REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

S. S. “Edna”. Disposal of pecuniary claims arising out of the recent war (1914-1918) (United States, Great Britain)

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XLII.

S.S. "EDNA" [1].

DISPOSAL OF PECUNIARY CLAIMS ARISING OUT OF THE WAR (1914-1918) [2].

PARTIES: United States of America, Great Britain.

SPECIAL AGREEMENT: Exchange of notes, May 19, 1927.

ARBITRATOR: John C. Knox (U.S.A.).

AWARD: New York, December 22, 1934.

American vessel captured by British cruiser.—Requisition pending prize proceedings.—Judgment ordering restitution without damages.—British Prize Court findings on probable cause for capture upheld by Arbitrator. —Detention and use for longer period than necessary.—Refusal of compensation.—Prize Rules, September 20, 1914.—Applicability.—Exhaustion of local remedies.—Injustice.—Assumption by United States of liability for claims by its citizens against British Government.—Laches of claimants. —Amount of compensation.—Interest.—Scope of Agreement of May 19, 1927.

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[1] See also in this volume the S.S. *Lisman* case, p. 1767, and the S.S. *Seguranca* case, p. 1861.

[2] For bibliography, index and tables, see end of this volume.

Special Agreement.

ARRANGEMENT EFFECTED BY EXCHANGE OF NOTES BETWEEN THE UNITED STATES AND GREAT BRITAIN FOR THE DISPOSAL OF CERTAIN PECUNIARY CLAIMS ARISING OUT OF THE RECENT WAR, SIGNED MAY 19, 1927.

[*The Secretary of State to the British Ambassador.*]

DEPARTMENT OF STATE,
Washington, May 19, 1927.

Excellency:

I have the honor to incorporate herein the text of an arrangement for the disposal of certain pecuniary claims arising out of the recent war, in which His Majesty's Government in Great Britain and the Government of the United States are interested, either as principals or in behalf of their respective nationals. This arrangement which has been agreed upon by representatives of both Governments, has been approved by the Government of the United States. The terms of the arrangement are as follows:

ARTICLE I.

With the exceptions stated in Article II hereof His Majesty's Government in Great Britain and the Government of the United States agree:

(1) That neither will make further claim against the other on account of supplies furnished, services rendered or damages sustained by it in connection with the prosecution of the recent war, all such accounts to be regarded as definitively closed and settled.

(2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be regarded as the final settlement of such claim, it being understood that each Government will use its best endeavours to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British Prize Courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them.

(3) That the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by the immediately preceding paragraph is fully reserved, it being specifically understood that the juridical position of neither Government is prejudiced by the present agreement.

ARTICLE II.

Nothing contained in this agreement shall be construed to annul, alter, modify or in any way affect the rights of nationals of either Government or to prevent the presentation of diplomatic claims based thereon, in respect of:

(1) The user of inventions by the other Government in connection with its prosecution of the war;

(2) Damage caused by or salvage services rendered to a vessel belonging to the other Government.

It is expressly understood that the provisions of this agreement do not apply to (1) Claims by the Government of the United States, or of its nationals, against the Government of any of His Majesty's self-governing Dominions or of India, or British nationals resident therein, or to claims against the Government of the United States by the Government of any of His Majesty's self-governing Dominions or of India, or by British nationals resident therein, and (2) Claims on behalf of either Government or its nationals for the release of property held by Custodians of Enemy Property in Great Britain and Northern Ireland and all British Colonies and Protectorates, and by the Alien Property Custodian or the Treasurer of the United States.

If the foregoing arrangement is acceptable to your Government, a note from you to that effect will be considered by this Government as completing the understanding and the arrangement will thereupon be regarded by the Government of the United States as having come into force.

In order to obviate the possibility of future misunderstanding as to the purpose or interpretation of the arrangement, I desire to state that the Government of the United States regards it not as a financial settlement but as the friendly composition of conflicting points of view which seemed to lend themselves to no other form of adjustment. It is my understanding, in these circumstances, that the present agreement will be construed by both Governments with full regard for the equities of all parties concerned. The Government of the United States realizes that by the terms of the agreement His Majesty's Government waive their right to receive a net cash payment on account of certain claims recognized by the United States as just and proper, and also their right to press certain other claims, liability for which has not been formally admitted by this Government, but which involve considerable amounts. I desire to record the fact that the Government of the United States will regard the net amount saved to it through the above-mentioned waiver by His Majesty's Government of outstanding claims against the Government of the United States as intended for the satisfaction of those claims of American nationals falling within the scope of paragraph (2) of Article I of the agreement, which the Government of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement. Consequently, I take pleasure in assuring you that the Government of the United States will recommend such action by Congress as will insure the utilization for the purpose just mentioned of the sums saved to the United States under the provisions of the present agreement, and that it will also safeguard His

Majesty's Government against possible double liability by exacting an assignment to the Government of the United States of all of a claimant's rights and interests in the claim in question as a condition precedent to the allowance of any compensation in respect thereof.

Furthermore since it appears that American citizens with claims against His Majesty's Government which do not fall within the scope of the present agreement enjoy certain rights of access to the British judicial or administrative tribunals not enjoyed in similar cases by British subjects seeking remedy against the Government of the United States, I take pleasure in extending to the cases of British claimants whose claims are not covered by the present agreement, the assurance contained in paragraph (2) of Article I of the agreement in question, that is that the Government of the United States will use its best endeavors to secure to British nationals the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and in such cases the Department of State will be happy to give active support to a request to the Congress for appropriate remedial legislation.

Accept, Excellency, the renewed assurances of my highest consideration.

FRANK B. KELLOGG.

His Excellency
The Right Honorable
Sir ESME HOWARD, G.C.M.G., K.C.B., C.V.O.,
Ambassador of Great Britain.

[*The British Ambassador to the Secretary of State.*]

No. 342.

BRITISH EMBASSY,
Washington, D.C., May 19th, 1927.

