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G. W. McNear, Incorporated (U.S.A.) v. United Mexican States

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its conclusion whether the investigation that took place was below the minimum standard required by international law must be based on a broad and general view of the steps taken rather than on a criticism of some particular point. And on the whole, it seems that in the present case considerable efforts were made. It is also stated in dispatches to the American Department of State from the American Consul at Mexicali that in his opinion the Mexican authorities were doing their best.

Decision.

The claim of the United States of America on behalf of A. L. Harkrader is disallowed.

G. W. McNEAR, INCORPORATED (U.S.A.) *v.* UNITED MEXICAN STATES

(October 10, 1928, concurring opinion by American Commissioner, October 10, 1928. Pages 68-73.)

DENIAL OF JUSTICE.—ILLEGAL DETENTION OF PROPERTY. Claimant sold two carloads of wheat to a Mexican importer under bills of lading which were not to be delivered until payment of purchase price. Goods were seized by Mexican customs authorities on ground they were property of Mexican importer, who was charged with payment of import duties and fees. Claimant requested court to order return of goods, showing facts of his ownership, but court ordered goods to be released only on provisional payment of import charges. Goods were then sold to satisfy such charges and a surplus was realized. Claimant then requested Mexican authorities to pay him value of wheat seized and sold but this request was denied. Claim for value of wheat *allowed.*

Cross-reference: Am. J. Int. Law, Vol. 23, 1929, p. 461.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

During May and June 1907 George W. McNear, an American citizen, now deceased, sent two carloads of wheat, sold to S. Montemayor, Ciudad Juárez, Mexico, on a cash basis, by the Southern Pacific Railroad, one, containing 610 sacks, valued at $1124.90, U. S. currency, from Portland, Oregon, in car No. 83074, and the other, containing 479 sacks, valued at $1019.90, U. S. currency, from Port Costa, California, in car No. 30758. The Southern Pacific Railroad issued bills of lading according to which the two shipments were consigned to the order of McNear, Ciudad Juárez, via El Paso, where S. Montemayor, care of J. T. Woodside, was to be notified. Sight drafts for the purchase price were sent to the Agency of the Banco Minero at Ciudad Juárez for collection. The bills of lading were attached to those drafts, and the Bank was instructed to deliver the bills of lading to Montemayor upon payment of the drafts only.

In El Paso the two cars with wheat were transferred to the Mexican Central Railway, by which they subsequently were taken to Ciudad Juárez. It seems that Montemayor or a representative of him took care

of having the necessary consular invoice issued, and that he had such an invoice covering besides the two carloads sold him by McNear a third carload of wheat sold him by the Nash-Ferguson Grain Company of Kansas City, Missouri, issued to himself.

At the time when the carloads in question arrived in Ciudad Juárez Montemayor was charged with having imported in a clandestine manner fourteen carloads of wheat without paying consular fees and customs duties thereon. Because of that charge he had fled from the town.

Acting on the belief that the two carloads shipped by McNear as well as the carload shipped by the Nash-Ferguson Grain Company were the property of Montemayor or in his possession, the Customs authorities in Ciudad Juárez requested the District Court to order a seizure of the three carloads in order to establish a security for the Treasury with regard to the pecuniary responsibility that might be imposed upon Montemayor. This request was complied with by the Court. Afterwards a representative of the Banco Minero as well as the American Consul at Ciudad Juárez tried to obtain the release of the goods by application to the court. They pointed to the fact that the bills of lading were in the possession of the bank and that according to a notation on the drafts, they should not be delivered to Montemayor until he paid the drafts, which he had failed to do. Their intervention, however, was opposed by the Administrator of the Customs House as well as by the Agent of the Ministerio Público at Ciudad Juárez, both of whom asserted that the carloads in question had been imported by Montemayor and that he would not have been able to dispose of them, as in fact he did, unless he had paid for them at El Paso. The decision of the Court was to the effect that no release could be ordered, but that a provisional delivery of the wheat could be made on payment of the duties and deposit of the value of the wheat, which amount in due time would have to be delivered to its legitimate owner. It is said in the decision that the proceedings which were being held were those of the summary character referred to in Article 608 of the Customs House Ordinance, and that the court was "unable at present to render any opinion as to the rights which may be had with regard to the attached property". The decision evidently implies, in accordance with Mexican law, that the shipper of the wheat, in order to protect his alleged right of property, would have to bring a formal action before the Court. McNear, however, did not adopt this course, but some years after he petitioned the Mexican government to order the Customs House in Ciudad Juárez to pay him $2,426.57, U. S. currency, namely the value of the wheat owned by him and seized by said Customs House. At that time the wheat had long ago been auctioned, and the revenue, deduction having been made for import duties and freight due on the goods, had been deposited with the Court. The government rejected McNear's petition. It was argued that, according to Art. 2822 of the Mexican Civil Code, a thing sold belongs to the buyer as soon as there is an agreement between buyer and seller with regard to the sale, and that, according to Art. 657 of the Customs House Ordinance, McNear's right to claim the amount deposited with the court as the balance left from the revenue of the auction sale of the wheat was lost by prescription. At first it was further argued that a business transaction between McNear and Montemayor had taken place when the goods arrived at El Paso, but later on it was admitted that this supposition was erroneous.

