

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Adolph G. Studer (United States) v. Great Britain

19 March 1925

VOLUME VI pp. 149-153



NATIONS UNIES - UNITED NATIONS
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estimate or guess as to her location when seized". To check the location by reference to the speed of the *Roy* on her trip to the fishing ground is impracticable because varying estimates of speed were made. The so-called "deep hole", where the nets were set, might have been ascertained with reasonable accuracy, but no evidence on this subject has been adduced. The unexplained disappearance of the best contemporary evidence, namely, the statements taken at South Bay Mouth two days after the seizure for the express purpose of ascertaining the facts, is also a disturbing factor. The evidence of damages is inconclusive and unsatisfactory.

The Tribunal is constrained to emphasize the failure of the claimant to submit to the orderly legal procedure provided for the determination of the issue at the time. The seizure here complained of was the initial step in a procedure which, if it had been permitted to pursue its normal course, would have led to a judicial inquiry in which the very issue here presented would have been considered with full opportunity to elicit all the facts by examination of records and cross-examination of material witnesses. This procedure was interrupted, and its logical completion rendered impossible, by the affirmative act of the claimant's representative in withdrawing the vessel from the only jurisdiction where the matter could be duly and promptly dealt with. The circumstances do not justify us in finding that the Canadian authorities had abandoned the seizure when such withdrawal took place.

Moreover, proceedings might have been taken in the Canadian courts at any time against the Fisheries inspector personally or against the Canadian Government by way of petition of right.

The terms of submission provide that this Tribunal "shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal".

In the exercise of the discretion thereby conferred, the Tribunal is of the opinion that the claim must be disallowed.

Now, therefore :

The award of the Tribunal is that the claim of the Government of the United States be disallowed.

ADOLPH G. STUDER (UNITED STATES) *v.* GREAT BRITAIN

(March 19, 1925. Pages 548-553.)

ANNEXATION. SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—.—INTERNATIONAL RESPONSIBILITY FOR DEPENDENT STATE.—EXHAUSTION OF LOCAL REMEDIES.—EVIDENCE: PROOF OF MUNICIPAL LAW.—EXTRAJUDICIAL ACTION. Grant of land made on February 3, 1877, by Sultan of Muar to Mr. Adolph G. Studer, United States citizen. Annexation of Muar in 1878 by Sultan of Johore who, according to Mr. Studer, deprived him of benefit of grant. Assumption by Great Britain of international responsibility for Government of Johore in 1885. Failure of Mr. Studer to submit case to local Courts as agreed to by Sultan. Lack of evidence concerning facts and municipal law obtaining in Muar at time of grant. *Held* that reason why claim not carried before Courts of Johore not sufficiently explained. Claim

disallowed with recommendation that Sultan's offer that claim be submitted to Johore Courts be renewed.

Cross-reference: Am. J. Int. Law, vol. 19 (1925), pp. 790-794.

Bibliography: Nielsen, p. 547.

This claim as put forward in the memorial is "for the repeated invasion and ultimate destruction of cessionary and property rights" in the State of Muar, in the Malay Peninsula. The particular events giving rise to it took place in the years 1875, 1876 and 1877. The original claimant, Adolph G. Studer, was at that time the Consul of the United States at Singapore. He conceived the idea of securing a cession of land somewhere in the peninsula and establishing a plantation. After a preliminary inquiry he decided that the State of Muar was a desirable location for his project and accordingly approached the ruling Sultan of that State, Ali Iskander Sah, with a view to obtaining a grant. Following certain conversations with one Keun, an employee of a bank at Singapore, who apparently represented the Sultan, Studer sent Keun to see the latter at Malacca, and the result was a so-called preliminary concession dated December 24, 1875 (appendix to the memorial, pp. 201-204). This instrument, drawn up by Studer himself in the technical language usual in conveyances made under the Anglo-Saxon system of land tenure, purported to convey to Studer under certain conditions the fee simple title to a tract of land six geographical miles square, to be selected by Studer on any portion of Muar not already disposed of by the Sultan. One of the conditions required Studer to make the selection within three years from the date of the instrument. About one year later Studer himself went to Malacca and, after an interview with the Sultan, proceeded to Muar where he undertook to make the selection. At the same time he also located grants for several other individuals who appeared to have become interested, through him or otherwise, in the possibilities for developing plantations in that territory.

On February 3, 1877, the preliminary grant was superseded by a final one which defined Studer's concession by metes and bounds (appendix to the memorial, pp. 204-206). This second instrument appreciably enlarged the area of the grant so that it included approximately 80 square miles. The final grant comprised substantially 50,000 acres.

Sultan Ali died in July, 1877.

