REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885

Case of Amos B. Corwin v. Venezuela (the schooner *Mechanic* case), decision of the Commissioner, Mr. Little

Commission de réclamations constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Venezuela le 5 décembre 1885

Affaire concernant Amos B. Corwin c. Venezuela (Affaire de la goélette *Mechanic*), décision du Commissaire, M. Little

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would the minister of the United States to Venezuela address the government of Apure, for instance?

How would the State Department conduct the correspondence? And if redress were refused, against whom would reprisals be taken or war declared, in any case of sufficient magnitude to justify such extreme measures? Could the rest of Venezuela be at peace while Apure was engaged in war with a foreign power asserting the rights of its citizens? These questions answer themselves, and I can never assent, therefore, to the doctrine that as between the members of the family of nations any third party can be recognized and treated as responsible for an international offense, simply by reason of internal relations to some federal head.

Case of Amos B. Corwin *v.* Venezuela (the schooner *Mechanic* case), decision of the Commissioner, Mr. Little*

Affaire concernant Amos B. Corwin c. Venezuela (Affaire de la goélette *Mechanic*), décision du Commissaire, M. Little**

Prize law in the context of war—seizure of a neutral vessel and its cargo considered to amount to an act of piracy—in front of prize courts, the *onus probandi* of a neutral interest rests on the claimant—exclusive right of the State to which the captors belong to examine the conduct of its own members before becoming answerable for what they have done—in practice, prize courts judgments respected as much as judgments of municipal courts despite their summary proceedings.

State responsibility—denial of justice resulting from its prize courts' judgments—State's liability begins only when the court of last resort has acted on it—no right for subjects of a neutral State to apply to their own State for a remedy against an erroneous sentence until the final appeal.

Standing of an insurance company in front of the Claims Commission—standing in its own right—in case of abandonment of property and the subsequent payment of the entire loss, the insurer succeeds to all the rights of the insured respecting the property—competence of the Commission to assess whether the proceedings and judgment of the prize court were manifestly and certainly wrong.

Droit de prise dans un contexte de guerre—saisie d'un navire neutre et de son chargement réputée équivalente à un acte de piraterie—devant un tribunal des prises,

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3210.

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l'*onus probandi* de l'intérêt neutre est à la charge du plaignant—droit exclusif de l'État dont relèvent les geôliers d'examiner la conduite de ses propres membres, avant de répondre de leurs actes—en pratique, en dépit de leur procédure sommaire, les jugements des tribunaux des prises sont tout autant respectés que les jugements des tribunaux nationaux.

Responsabilité étatique—déni de justice résultant des jugements de ses tribunaux des prises—la responsabilité de l'État intervient uniquement lorsque la Cour de dernière instance a statué sur ce point—pas de droit pour les sujets d'États neutres de contester dans leur propre État une sentence erronée, avant l'ultime appel.

Locus standi d'une compagnie d'assurance devant la Commission de réclamations—*locus standi* pour faire valoir son propre droit—en cas d'abandon des biens et du paiement subséquent de l'intégralité des pertes, l'assureur succède à l'ensemble des droits de l'assuré pour ce qui est desdits biens—compétence de la Commission d'évaluer si la procédure et le jugement du tribunal des prises sont manifestement et assurément erronés.

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The *Mechanic*, an American schooner, flying the flag of the United States, Taber, master, sailed from Havana, April 17, 1824, with a general cargo, bound for Tampico, Mexico, via Key West. A part of the cargo consisted of goods valued at near $20,000, shipped from the Cuban port by Joaquin Hernandez Soto, "by order and on account and risk of Robert Barry of Baltimore, an American citizen," and consigned to "Ant. M. Miranda, Pueblo Viejo, Mexico, or his assigns, he or they paying freight on the said goods."

The vessel, with Soto aboard, arrived at Key West in due course and departed therefrom May 4, with her sea papers in proper form. Two days out she was captured by a privateer, the *General Santander,* Chase, master, under commission of the Republic of Colombia against Spain, and detained under a charge of carrying enemy goods, Colombia being then at war with Spain for independence. Soto, with some eight others, being taken from the vessel she was sent in charge of a prize crew to a Colombian port for adjudication of the goods seized before the proper tribunal. In due season libel proceedings were instituted against the cargo before the Colombian prize court at Puerto Cabello, and on the 9th of July, after hearing, the Soto invoice was found to be enemy property and condemned as good prize.

