harm, and solely with reference to the relations which the claimant company bears to the situation in question.

It therefore becomes the duty of the umpire to disallow the claim, and judgment may be entered accordingly.

FEUILLETAN CASE

In the absence of positive proof of payment of wages by the Government, after admitting an employment by it, and in the face of positive testimony that wages were not paid, the Government was held liable.

Interest allowed on amount due, but expenses of claim disallowed.

PLUMLEY, *Umpire*:

The Commissioners failing to agree, this case comes to the umpire for decision, and was considered and determined in the United States under the agreement between the two Governments permitting the same.

The claimant alleges that he took service as fourth engineer on board the Venezuelan gunboat *Restaurador* on February 27, 1901; that on the 16th of May of the same year he was shipped by Venezuelan authorities on board the gunboat *General Crespo* to La Guaira, there to give evidence in the matter of an inquiry there being had concerning the second engineer of the first-named gunboat; that he arrived in due course at La Guaira on the 18th of May, and gave his statements concerning the matter named; that under instructions of Venezuelan authority he remained in La Guaira, and later he examined the gunboat *Rayo* and made report of her condition, and then acting under orders, repaired the gunboat, and on the 15th of October of that year was transferred to the *Rayo*, serving regularly as third engineer until December, 1901; that then expressing a desire to leave the service he was put under arrest and forced to remain, and did remain, until the 27th of February, 1902, when he was released; that his salary under his first engagement as fourth engineer was 65 pesos monthly; that some time subsequently, while still serving on the *Restaurador*, he was raised to third engineer, at the monthly wage of 75 pesos, but the time when this advancement of wage took place is not stated. He claims that he went to La Guaira under orders and wages, but whether his wages were at 75 pesos, 65 pesos, or some other rate, he does not state. He does not state at what wages he acted as inspector and repairer of the *Rayo*, but he claims that his engagement as engineer of the *Rayo* was at the monthly wage of 60 pesos. For all these services he claims the sum of 492 pesos, alleging that he has never been paid any salary.

Aside from his own statement he furnishes the evidence of one Manuel Flores, who states affirmatively and positively from his own knowledge that the claimant was sent to La Guaira and without having had his wages paid.

The respondent Government contends that the claimant held the position of fourth engineer only on board the *Restaurador*; that he served from the 27th of February, as alleged by the claimant; and that he remained on the *Restaurador* until the 31st of May following, when he deserted the service of the Venezuelan Government, and that nothing remained owing him for his wages.

It is further contended by the respondent Government that there was no action or inquiry had at La Guaira against or concerning the second engineer of the *Restaurador*, and that the allegation of the claimant that he was sent to