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RECUEIL DES SENTENCES ARBITRALES

Toberman, Mackey & Company (U.S.A.) v. United Mexican States

20 May 1927

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NATIONS UNIES - UNITED NATIONS

Decision

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of the Peerless Motor Car Company the sum of $11,465.50 (eleven thousand four hundred and sixty-five dollars and fifty cents) together with interest on that sum at the rate of six per centum per annum from October 15, 1913, to the date on which the last award is rendered by the Commission. The said amount of $11,465.50 is the equivalent of 23,000.00 pesos for which claim is made. The Commission renders the award in the currency of the United States conformably to its practice in other cases of making all awards in a single currency, having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two Governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned "in gold coin or its equivalent".

TOBERMAN, MACKEY & COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(May 20, 1927, concurring opinion by American Commissioner, May 20, 1927. Pages 306-311.)

STANDARD OF CARE OF PROPERTY HELD IN CUSTODY. Respondent Government *held* not subject to obligation to take special care, of a standard commensurate with that of a private concern, of goods coming into the custody of its customs service and left with it beyond required period for withdrawal of goods.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 182; Annual Digest, 1927-1928, p. 228; British Yearbook, Vol. 9, 1929, p. 157.

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America in behalf of Toberman, Mackey & Company, an American corporation, demanding from the United Mexican States the sum of $1,845.57, with interest, the value of 376 bales of hay, property of claimants, which was damaged in the Mexican Custom House of Progreso, Yucatán, Mexico, between the beginning of June, 1919, and July 23, 1920. It is alleged that the hay in question became completely deteriorated by exposure to the weather, on account of the negligence or lack of care of the authorities of the Mexican Custom House.

2. The evidence presented in this case shows that Toberman, Mackey & Company, an American firm dealing in grains, seeds, fodder and other products, having previously received an order from the firm of Crespo and Suárez, of Progreso, shipped in New Orleans, Louisiana, U.S.A., on a Norwegian vessel, June 3, 1919, 376 bales of compressed hay, under a bill of lading issued by the Gulf Navigation Company, Inc. The shipment was consigned to shippers order, Crespo and Suárez to be notified upon

its arrival, who, although they apparently had dissolved partnership on January 31, 1919, continued to do business jointly or separately. The shipment of hay was delivered by the steamer to the Custom House at Progreso sometime during the early part of June, and it was placed in an open space on the wharf, covered only with a canvas. Crespo and Suárez did not accept the hay, due, apparently, to some questions as to the manner of making payment for it, the result of which was, that they neither took steps to withdraw the hay from the Custom House nor to pay the import duties. The Gulf Navigation Company, Inc., on August 7, 1919, received from one Mariano de las Cuevas, who seems to have been the shipping company's agent, notice that Crespo and Suárez had not withdrawn the hay, in spite of his having urged them to do so, and that the hay had deteriorated somewhat on account of rains which had fallen. The Gulf Navigation Company, Inc., on December 12, 1919, notified claimants that Crespo and Suárez had definitely refused to accept the shipment of hay; that the latter was already in a rather bad state, after a long period of storage in the Custom House; and that the shipment was to be auctioned in conformity with customs regulations. Finally, the Custom House, in compliance with said regulations, and as the hay was then useless, burned it on July 23, 1920.

3. The claimant Government alleges that the Custom House of Progreso was negligent on account of not having taken due care of the fodder in question, as shown by the fact that it left said fodder in the open, exposed to the elements, for more than one year; that such negligence of Mexican officials, which was the cause of the complete loss of the goods, makes the Mexican Government responsible according to general principles of law, as well as under special provisions of the General Customs Regulations of the United Mexican States (Articles 120, 153, and others). The Mexican Government, on its part, alleges in defense, that the loss of the hay was due to the negligence of the consignees, of the shipping company or of the claimants, who did not comply with said Customs Regulations, citing also the provisions thereof to support their contention.

4. This case involves, therefore, an alleged act of a Mexican authority, which act, in the terms of the Convention of September 8, 1923, has resulted in injustice to American citizens. Said act is the omission of a Custom House to take due care of merchandise deposited therein. I do not believe that there is any clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its Custom Houses, for the mere purpose of exercising the sovereign right of collecting import and export duties. It is conceivable that, under certain circumstances, the State may assume certain obligations in the exercise of sovereign acts of this nature; but, if such obligation is not established very clearly, it cannot, in my opinion, be imposed on the State. The question lies in determining whether the law of such State (in this case, Mexican law) imposes on custom houses the obligation of guarding, at all times and without limit like a good *pater familias*, all goods and merchandise which pass through its ports of entry. Mexican law in this respect is sufficiently clear, according to my opinion. In fact, the General Customs Regulations of Mexico require that application be filed for the dispatch of imported goods, within eight days following the date of unloading, and that the merchandise be withdrawn, at the latest, thirty days after unloading has been finished (Article 152). The party obliged to comply with these obligations, is the consignee (Article

