

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 the Representatives of Captain John Clark et al. v. Venezuela,
opinion of the Commissioner, Mr. Findlay**

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 les Représentants du Capitaine John Clark et al. c. Venezuela,
opinion du Commissaire, M. Findlay**

VOLUME XXIX, pp.270-278



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2012

**Case of the Representatives of Captain John Clark *et al.* v. Venezuela,
opinion of the Commissioner, Mr. Findlay***

**Affaire concernant les Représentants du Capitaine John Clark *et al.*
c. Venezuela, opinion du Commissaire, M. Findlay****

Standing before the Commission—nationality of the claimant—estoppel.

Nationality—recognition of dual nationality—contradiction between obligations and rights implied by the two different nationalities alleged by the claimant—presumption of nationality of the country of birth—burden of proof of expatriation and change of nationality on the claimant.

War—breach of duties of neutrality—right of capture of belligerent vessels under the commission of a belligerent State—elementary principle of law: when nations are at peace all their citizens and subjects are at peace and vice versa—right to make war vested in the sovereignty and taken away from the individual—an offence which is not merely a breach of municipal law within the reach of the pardoning power of the Executive but is essentially and distinctively an offense against the law of nations is beyond the competence of any power to pardon or condone.

Effect of wrongdoing of claimant—no man may invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing—contract fraught with illegality and turpitude is utterly null and void, conferring no rights or obligations sustainable by any court of law or equity—duty of court to apply the prohibition against such claims *sua sponte* whenever the record discloses that it is applicable.

Locus standi devant la Commission—nationalité du plaignant—estoppel.

Nationalité—reconnaissance de la double nationalité—contradiction entre les obligations et les droits impliqués par les deux nationalités invoquées par le plaignant—présomption de la nationalité du pays de naissance—charge de la preuve de l'expatriation et du changement de nationalité incombant au plaignant.

Guerre—violation du devoir de neutralité—droit de capturer les navires belligérants en vertu du mandat d'un État belligérant—principe élémentaire du droit : tous citoyens et sujets de nations vivant en paix vivent en paix et vice versa—droit de faire la guerre conféré à la souveraineté et retiré à l'individu—infraction n'étant pas seulement une violation du droit interne relevant du droit de grâce de l'Exécutif, mais étant de manière essentielle et spécifique une infraction au droit des gens, ne relevant du droit de grâce ou d'excuse d'aucun pouvoir.

* 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. 2743.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 2743.

Conséquences des méfaits du plaignant—nul individu habilité à invoquer ou recevoir l'assistance de quelque tribunal que ce soit, interne ou international, pour le recouvrement des fruits de ses propres méfaits—contrat entaché d'illégalité et de turpide étant absolument nul et non avenu, ne conférant aucun droit ni aucune obligation que quelque tribunal puisse reconnaître, en droit ou en équité—devoir du tribunal d'appliquer d'office l'interdiction de telles demandes dès lors que cette interdiction est applicable au regard du dossier.

The great question in these cases is whether, assuming the lawfulness of Captain Clark's commission, issued by the Oriental Banda, and the unjustifiable snatching of the prey from his talons by Commander Joly of the Colombian navy, the claim can be supported before a tribunal like this, and restitution decreed, without a violation of the principles of sound international law and morality. It is admitted that the courts of the United States would have been bound to order a restitution of the vessels to their proper owners had they been brought within the jurisdiction of that country. This was the ruling in many similar cases of contemporaneous date, most of which are cited in the brief of the learned counsel for the last-mentioned claimants, but the law of which was laid down with great clearness and force by the Supreme Court in the earlier case of *Talbot v. Jansen*, in 3 Dal. p. 133.

While, however, it is conceded that the courts of the United States would be bound to respect and enforce the neutral obligations of the country, in any case of seizure arising out of the acts of one of its citizens, under color of a foreign commission, it is contended that when a controversy originates in a trespass of this kind, but does not concern the neutral who has been injured, but only the wrongdoer in his relations to a third party, who quoad him is a tortfeasor also, then the principle does not apply, and there would be no impropriety in the United States enforcing the claim; although in doing so it must necessarily sanction a breach of its own laws and the law of nations and violate solemn treaty stipulations.