May 14, Barry procured insurance on the goods against all loss, including loss by capture, past and prospective, occurring during that trip, in two New York companies, to wit: $12,000 in the Atlantic Insurance Company and $7,000 in the Hope Insurance Company, of that city. In January 1825 the Atlantic paid its policy in full and in June following the Hope paid its, with $175 interest, making in all $19,175, covering the full value of the goods.

Soto made a formal assignment about this time of all and singular his rights pertaining to said goods, and growing out of the capture thereof, to the insurance companies.

It does not appear that he made any exertion to save them from capture by the assertion of ownership as a neutral, either then or afterward, in the prize court. It seems he abandoned them at capture. A year later, when the insurance companies were preparing their case for presentation before the Colombian Government, he made affidavit that he was a native of Spain, but a citizen of Mexico engaged in mercantile business there, and had been since 1819 that he invoiced the goods in the name of Barry for safety and that no Spanish subject had any interest whatever in them at the time of shipment or after ward, they being his sole and exclusive property.

In 1826 the Government of the United States presented the claim of the insurance companies for indemnity in the premises against the Government of Colombia, it being alleged that the goods were neutral, and not, as found by the court, enemy property. But nothing was allowed by that government.

After—upward of twenty-five years after—the dissolution of Colombia (1830) and the adjustment of her liabilities between the constituent States, fifty per centum thereof falling to New Granada, the insurance companies assigned that portion of the claim which was against that State, namely one-half of it, to the present claimant, Amos B. Corwin.

He prosecuted the portion so assigned against that government before the mixed commission under the treaty between New Granada and the United States of 1857, and secured an award for the amount thereof, to wit, the half of $19,175, with interest to the date of the allowance, 1862, amounting in all to $_____.

In 1863, the American minister at Caracas asked the Venezuelan Government in behalf of Corwin to pay its proportion of the insurance claim, to wit, 28 1/2 per centum.

The claim for that proportion was presented to the Caracas commission of 1867–68, which awarded him $15,629.87. It is now made before us and amounts with interest to near $30,000.

It is well settled that where there is abandonment of property under circumstances like these and the entire loss is paid, the insurer succeeds to all the rights of the insured, of whatever kind, respecting the property as of the time of abandonment. (Phillips on Ins., § 1712 *et seq.* Hollbrook, adm'r, *v.* United States, 21st Ct. Claims 438.) The conveyance by Soto to the insurance companies, in 1825, was therefore quite superfluous. The companies were subrogated to his rights and to them only. A question suggests itself, whether, in respect to this treaty supposing Soto to have been a Mexican, the companies do not succeed simply to the rights which he would have, if living, but for the payment of the insurance. If so, they can not claim here, for he, not being a citizen of the United States, would have no standing

under the treaty. We think, however, that it is not their *status.* To hold so, would be to say there may be invasion of neutral rights without remedy. Mexico refuses to interfere in Soto's behalf, for he is indemnified, it refuses the companies, for they are Americans. The United States refuses them, because they have only the rights of Soto, and he has no claim on its services, for he is a Mexican.

The true view as it seems to us, is that the companies are to be regarded as having succeeded to Soto's rights at the seizure of the goods, May 6, and of course *cum onere.* If the capture was wrongful, the wrong was consummated and then first made apparent by the judgment of the prize court, and consummated *as against them.* They therefore stand in respect of the wrong, not in Soto's shoes but in their own.

They consequently have a standing here in their own original right.

Are they bound by the judgment of the prize court?

It has been suggested in argument whether, as indeed it seems to have been claimed by the American minister at Bogota in 1824–1827 that Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter and Spain of 1795, which embodied the doctrine that "free ships make free goods," making its violation an act of piracy and that such obligation continued during her struggle for independence. Mr. Chief Justice Marshall, 9 Cranch, 191, said. "The United States having formed a part of the British Empire, their prize law was ours; and when we separated it continued to be ours, so far as adapted to our circumstances, and was not varied by the power which was capable of changing it."

It is likewise probably true that the Spanish prize law, impressed, it may be, with such conventional modifications as to particular states as were from time to time made, became the prize law of the Spanish-American colonies, subject to the qualifications named. Conceding its operation as to Colombia at independence, it continued under the principle stated, only so long as adapted to her condition, and she, of course, was the judge of that. The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law with its conventional modifications as to the United States (if before in force), was not adapted to her circumstances, and at the same time a decree "varying it by her power," in conformity with international law.