Sir:

I have the honour to incorporate herein the text of an arrangement for the disposal of certain pecuniary claims arising out of the recent war, in which the Government of the United States and His Majesty's Government in Great Britain are interested either as principals or on behalf of their respective nationals. The terms of this arrangement, which has been agreed upon by representatives of both Governments, are as follows:

ARTICLE I.

With the exceptions stated in Article II hereof His Majesty's Government in Great Britain and the Government of the United States agree:

(1) That neither will make further claim against the other on account of supplies furnished, services rendered or damages sustained by it in connection with the prosecution of the recent war, all such accounts to be regarded as definitively closed and settled.

(2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be regarded as the final settlement of such claim,

it being understood that each Government will use its best endeavours to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British Prize Courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them.

(3) That the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by the immediately preceding paragraph is fully reserved, it being specifically understood that the juridical position of neither Government is prejudiced by the present agreement.

ARTICLE II.

Nothing contained in this agreement shall be construed to annul, alter, modify or in any way affect the rights of nationals of either Government or to prevent the presentation of diplomatic claims based thereon, in respect of:

(1) The user of inventions by the other Government in connection with its prosecution of the war ;

(2) Damage caused by or salvage services rendered to a vessel belonging to the other Government.

It is expressly understood that the provisions of this agreement do not apply to (1) Claims by the Government of the United States, or of its nationals, against the Government of any of His Majesty's self-governing Dominions or of India, or British nationals resident therein, or to claims against the Government of the United States by the Government of any of His Majesty's self-governing Dominions or of India, or by British nationals resident therein, and (2) Claims on behalf of either Government or its nationals for the release of property held by Custodians of Enemy Property in Great Britain and Northern Ireland and all British Colonies and Protectorates, and by the Alien Property Custodian or the Treasurer of the United States.

I am authorized to inform you that the foregoing arrangement is acceptable to His Majesty's Government in Great Britain and I hereby convey their acceptance thereof in acknowledgment of that contained in your note on behalf of the Government of the United States. The understanding is therefore regarded as having been completed and the arrangement as having come into force.

In order to obviate the possibility of future misunderstanding as to the purpose or interpretation of the arrangement, I am directed to state that His Majesty's Government in Great Britain regard it not as a financial settlement but as the friendly composition of conflicting points of view which seemed to lend themselves to no other form of adjustment. It is my understanding, in these circumstances, that the present agreement will be construed by both Governments with full regard for the equities of all parties concerned. By the terms of the agreement His Majesty's Government in Great Britain waive their right to receive a net cash payment on account of certain claims recognised by the United States as just and proper, and also their right to press certain other claims, liability for which has not been formally

admitted by the Government of the United States. It is understood that the Government of the United States will regard the net amount saved to it through the above-mentioned waiver by His Majesty's Government of outstanding claims against the Government of the United States as intended for the satisfaction of those claims of American nationals falling within the scope of paragraph (2) of Article I of the agreement which the Government of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them or in respect of which, for other reasons, the equitable construction of the present agreement calls for a settlement. I take note with satisfaction of your assurance that the Government of the United States will recommend such action by Congress as will ensure the utilization for the purpose just mentioned of the sums saved to the United States under the provisions of the present agreement and that it will also safeguard His Majesty's Government in Great Britain against possible double liability by exacting an assignment to the Government of the United States of all of a claimant's rights and interests in the claim in question as a condition precedent to the allowance of any compensation in respect thereof.

Furthermore, since it appears that British subjects with claims against the Government of the United States which do not fall within the scope of the agreement above quoted do not enjoy rights of access to American judicial or administrative tribunals as complete or effective as are enjoyed in similar cases by American citizens seeking remedy against His Majesty's Government in Great Britain, it is understood that the Government of the United States extends to British claimants whose claims are not covered by the agreement above quoted, the assurance contained in paragraph (2) of Article I of the said agreement, that is to say, that the Government of the United States will use its best endeavours to secure to British nationals the same rights and remedies as may be enjoyed by its own nationals in similar circumstances and that in such cases the Department of State will give active support to a request to the Congress for appropriate remedial legislation.

I have the honour to be,
with the highest consideration,
Sir,
Your most obedient, humble servant,

ESME HOWARD.

The Honourable
FRANK B. KELLOGG,
Secretary of State of the United States,
Washington, D.C.

SUDDEN & CHRISTENSON, INC. v. UNITED STATES.

IN THE MATTER OF THE CLAIM IN BEHALF OF JOHN A. HOOPER, SUDDEN & CHRISTENSON, A CORPORATION, G. W. MCNEAR, INC., EMIL T. KRUSE, GILBERT LOKEN, AND EDWARD KRUSE, ALL CITIZENS OF THE UNITED STATES AND OF THE STATE OF CALIFORNIA AND OWNERS OF THE AMERICAN STEAMSHIP "EDNA", FOR ALLEGED LOSS AND DAMAGE SUFFERED BECAUSE OF THE SEIZURE AND REQUISITION OF SAID STEAMSHIP BY THE BRITISH GOVERNMENT AND THE USE THEREOF BY SAID BRITISH GOVERNMENT.

Award rendered December 22, 1934.

Appearances: Legal Adviser to the Department of State (by J. A. Metzger and J. B. Matre, Esqs.); Harvey D. Jacob, Esq., counsel for claimants.

John C. Knox, arbitrator.

Prior to March 7, 1914, the steamship *Edna*, with which this inquiry is concerned, was known as the *Jason*. She had Norwegian ownership and registry. By charter agreement she came under the management and control of a national of Germany named Friedrich Jebsen. He, it seems, was a reserve officer in the naval forces of that country. At his instance, the vessel was put in trade between Pacific ports of the United States and Mexico.

On or about the date above mentioned, the *Jason*, for a consideration of £16,000, passed to the ownership of a Mexican corporation named "Lloyd Mexicano, S.A.", dominated by Jebsen. Thereupon, the Mexican Consul General at San Francisco, acting under authority of his government, gave the ship a provisional Mexican registry, and she was renamed *Mazatlan*. The status thus acquired, with exceptions hereafter to be noted, continued until near the end of 1915, when the ship was purchased by present claimants, and given the name *Edna*.