It is to be observed that this is not the view of the learned counsel who represents the United States in these cases, and who seeks to establish the responsibility of Venezuela upon the ground that she has recognized and admitted the claim and is estopped from disputing its validity or claiming exoneration by reason of the turpitude of the original seizure. With these elements out of the case we did not understand him as contending that the United States could prosecute a claim of this character without at the same time involving itself in the admission that a violation of its laws and of the international law founded upon the strict observance of neutrality as the groundwork of the peace of nations, were matters not worth considering in such a controversy.

It will be admitted that Venezuela has no concern with the question whether the United States holds a strict or a slack rein in the enforcement of its laws in any matter between it and some third party or its own citizens, and that it does not lie in her mouth to set up as against one of these citizens a plea of turpitude founded on a breach of these laws, and especially as an excuse for the nonpayment of money which, as between her and that citizen, she had no right to appropriate in the first instance and has no right now to withhold.

Captain Clark was either a citizen of the United States or a citizen of the Oriental Banda, or he was a citizen of both countries. To have any standing before this commission he must have been a citizen of the United States. If he was a citizen of the United States, however, he could not have been a citizen of the Oriental Banda, unless he can claim a double citizenship of both countries.

Treating him as a citizen of the United States pure and simple, he was clearly a violator of its laws and the law of nations when he captured on the high seas the property of persons who were at peace with the United States, and as such violator could have no hearing in the courts of the United States, and certainly can have none before this tribunal.

As a citizen of the Oriental Banda, disentangled from other ties of allegiance, he is excluded from presenting his claim here by the express terms of the treaty, which only covers claims of citizens of the United States. Unless, therefore, a man may lawfully, at one and the same time, be a citizen of two countries, with the right to claim the protection of either, in consideration of the allegiance he owes to each, without regard to the contradictions and absurdities which such an anomalous dual relation involves, the case of Captain Clark must be dismissed. The petition of E. J. D. Cross, adm'r *d.b.n., c. t. a.*, of the estate of John Clark, alleges substantially that he was a naturalized citizen of the Oriental Banda. It is a concession in the case that he was born a citizen of the United States. Now, could he be both—a citizen of the Oriental Banda for the purpose of escaping a penalty, prescribed by the law of the country of his nativity, for a violation of its neutrality, and at the same time a citizen of that same country after the very offense was committed—for the purpose of giving him a standing before a commission organized to hear claims of its citizens with the ulterior purpose of obtaining the fruits of his wrong doing? Upon this hypothesis he leaves the United States with no intention of renouncing his allegiance, and yet at the same time with the intention of doing so. He becomes a naturalized citizen of the one country with the full purpose and determination of remaining a native citizen of the other. He expatriates himself and yet does not expatriate himself; he is naturalized and yet not naturalized. He bears a commission which the Oriental Banda has a right to issue, but in what character, as citizen of that country or of the United States?

When he captured the *Medea* and the *Reina de dos Mares*, was he a citizen of the United States, or of the Oriental Banda, or both? If he was a citizen of the United States it would have been its duty to protect him in

his captures and wrest them out of the possession of Commander Joly, and wrest them, too, not for the purpose of restoring them to their owners, but to establish the right and possession of Captain Clark. In doing so, if such a thing were conceivable, the United States would have protected an offender against its laws, and at the same time involved itself in war with both Spain and Portugal. No one pretends that any attempt on the part of the United States to support the claim of Captain Clark at the time would have involved it in absurdities and serious consequences less extreme. On the other hand, if the captain was a citizen of the Oriental Banda, proceeding under a letter of marque regularly and lawfully issued by that country, then it is clear that the United States owed him no duty and that he must look to the country of his adoption for whatever protection he required. The idea that at one and the same time he could accept and hold this commission as a citizen of both countries is simply preposterous.

