REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Several Canadian Hay Importers (Great Britain) v. United States (Canadian Claims for Refund of Duties)

19 March 1925

VOLUME VI pp. 142-147

NATIONS UNIES - UNITED NATIONS

their failure for eight years to make any protest or demand for its return is relevant, in our view, only to the question of quantum of compensation, and does not qualify the intrinsic wrongfulness of Mr. Harrison's action. In this aspect of the case, that action constitutes an international tort, committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of international law which gives what, in all the circumstances, is fair compensation for the wrong suffered by the neutral owner. This, and not the contract value of the material is, in our opinion, the true measure of damages.

There is evidence that in October, 1907, the material had deteriorated by reason of rust, corrosion, and bending (ans., annex 19); but this deterioration would have resulted, perhaps to an even greater degree, had the material lain near the sea at Port Elizabeth; and it is a reasonable inference that it was because of their inability to find a purchaser that Messrs. Mackie, Dunn & Co. let the material lie in store for so many years. In other words, in our view, the consignment to Bloemfontein did not cause the deterioration. Taking, therefore, £ 1,500 as the value of the material in 1909, and deducting therefrom the sums of £ 249 and £ 17 10s. for charges at Port Elizabeth (supp. pap., pp. 31 and 16) and £123 for marine freight due to the *Clan Robertson* (supp. pap., p. 33), which the Union Bridge Co. would have to pay in any case, and making some allowance for storage at Bloemfontein, we think that justice will be met by an award of £ 750 without interest.

Now, therefore:

The Tribunal decides that His Britannic Majesty's Government shall pay to the Government of the United States of America the sum of £ 750 sterling.

SEVERAL CANADIAN HAY IMPORTERS (GREAT BRITAIN) *v.* UNITED STATES

(Canadian Claims for Refund of Duties. March 19, 1925. Pages 364-370.)

EXHAUSTION OF LOCAL REMEDIES.—MUNICIPAL LAW: KNOWLEDGE OF ALIENS OF PRESUMPTION.—IMPLIED WAIVER OF DEFENCE. Collection between 1868 and 1882 of too high customs duties on importations of baled hay from Canada into United States. Failure of claimants to avail themselves of legal remedies secured by United States legislation. No reimbursement of claimants made. *Held* that legal remedies were adequate and that importers are presumed to know customs laws of countries with which they are dealing; plea that claimants at time of collections were unaware, until too late, that duties paid were in excess of those imposed by law therefore rejected. *Held* also that submission of claims to Tribunal by United States constituted no implied waiver of defence under municipal law. Claims disallowed.

Cross-references: Am. J. Int. Law, vol. 19 (1925), pp. 795-800; Annual Digest, 1925-1926, p. 230.

Bibliography: Nielsen, pp. 347-363.

This proceeding involves five claims which have been argued, submitted, and considered together for duties paid to the Government of the United States

on importations of baled hay from Canada. It is contended that the duties so paid were in excess of those imposed by law.

Concerning the facts there is no dispute.

Between 1868 and 1882 duties were levied, collected, and paid pursuant to the provisions of section 2516 of the Revised Statutes of the United States. The material portion of this statute reads as follows:

"There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of 10 *per centum ad valorem*; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of 20 *per centum ad valorem.*"

The duty of making classifications under the customs laws was vested in the collectors of customs, supervised by the Treasury Department. That department classified baled hay as an article manifactured in whole or in part, and, therefore, during the period mentioned, the duty of 20 *per centum ad valorem* was levied and collected upon all baled hay imported into the United States.

There were also in force at this time the following laws relating to protest, appeal, and resort to the courts by importers for the recovery of any duties alleged to be erroneously or illegally exacted.

Section 2931 of the Revised Statutes of the United States:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

Section 3011 of the Revised Statutes of the United States:

"Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal

shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

These provisions are similar to those found in the customs laws of various countries, including Canada (pages 57 to 63 of the answer.)

The several claimants were Canadian shippers of baled hay consigned to agents or brokers in the United States who paid and billed back upon their respective consignors duties at the rate of 20 *per centum, ad valorem.*

In 1882 a firm of commission merchants in New York, availing itself of the provisions of sections 2931 and 3011 of the Revised Statutes above quoted, proceeded by protest, appeal and suit to recover the difference between 10 *per centum* and 20 *per centum, ad valorem,* paid on certain shipments of baled hay. This proceeding culminated in a decision of the Circuit Court of the United States for the Northern District of New York to the effect that under section 2516 of the Revised Statutes of the United States, baled hay was dutiable only at the rate of 10 *per centum ad valorem* (Frazee, *et al. vs.* Moffitt, collector; 18 Federal 584). Consequently, the plaintiff in that proceeding recovered judgment for the additional 10 per centum which it had paid. There was no appeal from this decision and the Treasury Department on March 23, 1882, issued to collectors of customs a circular reading in part as follows:

"The Attorney-General has advised acquiescence in such ruling (Frazee, *et al. vs.* Moffitt, collector). I yield to this opinion and officers of the customs will govern their actions accordingly."