During the vessel's ownership by the Mexican corporation, she had an eventful career, and acquired a widespread reputation. Factors contributing thereto were internal strife in Mexico, strained relations between that country and the United States, and finally, the Great War that came upon the world in August of 1914. Under the name *Mazatlan* the vessel made four voyages up and down the Pacific coast. The first was of no consequence. The second covered the period running from May 14 to August 3, 1914. In June of that year, and due, no doubt, to a desire to avoid

complications arising from disturbances between the rival and contending political factions in Mexico, effort was made to change the ship's registry.

The laws of this country were such that the vessel, in her then ownership could not receive authorization to fly the American flag. Resort was had to the German consul at San Pedro, Calif. Through sanction of that official, doubtless solicited and obtained by Jebsen, the ship procured upon June 20 a document that purported to permit her to carry the flag of Germany. Thereupon the name "La Paz" which had indicated the Mexican port of registry, was painted from her stern, and Hamburg was substituted in its place. Under these pretenses, the vessel completed her voyage and returned to San Francisco about August 3, 1914. Outbreak of war between Great Britain and Germany was highly imminent. In the light of what was about to occur, further use of the German flag was inadvisable. It was, therefore, supplanted by that of Mexico, and La Paz, instead of Hamburg, again appeared on the ship's stern. Possibly this change had not been made before war actually was declared.

For some days following these changes of outward appearance, the vessel lay at anchorage in San Francisco Bay. On August 14, she prepared to receive cargo which subsequently came aboard. It included 500 tons of coal, consigned to merchants located at Guaymas. At this point, observation should be made that a young man named Smith, who was trained in wireless communication, was employed on board the ship. He, together with other members of the crew, understood the coal to be intended for use by the German cruiser *Leipsig*, then operating in the Pacific.

Meanwhile, various other persons entertained suspicions as to the intended destination of the coal on board the *Mazatlan*, and these came to the notice of American and British officials in San Francisco. As a result, the ship was refused clearance until she should furnish bond that the coal would not be delivered to any German man-of-war that had coaled at an American port within the preceding three months. After some delay, such security was posted, and the *Mazatlan* got to sea on August 23. She directed her course for San Pedro. On arrival there, Jebsen and a Captain Zur Helle, accompanied by two women, and a wireless operator, named Traub, together with a German naval reservist, joined the ship. She also took on board several heavy boxes, some baggage, and some private boxes. Some of these, it was subsequently indicated, contained gunsights and other material likely to be found useful by a man-of-war.

After remaining seven hours at San Pedro, the *Mazatlan* again put to sea. When well out, Jebsen sought to get into communication with the *Leipsig*. He was frustated from doing so by Smith, who manipulated his apparatus to prevent the message. The next day, the vessel reached Ensenada, arriving early in the morning and departing in the evening. When again under way, and at 9.20 p.m., the wireless call of the *Leipsig* was received. The second day thereafter, the *Mazatlan* dropped anchor at Bellenas Bay within 200 yards of the German cruiser. Jebsen, Zur Helle, the reservist, and Traub boarded her. They took with them the several boxes, packages, and some mail. After about four hours, Jebsen, Traub, and Zur Helle returned to the *Mazatlan*. She shortly left and, in due course, made for La Paz. She then proceeded to Guaymas, where she arrived on September 2. She there discharged her coal cargo into lighters, and it thereafter went into the bunkers of the *Leipsig*. While at Guaymas, Smith, the wireless operator, whose sympathies lay with the British cause,

went ashore and communicated his knowledge and suspicions concerning the activities of the *Mazatlan* to the British consul.

While at this port, the captain of the German merchantman *Marie*, then at Guaymas, and owned by a relative of Jebsen, accompanied by several Germans, visited the *Mazatlan*. Before her departure, Jebsen, Zur Helle, and their women companions left the ship. Jebsen rejoined her at Topolobampo, the next port of call. Zur Helle, it is surmised, joined the *Leipsig*, and sank with her when she met disaster in the naval battle at Falkland Islands. Just before Jebsen returned to the boat, Captain Paulsen of the *Mazatlan* told Smith that the German wireless operator could not work the ship's wireless apparatus, and that he, Smith, should immediately send a code message to the *Leipsig*. Under threats made by the chief engineer and other officers, Smith pretented to send the message, which, as later stated by Traub to Smith, was designed to acquaint the *Leipsig* with the position of British merchant ships and thus make them easy prey for the German cruiser. Smith reported to Captain Paulsen that the message had been dispatched. Thereupon, Paulsen tore up the message and threw it overboard. A similar episode took place the next morning. All this occurred at Topolobampo. The next morning, while still in port, the *Mazatlan* was commandeered by an official of the Mexican Government. The vessel, under governmental direction, went farther along the coast to Mazatlan. But, in October, 1914, the vessel was again in San Francisco.

The ship's fourth voyage, under the name *Mazatlan*, began October 14, 1914, and after much involuntary service in Mexican waters, terminated October 8, 1915. The first vicissitude encountered on the journey was a requisition of the vessel by followers of General Carranza, during which she carried his troops and supplies. She then fell into the hands of supporters of General Villa. She was so held until October, 1915, when the sum of $15,000 was paid to the captors for her release.

While the vessel was undergoing these experiences, John H. Rinder, a former British subject, and a member of His Majesty's naval reserve between 1890 and 1904, and, in 1914, a naturalized citizen of the United States, was engaged in the ship-brokerage business, and in general shipping in San Francisco. Upon several occasions prior to January 13, 1915, he had called at the San Francisco offices of the corporate owner of the vessel with a view to chartering her. Jebsen, meanwhile, for some reason, had developed a wish to sell the ship. In a letter sent to Rinder under date of January 13, 1915, he attributed such desire to "demoralized conditions on the Mexican coast". He suggested, however, that he would be willing to negotiate a charter with the strict understanding that the boat would not go to British Columbia ports.