Claim is now made against the United Mexican States by the United States of America on behalf of G. W. McNear, Incorporated, an American corporation, to which, prior to his death, George W. McNear assigned amongst other things, "all book accounts, debts, claims and demands" belonging to or pertaining to his business, for damages for wrongful seizure of the wheat in question in the sum of $2,144.80, U.S. currency, with interest thereon at 6 per cent from July 25, 1907, the date when the seizure is alleged to have taken place.

In the opinion of the Commission there can be no doubt that the detention of the wheat was wrongful. The sale of the wheat to Montemayor was a conditional sale. The intention of the parties to the contract of sale was that the ownership and the possession of the goods should not pass to the buyer before payment of the purchase price had taken place. Upon such a case Art. 2822 of the Mexican Civil Code does not bear, this article being applicable only so far as the parties have not agreed otherwise, and the issuance of a consular invoice covering the goods in question could not alter the legal position of the parties with regard to the goods, as such a document does not confer any title to the goods in the person to whom it is issued. It is possible that the court was justified in ordering the seizure of the goods in the course of proceedings of a summary character, in which it was stated by the Customs authorities that the goods had been imported by Montemayor. But from the moment the Customs authorities were informed that the bills of lading were in the hands of the Banco Minero and could be delivered to the buyer on payment of the purchase price only, it ought to have been perfectly clear to those authorities that the wheat should be released. From that moment their retention of the wheat constitutes a violation of a rule that is of fundamental importance to commerce and with which they should have been familiar. For this violation the Commission holds that Mexico must be responsible under international law, notwithstanding that possibly McNear might have had his right recognized, if he had brought a formal action before the Court. The Commission further holds that the amount to be awarded must be the value of the wheat.

Nielsen, Commissioner:

I agree with the result that flows from the Presiding Commissioner's opinion, because to my mind the seizure and detention of the wheat, the property of the claimant, without compensation, was a confiscation of that property

It is clear, as stated in the Presiding Commissioner's opinion, that the transaction between McNear and Montemayor was in the nature of a conditional sale. Whatever justification there may have been for the seizure of the wheat on suspicion that it belonged to Montemayor, there was no warrant for the detention of the property when the facts of ownership, which were very simple, were made clear. I perceive no proper reason why the same authorities who initiated steps to have the wheat seized should not promptly have initiated steps to have it released, when the facts regarding ownership were made clear to them. Whatever may have been the view of the court whose process was invoked, the administrative authorities, consistently from the beginning of the proceedings up to the time of the last application made by McNear for compensation, continued to adhere to different arguments to my mind all unsound, to the effect that title to the property had vested in Montemayor.

There is not presented to the Commission any case of a seizure and sale of goods for non-payment of duties and the failure of the owner of the goods to apply within a prescribed statutory period for the proceeds of the goods less the amount of the import duties. The goods were seized on the theory that they belonged to Montemayor, and they were retained on that theory. There is no evidence to indicate that it was necessary to sell these goods for non-payment of duty. Had the wheat been seized and sold in accordance with Mexican law for non-payment of duties, and had McNear failed to apply for the proceeds less the amount of the duties, he would have no complaint, because obviously the execution of proper decrees or legislative enactments with respect to the sale of goods for non-payment of duties could result in no wrongdoing to an importer.

Whatever may be said with regard to the original seizure, it is clear that the continued detention without compensation was wrongful. I do not understand that the Mexican Government denied compensation to McNear on the ground that he did not resort to legal remedies. Clearly their denial was based on the ground that he was not the owner of the goods. And whatever legal remedies, if any, may have been open to him against wrongful seizure or detention or both, that point has been eliminated by Article V of the Convention of September 8, 1923. Citation was made in the written and the oral argument by counsel for Mexico to the *Canadian Claims for Refund of Duties* decided by the tribunal under the Agreement of August 18, 1910, between the United States and Great Britain. Those cases are not pertinent to the instant case. In those cases the United States made it clear to the tribunal, which sustained the argument of counsel for the United States, that the United States had not invoked the rule of international law with respect to the exhaustion of legal remedies. It was shown that neither the question of the application of that rule nor provisions of the arbitral agreement in relation thereto was pertinent to a decision of the case upon the law and facts thereof.

Decision.

The United Mexican States shall pay to the United States of America on behalf of G. W. McNear, Incorporated, $2,144.80 (two thousand one hundred forty-four dollars and eighty cents) with interest at the rate of six per centum per annum from July 25, 1907, to the date on which the last award is rendered by the Commission.

DANIEL R. ARCHULETA (U.S.A.) *v.* UNITED MEXICAN STATES

(October 10, 1928. Pages 73-77.)

NATIONALITY.—EVIDENCE NECESSARY TO REBUT PROOF OF NATIONALITY. When evidence was furnished that decedent was born in the United States and held legislative offices in the State of Colorado, fact that he was referred to as a person of Spanish-American parentage *held* not sufficient to rebut conclusion that he was an American national.