The question arose in the case of the *Senora,* a Spanish vessel captured by a Carthagenian privateer, and taken again by an American cruiser, supposing it British, during the war of 1812. The Supreme Court of the United States said. "The treaty with Spain can have no bearing on the case, as this court can not recognize such captors [the Carthagenians] as pirates;

and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution." (4 Wheaton, 497)

Said the same court in case of the *Pastora,* a Spanish vessel captured by a privateer under the flag of La Plata, 4 Wheaton, 63, *per* Marshall, C. J. "The case of the United States v. Palmer, 3 Wheaton, 610, establishes the principle that the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments of South America may employ against their enemy."

It seems to us, therefore, clear that Spain's engagements to the United States, under the treaty of 1795, did not extend to and bind Colombia in respect of the doctrine stated, at least at the time of this capture, and that the law of nations in this regard was then her only guide, she not as yet having bound herself contrary wise by treaty

The seizure by the *Santander* of the *Mechanic,* and the sending of her to Puerto Cabello for authoritative decision as to her cargo, under a claim of its being enemy (Spanish) property and the adjudication there by the Colombian prize court of the question, were, as is conceded, authorized by the law of nations. But it is contended the court found that Soto was a Spaniard, when he was in fact a Mexican, and that its judgment being predicated on that error of fact, is not binding on these companies as respects their demands against the government of the captor.

Undoubtedly a wrong done by a government through its prize courts is redressible in a proper case the same as if done through its other courts or agencies. But the wrong must be shown. Although a prize court is summary in proceeding, acting in time of war when impartiality in procedure and decision is not in *practice* generally thought to be attained, yet its judgments are in the eyes of the public law respected much as judgments of municipal courts are. Mr. Wheaton says: "The *theory* of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both."

The Supreme Court of the United States declared a prize tribunal "a court of the law of nations, and takes neither its character nor its rules from the municipal law." (Schooner *Adeline,* 9 Cranch, 244.)

When the United States complained to Denmark because of the sentences of her prize courts affecting citizens of the United States during the war between that power and Great Britain, it was not that those sentences were against the weight of the evidence and probably wrong; but that they, being affirmed by the court of last resort, amounted to "*a denial of justice.*"

Mr. Wheaton, quoting with approval from the notable report of Sirs George Lee, Dudley Ryder, Dr. Paul, and Mr. Murray to the British Government, 1753, on the reprisals by Prussia on account of captures by British cruisers and condemnations by British admiralty courts, says it plainly shows: "That in the opinion of the eminent persons by whom that paper was drawn up, *if justice be denied in a clear case by all the tribunals,* and afterward by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed." It is only says Vattel, "in cases where *justice is refused or palpable and evident injustice is done,* or rules and forms openly violated" that definitive sentences should not be respected. "The British court," he says, "established this maxim with great strength of evidence on the occasion of the Prussian vessels seized and declared lawful prizes during the last war." (See Crousden et al. *v.* Leonard, 4 Cranch, 404 Vattel, Bk. 2, § 84, *The Mary*, 9 Cranch, 142, 1 Wheaton, 238, *Santisima Trinidad*, 1 Brock, affirmed in 7 Wheat. 283.)

Says Bluntschli:

> The belligerent which constituted the prize courts is always responsible to neutral states for every *manifest* violation of international law committed to the prejudice of the neutrals by that court.

We do not understand the doctrine announced by the commissioners under the treaty of 1794, between the United States and Great Britain, to be at variance with the foregoing. While they refused acquiescence to the contention that a prize sentence affirmed by the lords commissioners was conclusive on the parties (except as to the *rem),* they seemed to place it (otherwise) along with other judgments. They said: "A sovereign is as much liable for wrongful action of prize courts as he is for the wrongful action of any other court." Their insistence may be condensed in almost their exact words—prize jurisdiction must be *rightfully* used by the state that claims it. From this no one will dissent.

Counsel for Venezuela, then, is quite right in saying, "the question for us is not whether upon the facts before the prize court we would have come to a different conclusion." It is whether the proceedings and judgment of that court were *manifestly and certainly* wrong, to the prejudice of the claimant.

We are not convinced of their wrongfulness.