Negotiations for a disposition of the ship were begun between Jebsen and Rinder. They continued until February 2, 1915, when an understanding was reached that the boat would be sold for $115,000, her registry to remain unchanged until all payments should be made. In the same month, the negotiations culminated in an agreement of purchase and sale made between Lloyd Mexicano, S.A., and Rinder's principal, the Executive Co., a corporation organized under the laws of California.

The vessel, however, was still under detention in Mexico. Money was needed to secure her release, and her owner, through overdrafts, was indebted to certain banks, represented by one Wilson. In order, it is said, to secure payment of this indebtedness, and of any further advances, Wilson in April, 1915, took a bill of sale from the Lloyd Mexicano, S.A. In July

following, he transferred the ship to a pocket corporation, called "Western Pacific Steamship Co". Some time thereafter, the sum of money, which the Mexicans who held the *Mazatlan* were demanding, was paid, and the boat was released on September 23. She at once sailed for San Francisco. She had hardly reached there when, upon October 12, 1915, the Western Pacific Steamship Co. gave a bill of sale to the Executive Co. It, in turn, on October 13, passed ownership of the vessel to Sudden & Christenson. The consideration for this transfer was $125,000. Of this amount, $10,000 went to the Executive Co. as its profit, the balance going into the hands of Wilson. From this latter sum, $50,000 later followed Jebsen to Germany.

During the period that record title to the *Mazatlan* resided in Western Pacific Steamship Co., that corporation sought to have her admitted to American registry. The application seems not to have been regarded favorably by the authorities, and it was withdrawn on October 13, 1915.

On the very day that claimants acquired title, they took steps to bring the ship under the American flag and to record her under the name *Edna*. They succeeded about a month later. During this interval various departments of this Government were asked to approve or recommend against the application. In the course of the proceedings more or less investigation was made of the vessel's history, and into the character of her new ownership. Shortly before the vessel was put upon the American rolls, I. B. Hibbard, upon behalf of Sudden & Christenson, in a letter of thanks to a Government official, said:

"The *Mazatlan* has been looked upon with suspicion for the last two years, owing to the various escapades in which she has been engaged both with the Mexican and German interests. This, however, is all passed now. All of the old owners and interests have been eliminated...."

The formal certificate of registry is dated November 10, 1915, and it describes the craft as having been built in Norway—"as appears by affidavit of William H. Thornley, agent, in lieu of Mexican registry withheld....".

On the day American registration was completely effected, D. B. Dearborn & Co., New York ship agents, acting for claimants, chartered the *Edna* to W. R. Grace & Co., a well-known American shipping concern. In November of 1915 she cleared San Francisco carrying a cargo of flour and lumber for South American ports. She was bound there in order to be in position to fulfill her charter engagement, which was to carry nitrate from Chile. Reaching Antofagasta on January 18, 1916, she went on to Caleta Coloso and Mejillones, at which places the nitrate was loaded. It was consigned for delivery at Barbados and Martinique.

On January 27 the *Edna* sailed from Mejillones. Upon the same day, and before making much progress upon her course, she was overhauled and seized as a prize of war by H.M.S. *Newcastle*, in command of Captain Fowlett. The following day, Lieutenant Lord Congleton, from off the *Newcastle*, was appointed prize officer of the captured boat. With a prize crew on board, she was taken to Port Stanley, Falkland Islands, some 2,500 miles away, for an adjudication in prize.

Knowledge of the seizure did not reach claimants until late February or early March, 1916, when they received a cable advice. Putting themselves in touch with the American Secretary of State they informed him of what had occurred and stated their lack of knowledge of any reason for the seizure.

On March 22, 1916, summons was issued from the Supreme Court at Falkland Islands in a suit to declare the *Edna* good and lawful prize. The writ was returnable in eight days. On the date of issuance the process was served on the master of the *Edna*. Of this development the owners were promptly informed. They were, nevertheless, without knowledge as to the cause alleged for seizure. The first authoritative word along this line that came was contained in a cable from the American Embassy in London, which was relayed to claimants by the Department of State upon April 1, 1916. The message read:

"Foreign Office now informs me that the steamship *Edna*. ex-*Mazatlan*, has been captured on ground of enemy ownership and of transfer from the enemy flag after the outbreak of war, and that she will be brought before prize court for adjudication accordingly; also that it is possible that other charges will be brought against the vessel in connection with her conduct during the war."

On the day claimants acquired this information, the Supreme Court at Port Stanley held a preliminary hearing in the prize cause. The sole representative of the owners and the ship was the master. The proper Officer for the Crown called attention of the court to the fact that no bill of sale had been found among the ship's papers, and that Mexican registration of the vessel had been withheld. But, he said, he based no argument on these circumstances. Lord Congleton who, at the time of seizure, did not know why the ship should have been taken into custody, testified at the hearing that he then had reason to suppose the detention of the *Edna* had been occasioned by the fact that prior to the war she was under the German flag, and had been guilty of performing unneutral services on her previous voyage.

The captain of the *Edna* was asked if he wished to address questions to Lord Congleton, and replied in the negative. When the master had thus spoken, the Crown laid two previously prepared petitions and proposed orders before the court. The first of the applications asked that the *Edna* be temporarily delivered to the Crown. The second requested a transfer of the proceedings to England. Both were granted. At this moment the master interposed to say that he had received a message from his owners in which they requested postponement of the hearing. To this the Chief Justice responded:

"I am afraid your application is too late. I think that you will find that, the court having transferred the proceedings to the High Court of Justice in England, it will be far more convenient than if the case were conducted in this Colony. I have no doubt that the owners will fully asquiesce in this transfer to the High Court in England."

At some time between April 1 and June 15, the *Edna* was taken to London.