The contention of the United States is that although Studer subsequently complied with all of the conditions of the grant, he was deprived of the benefit thereof, and his concession was effectually destroyed, through the wrongful acts and omissions of the subsequent ruler of Muar, the Sultan of Johore, to whose dominions the State of Muar was annexed in 1878.

The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.

In January, 1894, Studer brought his claim to the attention of the British Acting Governor of the Straits Settlement by means of a letter outlining at length the history of the concession and of his efforts to secure recognition for it and to operate under it (appendix to the memorial, p. 175). In October, 1894, Studer filed with the State Department at Washington a comprehensive statement of his claim, which occupies, together with the exhibits, nearly 200 pages of the record (appendix to the memorial, pp. 85-276 1/2). In October, 1896, the State Department took the matter up with the British Government and a long diplomatic correspondence ensued, concluding with a communication dated April 28, 1906, from Sir Edward Grey, then at the head of the Foreign Office, to the Honorable Whitelaw Reid, then American Ambassador

(appendix to the memorial, p. 582). This communication referred to a previous suggestion that the claim be submitted to the local courts in Johore for adjudication, and, after transmitting a memorandum from the Sultan of Johore and his advisory board, Sir Edward Grey said:

"It is therein again pointed out that no valid reason has yet been adduced for the claimant's refusal to submit his claim in a regular manner before the proper court in Johore; and, as was stated in the note to Mr. Choate of the 8th of November, 1903, His Majesty's Government feel that until that step has been taken the Johore Government cannot be pressed to recognize the claim in any way.

"It appears from the earlier 'statement of facts and argument for the claimant' drawn up in 1899, that some difficulty was thought to exist in adopting this course, on the ground that 'the immunity of the Sovereign Power from suits at law within its territorial limits, unless by its own consent and in the manner in which it ordains', was a familiar principle at law.

"With a view of meeting this objection His Majesty's Government have thought it desirable to obtain a distinct assurance from the Sultan of Johore on the subject; and His Highness has now formally expressed willingness to waive all technical objections, and to agree to the case being tried by the Principal Judicial Officer in Johore in the presence of a British officer. In the circumstances Your Excellency will no doubt agree that the legal remedies which are open to the claimant in the Sultan's courts must be exhausted before any question of treating the matter through the diplomatic channel or referring it to arbitration can be considered" (appendix to the memorial, pp. 582-583).

It does not appear that any advantage was taken of this offer. Counsel for the United States in the course of the oral argument stated that so far as he was advised the reason for the failure was that the existing treaty with the schedule in which this claim was ultimately included was then already under discussion between the two Governments (transcript of oral argument, p. 695), and Counsel for His Majesty's Government gave it as his understanding that the offer still stands (transcript of oral argument, pp. 447-448).

In the view which, with great reluctance, we feel obliged to take of this case, we do not consider it either necessary or proper for us to enter upon a detailed examination of the evidence presented. The Tribunal finds itself not only embarrassed by the singular lack of reliable evidence and testimony on both sides, but virtually precluded from arriving at any confident conclusion upon the merits of this most interesting and complicated controversy. There is hardly a statement of fact in this record which is not disputed; and the number of facts which may be said to be definitely ascertained or admitted is almost negligible. Every issue has been strenuously fought. It may be useful to enumerate some of these issues:

The power of Sultan Ali to make any concession is denied.

The evidence governing the status and authority of the Sultan in such matters is meagre and unsatisfactory.

Assuming that he had the power, it is contended that the Sultan did not in fact exercise it in this instance; that there is no adequate showing that the Sultan knew what he was doing when he signed the deeds or that he intended to do more than issue a mere licence or permit. In this connexion it is admitted that the record is silent upon the rather important question whether the Sultan could read or understand the English language in which the deeds were framed.

The relative positions of the Sultan and of the so-called Tumongong of Muar and the necessity for ratification by the latter are not so clearly defined as one would like to have them. In this connexion it is contended that the Tumongong did in reality ratify the concession; but the document relied

upon for this purpose is at least open to varying interpretations, and the further evidence on the point seems shadowy and imperfect.

The construction to be placed upon the grant itself has been debated at great length. On the one hand, we are asked to hold that the deed must be construed at its face value, in accordance with the principles of western systems of land tenure, as a conveyance of title in fee simple; on the other, it is argued that the instrument must be interpreted in the light of the Malay customary law, and that so construed it has the effect of a mere permit to enter and cultivate, such permit being personal to the grantor and lapsing with his death. The Tribunal has not before it any authoritative statement of the Malay customary law applicable to the State of Muar in 1876 and 1877. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native customary law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive.