Thenceforth baled hay ceased to be classified as a manufactured article under section 2516 of the Revised Statutes of the United States, and duties began to be levied and collected at the rate of 10 *per centum* instead of 20 *per centum, ad valorem.*

At no time did the claimants here involved avail themselves of the right of protest to the collector, appeal to the Treasury Department and resort to the courts secured by section 2931 and 3011 of the Revised Statutes of the United States. It is asserted, however, that at the time the collections were made they had no actual knowledge of the provisions of the customs laws of the United States and were not aware, until too late for protest and appeal under the statutes, that the duties paid were in excess of those imposed by law. In 1883 the claimants presented a memorial to the Governor-General of Canada requesting that their claims be brought to the attention of the United States, and certain diplomatic correspondence ensued. The position taken by the Government of the United States was in effect that in the circumstances the claimants must have recourse to Congressional action for any refund to which they might appear to be entitled. A bill was later introduced in Congress and the matter was in due course referred to the Committee on Claims of the United States Senate, which in turn referred the bill to the Court of Claims for findings of fact under the terms of the Act of March 3, 1887. The Court of Claims in February, 1909, reported back to the Senate Committee findings of fact in the case of one claimant, Blain, evidently taken as typical.

In the course of the argument a letter from the Secretary of the Treasury dated March 20, 1906, to the Senate Committee on Claims was produced. Inasmuch as this letter does not appear in the formal record, it is here quoted:

1126-D

"TREASURY DEPARTMENT

"OFFICE OF THE SECRETARY

"Washington, March 20, 1906

"The Chairman
"Committee on Claims
"United States Senate

"Sir:

"I have the honor to acknowledge the receipt of your letter of the 14th instant requesting information relative to the merits of S. 4402, granting to the Court of Claims jurisdiction to hear and determine, notwithstanding failure to file protests, etc., the claims of Hosmer, Crampton & Hammond and others for duties in excess of those imposed by law upon hay imported into the United States during the years 1866 to 1882, inclusive.

"All of the claims covered by said bill have not been identified on the records of the Department but many have been and all so far as identified are entirely similar and are covered by the following statement of facts.

"Under the tariff acts of 1861, 1862, and 1870, codified in the Revised Statutes of 1874 and 1878, hay was not specifically provided for and by a ruling of this Department dated April 8, 1868, the same was held to be dutiable at the rate of 20 % *ad valorem* as a non-enumerated manufactured article under the Act of March 2, 1861 (see section 2516, Revised Statutes).

"Duties were assessed in accordance with such ruling upon all imported hay until March 23, 1882, when the United States Circuit Court having held in the case of Frazer *v.* Moffitt, 18 Federal Reporter 584, that such hay was subject to a duty of 10 % only, as a non-enumerated unmanufactured article under section 2516 R.S., the Department acquiesced in said decision and duties at the rate of 10 % only were collected upon imported hay until the passage of the Act of 1883, by which hay was made subject to a specific duty at $2.00 per ton.

"Under the provisions of section 14 of the Act of June 30, 1864 (sec. 2931, Revised Statutes), the decision of the Collector was made final and conclusive against all persons interested therein unless a protest was filed against such decision within ten days thereafter, and an appeal taken to the Secretary of the Treasury.

"As none of the claimants filed the protests necessary to a review of the collector's decision and a refund of the duties erroneously assessed, they did not pursue their legal remedy and must be considered as having concurred in the collector's decision and in any errors occuring therein.

"The amount of duties involved in the aggregate or in each individual case covered by the bill can not be ascertained unless the ports of entry be stated and then only at a very large expense. The aggregate of the excessive duties collected on imported hay between the dates mentioned has, however, been variously estimated at from $250,000 to $2,000,000.

"In my opinion, the passage of the bill referred to would establish a very bad precedent, as I know of no reason why these importers should be repaid the excessive duties collected from them that would not equally apply to all persons who have paid excessive duties and have not pursued their legal remedy, and to allow all such claims would be equivalent to a repeal of the provisions of law requiring the filing of protests by importers and would subject the Government to an avalanche of claims subsequent to every adverse decision of the courts in customs cases.