On June 16, the Solicitor of the British Treasury notified claimants that the case of the *Edna* would be brought to trial in July. Claimants, acting through Crump & Son, their London solicitors, endeavored to obtain particulars of the charges against the *Edna*, but they were not at once successful. On June 28 claimants learned that the charges related to unneutral service, and assistance to the enemy on the part of the vessel. In the absence of better particularization, claimants were advised by their solicitors to procure affidavits to meet the charges. Further effort to secure parti-

culars of the wrongs alleged against the *Edna* elicited no response except information that not only did the British Treasury refuse particulars, but that the Prize Court upheld such refusal. Claimants then appealed to the American Government for assistance, and finally upon July 7, 1916, through this medium, learned that an additional alleged ground for seizure was that the *Edna*, when known as *Mazatlan*, had supplied coal to the *Leipsig*.

During all this time claimants were busily engaged in assembling proof and documents designed to establish the neutrality of the vessel and her freedom from conduct which justified her seizure and condemnation. However, the evidence which claimants wished to produce could not be collected in time for a trial of the issues at the July sittings of the British court.

Claimants also sought to have the vessel released on bail. While the transcript of court proceedings before me fails to reveal such application and respondent argues that none was made, the records of claimants' American attorneys, and those of their English solicitors, tend strongly to establish the contrary, albeit the application may have been informal.

Apparently, upon July 21, 1916, claimant's local attorneys cabled William A. Crump & Son, London solicitors, suggesting that the vessel be bailed for $125,000. On July 22, 1916, the proposal was communicated to the British authorities. On July 26, the Crown seems to have voiced opposition to bailing the ship inasmuch as she had already been requisitioned for use by Britain. The correspondence between claimants' London solicitors and their American attorneys indicates that the Prize Court would not permit formal application for bail, in that the court was without power to act thereon until the requisition of the vessel had been set aside. This course of action was in the face of the statement made by the British Secretary of State for Foreign Affairs to the American Ambassador to England, on February 10, 1915, in connection with the seizure of another American vessel, that "if an application of this sort is made by them, it is not likely to be opposed by the Crown".

About coincident with the effort to have the *Edna* released, the Crown specified the charges advanced against her. Thereupon, claimants devoted their efforts to a completion of their proof. By December 7, 1916, their evidence had taken final form. With the exception of a single affidavit bearing the last-mentioned date, and which was procured to meet an alleged surprise averment of a witness of the Crown, the proof was ready for submission to the court by late October, 1916. The Crown, upon its part, was not so diligent. Indeed, it was not until November 19, 1917, that the British Government had collected all the proof that was to be presented against the *Edna*.

From this time until April 2, 1919, when the case was moved for trial in the probate, divorce, and admiralty division of the High Court of Justice, before the late Right Honorable Lord Sterndale, president, the contending parties, whether deliberately or otherwise, managed to postpone final adjudication. First, the Crown offered to purchase the ship for $125,000. The owners asked $550,000. Then the vessel was reported as having been lost. This occasioned further delay. The Crown suggested its willingness to pay $270,000 for the ship. Again, claimants declined to accept. The Crown thereupon became desirous of awaiting a decision on the case of the steamer *Alwyna*, which was said to involve legal questions similar to those raised in the *Edna* litigation. These occasions for adjournments were followed in December, 1918, by the death of the judge before whom trial

was first moved, and the case had to await a further assignment. At last, upon April 2, 1919, the matter came on for adjudication and upon the same day Lord Sterndale delivered judgment. In rendering the same, he stated the only question in the case about which he had any doubt was "whether the Crown ever had any reasonable ground for seizing the ship at all". He went on to declare:

"I have grave doubts whether they had. But on the whole, considering the curious companies that were concerned in the matter, and considering what the history of this vessel is, I am not prepared to say that there was no reasonable ground for seizing her. I have grave doubt about it, I must confess. But on the whole, though with considerable doubt, I am not prepared to say that they have not proved that there was some reasonable ground for seizing the ship.

That being so, it seems to me to dispose of any question of damages; and it seems to me what was claimed for the deprivation of the use of the ship is really damages. I do not think the claimants can recover more than this—and this is not contested by the Crown—the deterioration, if any, which has occurred to the ship during the time she has been in the hands of the Crown. She was requisitioned under a temporary requisition, by an order of the Prize Court of the Falkland Islands, and she has been in use by the Crown since. If she has deteriorated in consequence of that use, or indeed for any other reason, while she has been in the hands of the Crown, that, I think, the Crown will have to make good. She does not come, in my opinion, within the exact words that have been read, of the prize rules, September 30, 1914, which provide that "Where the ship so requisitioned is subject to the provisions of order XXVIII, Rule 1, relating to detention, the amount for which the Crown shall be considered liable in respect of such requisition shall be the amount of the damage, if any, which the ship has suffered during such temporary delivery as aforesaid", because that relates only to enemy ships. But it seems to me, on principle, that the claimants are entitled to have the ship restored to them, as she was; and if by reason of the Crown, without justification, as I have found, detaining her and using her for three or four years, she has deteriorated, it seems to me they must make that good. I cannot give the claimants any more than that without holding, as I have said I cannot hold, that the Crown had no reasonable grounds for seizing the ship. In the same way, I cannot give the claimants their costs without coming to that conclusion. As I have said, I do not think, although I have grave doubt about it, that I ought to say there were no reasonable grounds. Therefore, I think there ought to be an order of release, the Crown making good any deterioration of the vessel during the time she has been in their hands, and no order as to costs."

From this judgment, each litigant appealed to the lords of the Judicial Committee of the Privy Council. Upon March 10, 1921, that tribunal, speaking through Lord Summer, dismissed both the appeal and cross-appeal. The effect, of course, was that Lord Sterndale's judgment was affirmed. In the course of the decision of the Privy Council, it was said, *inter alia :*

"There can be no doubt that when the ship was taken, those, at any rate, who directed the action of the cruiser had substantial ground for questioning her neutral or her private character. She had been so employed on the voyage above described as to justify inquiry, and after the first and before the second requisitioning by the Mexican authorities she was sent on another voyage along the same coast. Either requisitioning might under the

circumstances have been really not unwelcome to her owners, for, till things had blown over, it would afford an unobtrusive seclusion for a ship that had earned for herself a certain amount of evil notoriety. The termination of this retreat was quickly followed by a transfer to the United States Registry, and an intercepted letter revealed the fact that a German Government official had forwarded to Germany part of the purchase money paid for her. It is quite impossible to say that there was not probable cause for supposing that she had been a German 'fleet auxiliary' and so was liable to seizure with a view to condemnation.