Again the burden of proof is on Captain Clark, or those claiming under him, to establish the fact of his expatriation, as a man must be a citizen of some country, and cannot be an irresponsible nondescript, such as a citizen of the world, without the rights and corresponding obligations which spring from an established political status. He will be presumed to be a citizen of the country which has given him birth until he has established by satisfactory evidence the fact of his naturalization and adoption as a citizen of some other country. Until this is done, and the fact of his expatriation satisfactorily demonstrated, he can not escape the consequences of the violation of the laws of the country from which he has emigrated, nor can that country escape responsibility for his acts. He may go so far as to take an oath of allegiance to another sovereignty and then accept its commission, and yet not lose his character as citizen of the United States, so as to be amenable to its laws. (*Talbot v. Jansen.*) Now, in this case it is contended, on the one hand, by the representatives of Adams, the assignee of one-fourth of this claim, that Clark was born a citizen of the United States, made the captures as such, and died still bound by the ties of allegiance to his native country. On the other hand, to escape the consequences of this dilemma, his own immediate representatives set up the claim that he was a citizen of the Oriental Banda; but in doing so, plainly put themselves out of court, or rather erect an insuperable bar that prevents them from getting in. The difference in the attitude of the respective claimants is, that one class secure a *locus standi*, by the requisite jurisdictional averment, but in the course of the proceedings commit suicide, whereas, the other class do not so much as cross the threshold of the court.

It was contended that the United States had adopted this claim, and in a long course of diplomatic correspondence maintained its validity against Venezuela, and that by so doing, whatever turpitude affected the original transaction as between it and Clark, had been cleansed and condoned, and as it was the only party which could justly complain of his acts, the condonation had

the effect of a full pardon and restored him to all his rights, more especially as against Venezuela, which had appropriated his property by the strong hand and without the slightest color of claim. Put the case, then, in its strongest light and assume that Clark, on his return to the United States, had been prosecuted for a violation of its neutrality laws in accepting a commission to depredate upon the commerce of a country with which the United States were at peace, and after conviction had been pardoned, could this commission award restitution to the claimants as prayed⁵ Clearly not. This is not a United States court, in which the pardon of the President under the seal of the United States could be pleaded. The offense in this case was not a mere breach of the municipal law of the United States within the reach of the pardoning power of the Executive, but was essentially and distinctively an offense against the law of nations, beyond the competence of any power to pardon or condone. It is an elementary principle of this law that when nations are at peace all their citizens and subjects are at peace, and *vice versa*. War involves all alike in a common hostility. As a necessary deduction from this principle the right to make war is vested in the sovereignty and is taken away from the individual

To permit the individual citizen to make war upon a foreign citizen or subject whenever he considered himself aggrieved, would be destructive of the peace of nations, just as in the same sense, though on a much more limited scale, to permit each member of society to take the law in his own hands, would subvert the very foundations of social order. Treaties and municipal laws which recognize this principle are only declaratory or expository of the law itself, which is founded in international necessity.

When Captain Clark, therefore, sailed in the *La Fortuna*, under a commission which authorized him to prey upon the commerce of Spain and Portugal, he still retaining his citizenship of the United States, which was at peace with both of these countries, he was embarked on a cruise which, if it did not constitute him a pirate, was at least a continuing trespass in violation, not only of the law of his own country and the treaty with Spain, but of the law of nations.

Had he been arrested and taken into custody by the Spaniards his defense, doubtless, would have been that he was a citizen of the Oriental Banda, and as such protected by his letter of marque. He certainly would have made no attempt to defend upon the ground that he was a citizen of the United States, for the moment he did so he would have been punishable as a pirate for the offense against Spain under the treaty between that country and the United States. For his own protection, as well as the peace of nations, it was absolutely necessary that his status should have been defined with absolute precision.

It is conceded that in the state of the law with respect to expatriation, when Captain Clark left the United States it would have been impossible for him to have renounced his allegiance to that country in accordance with any prescribed statutory mode, for the reason that Congress had never legislated on the subject. And yet, still, if he had left his own country for a lawful pur-

pose, and with the deliberate design of being naturalized in another, and in good faith, evidenced by continued residence, had become a citizen of the country to which he had emigrated, it is not doubted that as to all acts subsequent to his naturalization he would be treated as a citizen of the country of his adoption. But he not only failed to demonstrate his expatriation by such open and accepted tokens as were available to him, but the claim now set up by his representatives is, that it was not his intention to expatriate himself at all; that he never removed his family from the United States; that they continued to reside in the city of Baltimore, and that he also resided there except when holding a commission in a foreign service. The brief of the learned counsel for the Adams claimants says, on p. 17, that—

It is incontestable that Captain Clark was a native citizen of the United States residing in Baltimore all his lifetime except for the two brief periods before referred to, and the time he was on the high seas under a commission from President Artigas.