109). When the parties concerned do not file their applications within said periods, the merchandise may remain in the storehouses or yards of the Custom House, incurring a custody charge *(derecho de guarda)*, the custody being limited to preventing the loss of the merchandise by theft or otherwise (Articles 153 and 698), but the law further provides, that complaints filed against the Custom House attributing to it delay in the timely withdrawal of the merchandise within the periods provided by the Regulations, will not be taken into consideration (Article 152). The same law presumes that the merchandise may be placed, in the absence of a special petition, on the yards or in the storehouses, without determining in which cases one or the other must be done. From the foregoing citations it is inferred that, although the merchandise may remain in the custom house after the expiration of the term allowed for its withdrawal, said custom houses refuse to accept any responsibility for its deterioration once that term has expired. It remains doubtful whether such responsibility is assumed for the month in question, although it may be presumed that it could be legally so. But in the present case, claimants have not proven that the complete deterioration and loss of the hay may have commenced during the first month that such hay was on the yards of the Custom House. On the other hand, although it is true that the consignees were the claimants, they stipulated that Crespo and Suárez should be notified, who, it appears, were the purchasers of the merchandise. Either of these parties should have paid the duties, applied for the dispatch of the shipment, and withdrawn the hay. Crespo and Suárez should have been given timely notice of the arrival of the hay, by the claimants themselves, as may be implied from the letter of February 27, 1920, signed by one W. M. James, and they doubtless received later on notice from said Mariano de las Cuevas. However, they did not file their application within the eight days, nor did they withdraw the merchandise within thirty days after unloading; neither did they specifically refuse, before the Custom House, acceptance of the shipment (Article 113). The shippers, Toberman, Mackey & Company, also should have been given timely notice by said Crespo and Suárez that the latter were having difficulties in obtaining the merchandise, and, at least, they were so notified on December 12, 1919, by the Gulf Navigation Company, Inc., in a letter which causes the presumption that they had already been given notice of this fact previously. Both parties incurred the delay on account of this failure to comply with the clear provisions of Mexican law, and it was their negligence that unduly threw on the Mexican Custom House authorities the care of the merchandise, which care they had in no way contracted for. There can not be, therefore, imputed to the Custom House a responsibility which it did not have, nor assumed clearly, and which, on the other hand, was thrown on it by the negligence of the consignees and claimants in this case, who, it appears, had a clear knowledge of the circumstances in which the merchandise was shortly after its arrival at Progreso, and, surely, two months after such arrival. Under such circumstances, taking into account that in this case no discrimination or other unjust act on the part of Mexican customs authorities have been proven, and that the negligence of the owners and consignees of the bales of hay in question appears evident, I believe that this claim should be disallowed.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

I concur in Commissioner Fernández MacGregor's opinion that the claim should be disallowed. I attach less importance to the provisions of Mexican legislation with respect to the interpretation of which conflicting contentions are advanced by counsel for each Government than to the uncertainty of the record in relation to facts concerning which it is important that the Commission should have definite information. The claim of the United States is predicated upon a complaint of negligence on the part of Mexican customs authorities in dealing with an importation of baled hay into Mexico.

International law of course recognizes the plenary sovereign right of a nation in all matters relating to imports and exports. The Mexican Government is free to establish at a port of entry elaborate facilities for storing imports or no facilities at all, and an importer can ship his goods to such a port or refrain from doing so just as he chooses.

Irrespective of what may be the precise formalities prescribed by Mexican law with regard to the treatment of imports, it seems to me that provisions of that law are probably substantially the same as those that doubtless exist generally in other countries. After a specified period storage charges are collected on imports, and after a further period goods may be sold or destroyed if not claimed. Presumably it is contemplated by Mexican law that some kind of care shall be taken of goods for a part if not all of such periods, and that commodities shall not be entirely unprotected, even though they are left without attention for long periods by importers, as was the claimant's shipment. However, I am of the opinion that, in considering the contention that Mexico is responsible for negligence on the part of the customs authorities we cannot properly fail to take some account of the conditions under which the hay was shipped to Progreso and left there until it was destroyed.

I am not prepared to say that under the terms of the Convention of September 8, 1923, liability might not be fastened upon a government for the acts of its customs authorities in a case revealing negligence with respect to protection of imported commodities, particularly in a case that might reveal a purpose of making discrimination against an importer whose goods were damaged or destroyed. It would be necessary in such a case that there should be convincing evidence of negligence on the part of those officials. The contention of the United States apparently is that negligence can properly be inferred from the fact that proper adequate care was not taken of the hay. It seems to me that there may have been negligence. However, while the Memorial contains an allegation of negligence, there is neither allegation nor evidence as to the nature of the facilities at Progreso for storage nor as to the particular reason why the hay was not cared for other than by the use of a canvas. Having in mind a proper limitation on inferences that may be drawn from evidence, I do not believe that on the record before the Commission an award could properly be rendered holding Mexico liable under international law for the destruction of the hay.

Decision

The Commission decides that the claim of Toberman, Mackey & Company must be disallowed.