....The evidence, as it developed, showed much that was provocative of doubt and suspicion. The financial circumstances preceding and attending her sale showed a reasonable case for believing that Jebsen was engaged in creating a screen of United States intermediaries between himself and the actual buyers, such as would disarm the suspicions or defeat the investigations of a captor and make it possible to find a complaisant neutral, who would willingly and successfully act for his protection. Even when the claimants came to give their own account of the matter on affidavit, they did not explain away this mystification, but only disclaimed participation in it. It is true that they proved actual payment of the price, but cross-examination might prove that they had a greater connection with Jebsen's acts than was consistent with good faith or the reality of the sale.... Furthermore, although the oral evidence given in 1919 ultimately confirmed the account of their conduct which the claimants had given in affidavits before the end of 1916, they also put forward numerous other affidavits so flagrantly false that the learned President expressed his surprise at their using them at all. Instead of contenting themselves with a completed title as neutral buyers and with proving their independance and ignorance of the *Mazatlan's* earlier proceedings, they advanced a case, which was really Jebsen's case, and was untrue. The captors could not be expected to sift out the false affidavits from the true, and apply for the release of the ship on a case better than that which, as a whole, the claimants made for themselves. Those who put forward a case of which so large a part was disingenuous, must not complain if the whole of it, with their own oral evidence was submitted to the judgment of the learned President, as a matter which only the court could decide.... The allowance of damages and costs is largely a question of discretion, which in past times has but rarely been answered unfavorably to captors, and it is enough to say that their lordships see no sufficient reason for differing from his (the President's) opinion.

The conclusion, therefore, must be that on no ground are the captors liable in damages or costs. The claim for something in the nature of an account of profits, earned by the use of the vessel while under requisition, is equally unsustainable. There is no theory of the relations between captors and claimants, still less between His Majesty, for whose use the ship was requisitioned, and the shipowners, which would support a claim of such a kind.... It is right to recognize that a result which restores the ship to her owners but leaves them without recompense of any kind for the loss of the use of her between 1916 and 1919 must be profoundly disappointing to them, and may seem to be not without some suspicion of paradox in law. It would be unsatisfactory that so long a time should have elapsed before this cause could be brought to an issue, were it not that the claimants do not seem to have taken any active steps to accelerate it and may well be supposed to have recognized that the delay was one which they could not fairly complain of. It is to be hoped, however, that, what-

ever the conditions of future wars may be, this case may never be regarded as anything but highly exceptional in this particular."

As reasonably might be expected, claimants felt aggrieved that, at the end of the Prize Court proceedings, they were denied damages for their deprivation of the use of the *Edna*. In the years between 1916 and 1919, as is commonly known, shipbottoms commanded extremely high prices and, had the *Edna* been available for use by claimants, she would have been a most valuable property. As matters turned out, the British throughout the three years, and more, that the *Edna* was in their hands, took full enjoyment of the vessel and at the end of the period, they were, according to the adjudication, without the slighest liability to claimants, save to deliver the boat to her owners in shipshape condition.

The owners, having exhausted their rights in the courts of Britain, and feeling themselves to have been denied the justice which those courts should have rendered, asserted a claim against the United States under and pursuant to the provisions of an agreement made between this Government and Great Britain, under date of May 19, 1927. By this convention, the United States assumed certain obligations with respect to the settlement of claims of American citizens against the British Government in which judicial recourse had been exhausted. Claimant's grievance falling within this category, it was agreed between the owners of the *Edna* and the United States that the claim so asserted, together with the defenses thereto that are available to this Government, should be submitted to arbitration, and that I should pass judgment thereon.

In order to bring about an accomplishment of this end, the owners of the *Edna* as claimants, and the United States as respondent, have laid before me an elaborate record. It includes not only the record of all proceedings had in the British courts, but the data and documents of claimants and of their attorneys and solicitors as well. In addition, the case has been briefed by both sides, and argued orally.

With all this before me, and having set forth a summary of facts which appear to be the most relevant and material, I proceed to a decision.

Claimants advance two basic propositions which are stated as follows:

> (1) That no probable cause at international law existed for the capture of the *Edna*, in which event claimants became entitled to costs and damages; and
>
> (2) That regardless of the question of probable cause Great Britain, having requisitioned the ship and profitably used the same for three years, claimants became entitled to a sum representing the fair and reasonable value of that use.

Speaking for the Supreme Court of the United States in the case of the *Olinde Rodriques* (174 U.S. 510, 535), Mr. Chief Justice Fuller said:

> Probable cause exists when there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation, and whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced.

With this definition as a guide in determining whether the *Newcastle*— acting, as she doubtless was, under wireless instructions of competent

authority in England—was possessed of sufficient probable cause to warrant seizure of the *Edna*, I place myself in agreement with the adjudications that have so held.

If this conclusion be warranted by the evidence and probable cause did exist, the captors, says the Supreme Court of the United States,

> were entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther and gives the captors their costs and expenses in proceeding to adjudication.

The *Apollon* (9 Wheat. 362, 372, 373).

While it may well be that anything and everything the *Edna* ever did was not enough to constitute her a public vessel of Germany, and was insufficient, justifiably, to warrant her designation as an auxiliary to the German war fleet, and that she was, therefore, capable of being sold and transferred to a neutral, after the outbreak of war, who might be entitled to hold and enjoy her free and clear of the consequence of previous unneutral conduct, she could not immediately divest herself of the reputation she had thus acquired. As a result of her conduct she had become notorious. Her acts in behalf of the *Leipsig* had been heralded to the world. These escapades, and Jebsen's participation therein, ultimately led to his indictment by a United States grand jury. In his desire to escape punishment, he seems to have fled the country, during the very period in which transfer to claimants was accomplished. In the light of relevations that were in process in late 1915 and early 1916, and which were known to all who were interested, no intelligent person would readily conclude that Jebsen, even though he had divorced his company of record title to the steamer, no longer was engaged in putting her at the service of his country. On the contrary, the natural inference would be that transfer of the boat was nothing more than deceptive subterfuge, and that the new entrants into her management and control were there to assist Jebsen in his purpose. Doubt and suspicion of the good faith of the transaction were both reasonable and inevitable. Had they not been entertained, the British authorities would have been chargeable with a credulity wholly incompatible with the necessities of war.