A large part of the oral argument has been devoted by both counsel to a discussion of events subsequent to the grant, bearing particularly upon Studer's efforts to comply with the conditions and to develop his project in the face of alleged interference by the local authorities. Some 12 acts of commission and omission have entered into this discussion. We apprehend that in any conscientious examination of the question whether a denial of justice within the meaning of international law took place, the conclusion would have to be based not upon the definite establishment of any one or more of these so-called "trespasses" as such, but upon the cumulative effect of these transactions viewing them as illustrative of a general prevailing condition and of the attitude maintained by the local authorities. These are all disputed questions of fact, and without taking them up *seriatim* and in detail we are constrained to hold that in the present state of the evidence we can not form a reliable conclusion as to whether there was or was not a denial of justice.

The Tribunal sees no reason to doubt Studer's absolute sincerity and perfect good faith from beginning to end; it has been deeply impressed by this circumstance, which is indeed conceded by counsel for His Majesty's Government. Nevertheless, where a case rests so largely upon *ex parte* statements prepared many years after the event by the party in interest, for the express purpose of presenting his claim in the best possible light, allowances must be made for infirmities of memory as well as for a claimant's natural sense of grievance amounting sometimes to almost an obsession. Studer's letter to the Acting Governor of the Straits Settlement and his communication to the Department of State were both written nearly 20 years after the transactions took place. Neither of these statements possesses the solemnity of a sworn declaration. They are merely the attempts of an individual who truly believed that he had been wronged, and perhaps had been unjustly treated, to recall and set down acts and circumstances of long ago. In effect, the Government of the United States asks the Tribunal to accept these statements without substantial corroboration and to found its judgment upon them. Without regarding many, if not most, of the essential facts as duly established in this way, it is difficult to see how any judgment could be rendered; and even so, much would be left to inference and conjecture.

On the whole record the Tribunal is convinced that the Government of the United States was justified in espousing this claim. It is, moreover, our unanimous feeling that the claim deserved, and still deserves, careful consider-

ation and adjudication upon the merits. The record here does not permit this, and we are definitely of the opinion that no Tribunal so far removed in time and space from the date and scene of this controversy can be expected adequately to deal with the intricate questions of fact involved. The industry and ingenuity of counsel in making the best of so difficult a situation has challenged our unreserved admiration. They have done everything that highly skilled and competent advocates could do to assist us.

The opportunity once presented to carry the claim before the courts of Johore under guaranties apparently sufficient to insure full inquiry and impartial adjudication seems to have been passed over for reasons which are not sufficiently explained. This Tribunal earnestly recommends that this offer be renewed and accepted and that the courts of Johore in that event take the matter up in a liberal spirit without regard to legal refinements and technicalities.

With this emphatic recommendation the award of the Tribunal is that the claim of the Government of the United States be disallowed.

OWNER OF THE *HORACE B. PARKER* (UNITED STATES)

v. GREAT BRITAIN

(November 6, 1925. Pages 570-572.)

REFUSAL OF REPAIRS OF FOREIGN FISHING VESSEL.—INTERPRETATION OF TREATY.—DAMAGES: LOSS OF USE, LOST PROFITS.—EVIDENCE. USUAL AND UNCHALLENGED. Refusal of Newfoundland authorities to allow *Horace B. Parker*, an American fishing vessel, the replacing in Bay of Bulls (Newfoundland) of riding sail blown away in boisterous weather. Vessel compelled to go to St. Pierre therefor. Time lost in getting back to fishing grounds. Decay of bait. Loss of catch. *Held* that under article 1 of Anglo-American Treaty of October 20, 1818, right of American fishermen to repair damages in Newfoundland waters not restricted to repairs essential to navigation, and that replacing sail needed for fishing purposes, where such sail has been blown away, is clearly within the phrase "repairing damages". *Held* also that measure of damages is loss of use of vessel, i.e., of probable catch, i.e. of catch of other vessels, or of average catch under conditions at hand (reference made a.o. to *Wanderer*, *Kate*, and *Favourite* awards, see pp. 68, 77, and 82 *supra*). *Held* further that unchallenged evidence of usual character provides sufficient basis upon which to make award. Amounts claimed for loss of catch and loss of bait awarded.

Cross-reference: Am. J. Int. Law, vol. 20 (1926), pp. 378-380.

This is a claim for damages by reason of the refusal of the Newfoundland authorities to permit exercise of the right of making repairs as secured to American fishermen by the proviso to article 1 of the Treaty of 1818. The evidence is somewhat in conflict. For the purpose of decision we accept the British version of the case as to what the claimant sought to do. The riding sail of the vessel having been blown away in boisterous weather, the master put into Bay of Bulls on the east coast of Newfoundland to obtain water and make necessary repairs. The Newfoundland authorities refused to allow the procuring of a new riding sail, asserting that "a riding sail is part of a fishery outfit and is not necessary for the sailing of a vessel". The master protested to the collector of customs and also sought to obtain a different ruling through the American consular agent, but the authorities at St. Johns sustained the