"For your further information I enclose herewith letters dated the 1st and 10th ultimo from the Department to the Chairman of the Committee on Claims of the House of Representatives relative to similar claims.

"Respectfully,
"L. M. SHAW
"*Secretary.*

"(2 inclosures)"

Although the subject was under consideration by Congress for several years no Congressional action was taken; and eventually the claims were included in the schedule for decision by the Tribunal.

It is clear from the foregoing statement of facts that the customs laws of the United States afforded adequate legal remedies to all importers in the situation of these claimants who might be dissatisfied with the duties exacted and contend that they were either unlawful or excessive. These remedies we find were not only reasonable and fair, but more or less common to the customs laws of all civilized countries. We do not conceive that in the orderly administration and enforcement of such laws any other course of action is open to governments as a practical matter. Some definite procedure for the control of appeals for refunds must be laid down and observed. It is of course conceivable that a statutory procedure might be so unreasonable as effectually to deny the right of protest and appeal, but we do not find any such condition here; and even if a case of unreasonable and arbitrary statutory procedure were presented, provided it applied equally to the nationals of the government concerned and to foreigners, we should entertain grave doubt as to whether it could be said to operate as a denial of justice so as to lay the foundation for an international claim.

Section 2931 of the Revised Statutes of the United States has been construed by the Supreme Court of the United States. We quote from the opinion in Arnson and another *v.* Murphy, collector, 115 U.S. 579, decided on December 7, 1885:

"The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the Secretary of the Treasury within thirty days after the liquidation. The decision of the Secretary on the appeal is made final and conclusive, unless a suit is brought within ninety days after such decision, in the case of duties paid before the decision, or within ninety days after the payment of duties paid after the decision; and no suit can be brought before a decision on the appeal, unless the decision is delayed for the time specified in the statute.

"We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal, and the bringing of a suit within the time limited by the statute after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed. The decision on the appeal is, necessarily, a matter of record in the Treasury Department, and, as is shown in the present case, it is communicated to the collector by a letter to him, the letter itself being the decision. The letter is a matter of record in the custom house. Inquiry there or at the Treasury Department would always elicit information on the subject: and the importer, knowing when his appeal was taken, can always protect himself by bringing his suit after the expiration of the time named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.

"The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defence, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in section 14 of the act of 1864, but in section 2931 of the Revised Statutes; and the 'suit' spoken of in those sections is the 'action' given in Revised Statutes, section 3011."

We adopt this reasoning as applicable to these claims.

The plea that the claimants were ignorant of their rights under the law, and consequently entitled to refunds of duties, regardless of the law, through the award of an international tribunal cannot be sustained. Importers, whatever their nationality, must be presumed to know and are bound by the customs laws of the countries with which they are dealing. These claimants in fact dealt through commission brokers and agents in the United States by whom the duties were actually paid.

The submission of the claims to this Tribunal by the Government of the United States constituted no implied waiver and did not operate to take them out from under the ordinary statutory provisions.

Now, therefore:

The award of the Tribunal is that the claims of His Britannic Majesty's Government be disallowed.

OWNER OF THE *R. T. ROY* (UNITED STATES) *v.* GREAT BRITAIN

(March 19, 1925. Pages 408-410.)

SEIZURE OF FISHING VESSEL IN LAKE HURON, ESCAPE.—EVIDENCE: PLACE OF SEIZURE, DAMAGE, FAILURE TO CO-OPERATE IN COLLECTING EVIDENCE.—EXHAUSTION OF LOCAL REMEDIES, EQUITY. Seizure of American fishing vessel *R. T. Roy* on June 25, 1908, by Canadian inspector of Fisheries in Lake Huron. Escape of vessel after preliminary examination by inspector of officers and crew at South Bay Mouth on June 27, 1908. Claim presented for damages on account of seizure, detention, loss of catch, destruction of nets. *Held* that, wherever boundary through Lake Huron was then located, evidence not sufficient to determine whether seizure effected on American or on Canadian side of it, and that evidence of damages inconclusive and unsatisfactory. Vessel's escape and its failure, therefore, to submit to orderly legal procedure emphasized. *Held* equitable to disallow claim for failure to exhaust local remedies.

Cross-reference: Am. J. Int. Law, vol. 19 (1925), pp. 800-803.

Bibliography: Nielsen, pp. 406-407.