The disclosures of this case are such as to take it entirely without the ruling made in the *Paquete Habana* (175 U.S. 677). In that suit certain fishing smacks that had been seized, upon the theory that they were properly subject to capture, were released and held to be entitled to costs and damages because of the non-existence of probable cause for their capture. In giving thought to this adjudication, it should be remembered that, as a general rule, fishing boats which devote themselves to fishing have long been exempted from the effects of hostilities. (Halleck's *Elements*, Ch. 20, Sec. 21, 1 Pistoye & Duverdy, *Treatise on Maritime Prizes*, Title 6, Ch. 1, p. 314.) Not alone this, but the *Paquete Habana* had previously engaged in no unneutral activity, as had the *Edna* when she bore the name *Mazatlan*. Nor was the smack owned and directed in her movements by a reservist of an enemy power who devoted his time and attention to the war service of his fatherland.

Claimants' second proposition—to the effect that, since Great Britain profitably used the *Edna* for three years, claimants are entitled to compensation, whether by way of damages or otherwise—is one for which I feel a measure of sympathy.

The lapse of time that occurred before the Prize Court proceedings were concluded led Lord Summer to comment upon the fact. He attributed the fault for delay to claimants' failure to take active steps to accelerate disposition of the cause. In part, I agree with him. I cannot do so entirely because the Crown seems to have been anything but anxious for a speedy adjudication. This, I should judge, was because use of the vessel was greatly desired. The celerity with which the *Edna* was requisitioned following her capture is indicative of this conclusion. It will be recalled that action looking to such use was all but completed before there was a preliminary hearing on the prize at Port Stanley. The indication is emphasized by the lack of co-operation of the Crown in claimants' effort to bail the vessel during the pendency of the cause in England. It gains positiveness by the reluctance of the Crown to release the vessel after Lord Sterndale delivered judgment that the vessel should be returned to her owners. That was upon April 2, 1919. The British wished the *Edna* to go to France. Consequently, she was not released until May 8, 1919, when the voyage had been completed. Claimants have since then received, however, from the British a sum in excess of $9,000, representing the earnings of that voyage. Upon completion of the voyage to France the vessel was bailed upon a bond of £40,000.

The history of the war is replete with accounts having to do with the extent to which British shipping was ravaged by German submarines. These narratives clearly disclose the necessities to which the Crown was put in obtaining sufficient bottoms to carry on its maritime affairs. A reason, if not a cause for the willingness of the Crown to permit the prize proceedings to take a leisurely course is thus made manifest. So long as the laches or conduct of claimants contributed to the needs of the Crown, it is not to be held responsible therein. It was entitled to acquiesce in claimants' delays. While claimants were diligent in filing their affidavits, they were so ill-advised, or so base, as to include depositions that were misleading, if not entirely false. First of all, the affidavits lacked frankness in setting forth the true ownership of all interests in the *Edna*. Secondly, claimants should have known that Captain Paulsen's affidavit of July 8, 1916, contained statements that appear to have been made with deliberate intention to deceive. This course of procedure was not designed to lend confidence to the claim of the owners, nor to engender a tolerant attitude upon the part of the Crown. On the contrary, it created occasion for such delay as reasonably was required to disprove the contents of claimants' affidavits, and to show the world-wide scope of the intention of Germany to use neutral instrumentalities in furtherance of its hostile objectives.

The last affidavit filed on behalf of the British Government is dated November 19, 1917. It treats of the subject matter last mentioned. This information was important in that it was designed to show that the *Mazatlan*, under the law of nations, possibly was not a subject of lawful transfer to a neutral within the war period. However, this evidence was known to the world long before November 18, 1917, and I can see little or no excuse why it should not have been in hand at a much earlier date.

As much is to be said of the affidavit of R.M. Greenwood, dated June 2, 1917, which relates to information contained in the *New York Times* of February 10, 1916. But, even after these affidavits were in the hands of the Procurator General, procrastination continued to characterize the proceedings.

In apportioning responsibility for this delay, it may be well to recite a part of the chronology of events as it appears from the records before me.

November 13, 1917.—Trial called. The Attorney General opens the case of the British Government. Trial was halted on news that vessel was lost. Crown offered $270,000 in settlement.

November 20, 1917.—Claimants' London solicitors advise that case has been adjourned for fortnight.

November 24, 1917.—American Department of State advises that, upon Departments' representation, trial has been adjourned for two weeks.

December 14, 1917.—London solicitors state that Crown is postponing further action to await judgment of Privy Council in case of *Alwyna*, which involved questions of unneutral service by prior owners.

February 3, 1918.—Information obtained that *Edna* is not lost.

February 19, 1918.—Procurator General presses for progress in negotiations.

April 22, 1918.—Claimants cable that their delay is due to their lack of desire to create impression that they are anxious to settle.

May 28, 1918.—Cable to English solicitors to obtain firm offer of settlement as alternative to continuation of trial.

August 21, 1918.—Solicitors advise that Crown reverts to £25,000 offer due to friction between Attorney General and Procurator General regarding former's earlier offer.

November 1, 1918.—Solicitors are instructed to reject Crown's offer.

November 21, 1918.—Crown's offer rejected.

December 26, 1918.—American attorneys request instructions from claimants in reference to holding case in abeyance owing to death of judge before whom trial was begun; new judge must be assigned.

December 30, 1918.—Solicitors cable that trial has been set for March 6, 1919.