Then, for the purpose of showing that he was treated as a citizen of the United States, notwithstanding his acceptance of service under another flag, the case of the *Bello Corunnes* in 6 W. p. 152, is cited. In that case there was another Baltimorean, Captain Barnes, who commanded the privateer, the *Puyerrredon*, bearing the flag of the Buenos Ayrean Republic. He had assumed the character of a citizen of the power that had commissioned him; captured the *Bello Corunnes*, a vessel belonging to Spaniards, off the southwest coast of Cuba, and which, in a pretended endeavor to reach a port in the United States, was stranded on Block Island. There were three classes of claimants who intervened in the proceeding instituted in the United States court for the condemnation of the vessel for a violation of the trade laws of the United States.

These were, the Spanish consul for the owners; the salvors; and Captain Barnes, as the captor; and the court, in speaking of the latter's claim, after showing that the *Puyerrredon* was American owned, says: "But they are also of the opinion that she must be held to be American commanded, since even if the doctrine could be admitted that a man's allegiance maybe put off with his coat, it is very clear that Mr. Barnes's citizenship is altogether in fraud of the laws of his own country."

Then is added the paragraph quoted in the brief: "His family has never been removed from Baltimore, and his home has been always either there or upon the ocean."

It will be observed that Captain Barnes, clearly perceiving that his claim to recovery could only be founded on his citizenship of Buenos Ayres, claimed in that character and right only just as in the present case the immediate representatives of Captain Clark, differing from the representatives of his assignee, Adams, claim that their ancestor was a citizen of the Oriental Banda. In all probability the cases of Clark and Adams, with respect to citizenship, were precisely the same. Both were citizens of the United States by birth, and both had a merely colorable citizenship of another country, and both, to repeat the

language of the court just cited, were making use of it, "in fraud of the laws of their own." The argument of the learned counsel is addressed altogether to the point of establishing Clark's citizenship of the United States, and in this connection he says that it is "hardly worth an argument to demonstrate the absurdity of the contention . . . that a citizen of the United States forfeits his citizenship by a violation of its laws."

Having established this point, and brought Clark within the letter of the treaty he seems to forget that in administering justice, which is the prime function of this commission, there is a more important question to be examined than Clark's citizenship, and that is the character of the claim itself. It is just because Clark was a citizen of the United States, and in that character committed acts of hostility against the citizens of another country, with which his own was at peace, that presents us from considering his claim. It would be very absurd indeed to hold that a citizen forfeited his citizenship by a violation of the neutrality of his country but it is quite true and proper to maintain that no man shall invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing.

If authority is needed on so obvious a proposition, founded alike on sound law and sound morality, it can be found in the case of the *Bello Corunnes* just cited.

The fact that the defendant against whom reclamation is sought is a wrongdoer also does not alter, but only serves to give point to the principle. Admitting to the fullest extent that Venezuela or Commander Joly was a flagrant trespasser in depriving Clark of his captures, that the commission he received was regular and lawful in all respects, and that the Oriental Banda, under whose flag he sailed, was invested with full belligerent rights, among which privateering was unquestionably one at the time of these occurrences, the stubborn fact still remains that Clark himself, the party through whom these claimants derive title, was a flagrant trespasser also, if indeed a harsher term might not be justly applied in characterizing his spoliations. It is not necessary for Venezuela to make the defense; it is the duty of the court, *sua sponte*, to apply the principle whenever the record discloses a fit case for its application. (*Oscanyán v. Arms Co.*, 103 U.S., p. 261.)

As between Venezuela and the claimants, outside of the duty to make restitution to the owners in the case of the vessel belonging to Portugal, with which Venezuela was not at war when the capture was made, there is a strong equity appealing for relief. Venezuela or Colombia was at war with Spain, and so far she was embarked in a common cause with the Oriental Banda; and crippling the commerce of the common enemy helped the cause of both. The seizure of the *Medea*, a Spanish vessel, by Joly under these circumstances was an ungenerous act, and the refusal of Venezuela to refund the value of this capture, after the Oriental Banda had waived whatever claims it had in favor of Clark, would have been dishonorable. But Venezuela, it appears, has actually paid the full amount of both claims, although the parties to whom payment