The Colombian prize court was duly established in pursuance of a law of the Colombian Congress passed October 14, 1821. That law authorized the executive power to establish prize courts in the republic, and promulgated rules and regulations for their procedure and government. This was done by executive decree, March 30, 1822, in which the rights and duties of parties and officers in prize matters are set forth fully and with precision, and, so far as we are advised, in conformity with the requirements of the public law and the usages of nations in this regard.

The prize court consisted of the senior commandant of the department, with an *asesor* learned in the law. An appeal lay from its decision to the supreme court of justice. We see in these laws no basis for the complaint, therefore, of one of the insurance companies, to Mr. Clay, in 1825, against the Colombian "ordinance" establishing the court.

The proceedings before the tribunal seem to have been regular and in accordance with usage. On the hearing, July 9, 1824, before the "senior commandant-general of the second marine department, finding himself associated with his *asesor* in the hall of the tribunal," to quote the language of the record, the following proofs as appears from the record, giving its terms, were offered:

> Documents are recapitulated Nos. 1 to 8.
>
> No. 8. Ten signed letters, which state that all the cargo is Spanish property which it was endeavored to protect beneath the American flag.

No. 9. Four declarations relating to the act of detention by the consignee captain [master (?)], passengers, supercargo, and pilot.

> Captain [master] declares that the only articles which he knows to be American property are those belonging to Mr. Gousche, supercargo.
>
> Joaquin Hernandez Soto, underconsignee and passenger, declared himself to be a native of the kingdom of Castile, in Spain; that he did not know who are the owners of the cargo, although in part owner and consignee himself, which portion he shipped on board an American vessel for greater security thereof.
>
> The captain of the schooner *Mechanic* makes the following representation: That the act of having detained this schooner, evinced that the cargo she had on board was not considered to be American property, except that part belonging to Gousche, for all the rest was shipped by merchants of Havana, and he believes it is their exclusive property; that he knows that almost all the merchants of Havana endeavor to guard their interests under the American flag, in order to escape capture by the Colombian privateers; that he has nothing to state in favor of said cargo, and judges that it is good prize.

What the supercargo or the passengers said is not intimated, and there is nothing in the case to show. The letters are not here, nor all the eight (ship) documents, and all we know of their contents is stated in the record. From this fragmentary showing, all that has come to us, so far from finding the prize judgment manifestly wrong, it seems to us justified.

The letters were said to show *all* the cargo was Spanish. The captain said it was shipped by merchants of Havana. He supposed it Spanish property and good prize. He knew those merchants were accustomed to send their merchandise under the American flag. Soto claimed to be a native of Spain, but did not pretend to anyone on board to be a Mexican; and disclaimed knowledge of the ownership of the goods. There was no showing of neutral property before the court, aside from the small amount acquit-

ted, and under the law the burden was upon him who asserted neutrality of property to prove it. The conduct of Soto was singular, to say the least. If he were a Spaniard one can readily see why he shipped the property in Barry's name and disowned it on the ship. But why should he do either, if he were a Mexican? There would be a reason for this if the property had been subject to capture in an American vessel by a Spanish cruiser, for Mexico was also at war with Spain. But under the treaty of 1795 it was not so subject to capture. To attempt it would have been an act of piracy subjecting the captors to execution, and their government to full indemnification.

His explanation, therefore, of shipment in Barry's name for greater safety does not explain, *if* he was a Mexican citizen. The circumstances all point to his being a Spanish subject.

Apropos to the question of the regularity and sufficiency of this proof, attention is directed to this passage in the opinion of Judge Story in the case of the *Isabella* (6 Wheaton, 1), decided not many years before 1824: "It is to be recollected," he said, "that by the settled rule in prize courts the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn shall in the first instance come from the ship papers and the passengers on board."

This judgment was, in our opinion, in accordance with the public law. Soto, other owners of the cargo, and the insurance companies through the master of the ship, were parties to the proceedings and bound by them unless involving manifest injustice. (Case of *Mary, supra, C*rousden et al. *v.* Leonard, 4 Cranch, 34.) The naked affidavit of Soto, a year afterward, can not avail against it.