December 31, 1918.—American attorneys cable suggestion that *Edna* be returned to owners and that they be awarded compensation.

January 2, 1919.—Solicitors state that diplomatic intervention desirable.

January 8, 1919.—Solicitors cable that Procurator General refuses suggestion of settlement.

April 3, 1919.—Judgment by Lord Sterndale.

May 8, 1919.—*Edna* released to claimants upon bond.

From the foregoing it is inferable that claimants, in their desire to obtain a good price for the *Edna*, or to have substantial compensation for her use, contributed to delay of the trial about as much as did the action of the Crown.

And yet, whatever may have been the responsibility of the respective parties, it is nonetheless a fact that the Crown used the vessel for three years and has been permitted so to do without payment of compensation in any

form or guise. In my opinion, this result, whatever may be the state of prior decisions, is essentially unjust. It will be recalled that Lord Sumner, in delivering the opinion of the Privy Council, said that the allowance of damages and costs is largely a matter of discretion. In so declaring, he appears to have indulged a more liberal view than did the Supreme Court of the United States in the *Apollon*, *supra*. However, his Lordship proceeded to indicate very clearly that captors usually are the beneficiaries of the court's discretion. As he did so, he gave recognition to the fact that the result of the *Edna* case "may seem to be not without some suspicion of paradox in law".

While it would seem that courts, and particularly those of last resort, in cases such as this, should have little difficulty in obviating all appearance of paradox in their decisions, they have not always hastened to do so. This appears to have been particularly true in prize matters. Consequently, in view of the harshness that has characterized this branch of jurisprudence, I am compelled to say that claimants have obtained a result which, however disappointing, would frequently be regarded in prize cases as an achievement of justice. But if the result be divorced from the rule of *stare decisis* and be viewed in the light of fair and just dealing, claimants are entitled to some consideration. That they suffered grievous loss in being deprived of use of the *Edna* for more than three years must be admitted. Great Britain was the beneficiary of that loss for a period that was longer than her necessities and her rights as a belligerent reasonably required. While I fully recognize the immunity which has attached itself to sovereignty, and although I appreciate the respect which international tribunals have accorded such immunity and the tolerance they have had for the rights of warring governments, I am convinced that, as an arbitrator, I am in duty bound to conclude that claimants, in part at least, have a just grievance.

Claimants, I think, are not entitled to compensation for use of the *Edna* for such period as reasonably was necessary for the Crown to obtain an adjudication upon the charges made against the *Edna*. Neither can they, as heretofore said, rightfully ask compensation for such use over the time that was consumed by their own laches, or such as resulted from their desire to obtain a good price from the British Government. But, making full allowance for these considerations, I think it safe to say, although not with entire accuracy, that the dilatory course pursued by the Crown delayed the prize proceedings for one year beyond the date upon which they reasonably should have been brought to finality. Whatever may be the necessities of war, they ought not to be allowed to serve as excuses for beclouding, if not obliterating, the just rights of neutrals.

My finding, therefore, is that the claimants are entitled, in the nature of demurrage, to have upon the claim now before me, such sum of money at the rate of exchange prevailing on May 8, 1919, as will represent the amount they would have earned as charter hire had the *Edna*, as a neutral vessel within the port of London, upon May 8, 1918, been requisitioned by the British Government for a period of one year at the rate that, upon such date, was being paid as requisition hire by that Government for steamers of the size and class of the *Edna*. This rate, I was informed, upon the argument, was 17 shillings per gross registered ton. If this be not correct, the parties may so inform me. The sum arising from this calculation shall be diminished by the amount, over $9,000, paid by the British Government to claimants in respect of earnings of the *Edna* upon the voyage made to France after the rendition of Lord Sterndale's judgment.

All other items for which indemnification is asked, saving interest, will be disallowed for the reasons that such items, in view of the probable cause which the Crown had in seizing the *Edna*, would necessarily have been borne by claimants in the normal and regular course of Prize Courts events. These items are properly chargeable to the events giving rise to the probable cause that justified capture of the boat.

Coming now to the question of interest, the agreement reached between the United States and Great Britain on May 19, 1927, does not specifically contemplate that interest should be paid upon such claims thereunder as receive favorable recognition by this Government. Whether interest shall attach to an allowance of a claim such as is here advanced, depends, very often, upon the action of the Congress. But, in this instance, the Congress has not acted. Having in mind, however, that the assumption of liability on this claim by the United States did not come about until May 19, 1927, and appreciating that only the sums saved to the United States by such agreement appear to be intended for the satisfaction of those claims of American nationals which fall within the scope of paragraph (2) of Article II, I should refrain from making an award of interest on the principal sum that I have decided should be received by claimants. Not being advised of the status of other claims coming within the scope of the agreement, I am in no position to determine their equities, and the effect thereon, of an interest allowance here. For this reason, it is my thought that, if Congress determines that claims established under the agreement should carry interest, the calculation thereof should be from May 19, 1927. I think, too, that the rate of any such calculation, in consideration of conditions existing over the greater portion of the intervening period, should not exceed four per cent per annum.

JOHN C. KNOX, *Arbitrator.*

AN ACT

For the relief of Sudden & Christenson, Incorporated, John A. Hooper, Emil T. Kruse, Edward Kruse, Gilbert Loken, and G. W. McNear, Incorporated, or their successors in interest.

Approved, August 19, 1935.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, the sum of $78,025.83, with interest at the rate of 4 per centum per annum from May 19, 1927, to the date of the approval of this Act, jointly, to Sudden & Christenson, Incorporated, John A. Hooper, Emil T. Kruse, Edward Kruse, Gilbert Loken, and G. W. McNear, Incorporated, or their successors in interest, upon receipt by the Secretary of State of satisfactory releases from the respective claimants of all claims for damages resulting from the capture on January 27, 1916, and subsequent use by the British Government of the steamship *Edna*, as recommended in the decision rendered on December 22, 1934, by the arbitrator, John Clark Knox, judge of the United States District Court for the Southern District of New York: *Provided,* That no part of the amount

appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.