was made, and some other circumstances connected with her conduct in the matter, have been made the subject of severe animadversion by the representatives of the United States at Caracas. With the view we take of the main question it is not necessary to discuss this branch of it. Whether payment was made, or not, or whether Venezuela is bound to pay what, as to a part of the claim, "might be considered a debt of honor," are questions quite apart from any matters which, we think, are proper for us to consider. Captain Clark was a citizen of Maryland, as well as of the United States, and although his rights and duties with reference to other countries are to be ascertained and established by his character as a citizen of the United States, which is the sovereignty of external communication in that dual republic, yet still, the law of his own State, as expounded by its highest court in a case similar to his own, ought not to be without significance and effect. The case of *Gill, Trustee, v. Oliver's Executors* has been referred to and is cited by counsel in his brief, p. 27. It is reported in 11 H. p. 520, and came up on writ of error from the court of appeals of Maryland. The question involved was, whether a trustee in insolvency should have the proceeds of a certain award made by the Mexican commission under the convention of 1839, in favor of one Goodwin, or whether they should go to the executors of Oliver, to whom he had made an assignment of the claim.

The claim originated in the supply of muskets and munitions of war under a contract with General Miña by the Baltimore Mexican Company, executed in Maryland in 1816. Goodwin became insolvent in 1817, and Gill was appointed trustee in 1837. Under the laws of Maryland all the property, rights, and credits of the insolvent, of whatever kind, passed to the trustee. The Mexican commission made its award in the Goodwin case in trust for the parties interested, in 1839. In the mean time Goodwin had sold the claim to Oliver, and died. At the time of the award, therefore, there was an outstanding transfer of all Goodwin's property as of the date 1837 in Gill, trustee, and a sale of the Mexican claim to Oliver, and the question was, as stated, Who should have the money, the trustee, or the executors of Oliver, who had died before the case got into the courts?

For some reason the Maryland court failed to have the case reported; but in a subsequent case, involving the same questions, which went up to the Supreme Court from the circuit court of the United States, it appears that that court had the record of the former case, which contained the decree of the Maryland court, before them, and quote from it as follows:

They (that is, the court of appeals of Maryland) are of the opinion that the entire contract (the Miña contract) upon which the claim of the appellee (Gill, the trustee) is founded, is so fraught with illegality and turpitude as to be utterly null and void, conferring no rights or obligations upon the contracting parties which can be sustained or countenanced by any court of law or equity in this State; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such claim does not pass to or vest in the trustee of the insolvent debtor.

It would be difficult to employ much stronger language, and yet every word is applicable to the present claim, because the court finds all this illegality and turpitude to flow from a breach of neutral duty. The case referred to is the case of *McBlair v. Gibbs* (17 H.249; 21 Curtis, p. 479). The original case of Grill, trustee, etc., in 11 H., was dismissed for want of jurisdiction, because the court did not find that there was any question involved under the judiciary act on which a writ of error could be founded. The decision of the Maryland court was thus left to stand, and he would be a bold man who would undertake to maintain that it can be shaken, either on principle or authority.

It is well known that the chief justice (Taney) did not agree with his brethren as to the jurisdiction of the Supreme Court, and afterward filed an elaborate dissenting opinion, in which he reviewed the controversy growing out of the Mexican claims at great length. In the course of this opinion, in speaking of the action of the commission in allowing the claims, he says:

Of course it was their duty not to allow any claim for services rendered to Mexico or money advanced for its use by American citizens in violation of their duty to their own country or in disobedience to its laws. For the Government would have been unmindful of its own duty to the United States if it had used its power and influence to enforce a claim of that description or had sanctioned it by treaty. (*Williams v. Gibbs*, 17 H. 262; 21 Curtis, 492).

We do not understand that the observations of Justice Grier, quoted in the brief, are at all in conflict with this opinion of the chief justice. Doubtless the risks taken by the Mexican company, in Baltimore, in furnishing military supplies to General Mina ought to have enhanced the justice and equity of its claims against the *new government of Mexico*, which had its origin in the revolution begun by Mina. The court, as we understand it, besides making what was an extrajudicial utterance, the case having gone off on a point of jurisdiction, only means to say that the Mexican Government in 1825 did a very proper and honorable thing in recognizing the justice of these claims.

So here we might express our individual opinions that Venezuela is in honor bound to make restitution, provided, of course, she has not already done so, by an appropriation for not only this claim, but also that arising out of the seizure of the Portuguese vessel. But we have said enough on this subject, and whatever may be the duty of Venezuela, being strongly of the opinion that the claimants have no standing before this commission, their petitions will be dismissed and claims rejected.