And that affidavit taken at its face was at least of questionable sufficiency under the doctrine laid down in the case of *Thirty Hogsheads of Sugar* (9 Cranch, 328), by Chief Justice Marshall, quoting a like enunciation by Sir William Scott. In that case Bentzon was a subject and resident of Denmark, owning and operating a plantation in Santa Cruz island, then in possession of the British. Thirty hogsheads of sugar manufactured from the products of said plantation by Bentzon's agents and for him were shipped from the island on a British vessel, consigned to a house in London for account of Bentzon. On their way (during the war of 1812) the vessel was captured by an American privateer and brought to Baltimore, where it and the cargo were libeled as enemy property. Both were considered as good prize, although the United States was at peace with Denmark. The ground of the decision as to the sugar was that it took its character *not* from that of the owner, but from that of the soil on which the cane was produced. How far or whether the goods of Soto may have been of his own manufacture in Cuba, arising from products grown there on his own land, there is nothing to indicate.

There is still another objection to this claim, even if the prize sentence was erroneous. This is not a case, it may be premised, where its principles

have been settled by the court of last resort, and where an affirmance would follow as a matter of course because of such former judicial settlement. There was involved a simple question of fact, to wit: Whether the Soto invoice was enemy property.

It is thoroughly well settled that in such a case—as indeed is true of judicial sentences generally where appeals are reasonably attainable—a state's liability begins only when the court of *last resort,* accessible by reasonable means, has acted on it.

The doctrine is well stated by Rutherforth (Inst. vol. 2, ch. 9, § 19), quoted approvingly as a part of his own text by Mr. Wheaton, p. 465. He says:

> In order to determine when their right to apply [those injured by wrongful sentence of prize court] to their own state begins, we must inquire when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else but the right of the state to which the captors belong to examine the conduct of its own members before it becomes answerable for what they have done, such exclusive right can not, and, until their conduct has been thoroughly examined, natural equity will not allow that the state should be answerable for their acts, until those acts are examined by all the ways which the state has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review to which the parties may appeal if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state for a remedy against an erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct: and till their conduct has been examined by all these means the state's exclusive right of judging continues.

The law of Colombia provided for appeals from its prize courts to the supreme court of the republic, as seen, yet there was no attempt at appeal. In fact, the captain of the vessel seemed to acquiesce in the sentence—at least, he thought, as he stated to the court, the goods condemned good prize. There is no reason to suppose he acted dishonestly or collusively. The conduct of Soto was sufficient, with the other facts stated, to justify his remark. If Soto abandoned the goods to their fate, why should the captain further litigate? He of course knew nothing of this particular insurance, for it was effected eight days after the capture.

Still he would reasonably assume insurance, and the law made him, being the master of the ship, the agent of the companies, in their absence, to protect

their interests in this regard. His failure to appeal, if such under the circumstances became his duty, was not the fault of Colombia.

There is still, apparently another objection to this claim as it is presented on the papers transmitted to us. It is prosecuted by Corwin. The papers here fail to show that he ever had other interest in the insurance demands than the portion prosecuted against New Granada.

The transfer to him by the Atlantic Company was, to wit:

> For the proportion of loss said government [New Granada] is liable to pay by reason of the seizure of the cargo of the schooner *Mechanic* in 1824 by the Colombian privateer *General Santander*, the said State of New Granada being liable to pay the one-half part of the loss sustained by said company by reason of such seizure, of the sum of about $6,000, with interest. To have and to hold the said hereby sold and assigned premises unto said Amos B. Corwin, his heirs, and assigns, forever.

The transfer by the Hope Company, made at the same time, is in substantially the same terms, save as to the amount of the interest transferred. But this half so assigned to him was allowed entire by the Bogota commission in 1862, and, so far as appears, settled by New Granada. Corwin's presentation through Minister Culver of a claim in his behalf upon the Venezuelan Government, in 1863, for her 28 1/2 per cent of the insurance, was not based upon any interest held by him, so far as disclosed here. He was not a claimant of that portion of the alleged indebtedness within the meaning of the treaty so far as appears. It is proper to say, however, that we should not be disposed to rest the decision upon the present showing in this regard without further inquiry, if the claim were good otherwise. It may be the diplomatic correspondence would supply the deficiency.

Again, even if the Corwin demand in 1863 could be shown to have been authorized, it seems to us it came too late, under our announcement in case No. 36, if that was its first presentation. Venezuela had then been a state thirty-three years. The demand was thirty-nine years old. It had been presented to the old republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had, presumably passed away and other means of defense become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other grounds stated, assuming proper and timely presentation of the claim against Venezuela.

The claim is disallowed.