GEORGE W. JOHNSON, ARTHUR P. WHITE, EXECUTOR, AND MARTHA J. McFADDEN, ADMINISTRATRIX (U.S.A.) *v.* UNITED MEXICAN STATES. ("DAYLIGHT" CASE.)

(April 15, 1927, concurring opinion by American Commissioner, April 15, 1927. Pages 241-254.)

Van Vollenhoven, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of the part owners (or their successors in interest) in the American schooner *Daylight*, which on the night of March 21, 1882, while at anchor outside the bar at Tampico, Tamaulipas, Mexico, was in collision with a Mexican gunboat under way, the *Independencia*. The schooner, with its cargo and the personal effects of its crew, was wrecked and lost. The United States alleges that the collision was due to culpable negligence or faulty seamanship on the part of the *Independencia* and that the Government of Mexico is responsible for damages caused by its public vessels; and therefore claims damages in the amount of $5,948.62, with interest.

2. The main facts of the case are as follows. In the late afternoon of March 21, 1882, there were at anchor within Mexican territorial waters

just outside the Tampico bar an American sailing vessel, the schooner *Daylight*, and about a mile to the north of this schooner the Mexican gunboat *Independencia*. The captain of the *Daylight* had gone ashore about 3 p. m. to make entry of his ship, and had not returned. The weather had been fair and had continued so until about 7 : 30 p. m., when suddenly a strong wind from the north, shifting to the northwest, commenced to blow, which about 8 p. m. developed into a violent storm with lightning, rain, darkness and a very rough sea. The commander of the *Independencia*, which was anchored with her starboard anchor secured by two chains, deemed it advisable for the safety of his vessel to put out to sea or, at any rate, to seek a better location. Therefore the *Independencia*, with her lights burning, began to weigh her anchor and to go ahead slowly in a southern direction; but, from about 7 : 50 p.m. on, made her engines work full speed, while dragging her starboard anchor. The *Daylight*, also with burning light, and two other ships which were anchored not far off, could see the steamer approach from at least that time on; as soon as the *Daylight* noticed her, or perhaps before that time, she either filed all available chain, or made everything ready to do so. The first shock of the collision occurred some twenty-five minutes later, about 8 : 15 p.m.; all this time, or at least the latter part of it, the gunboat had been seen tacking, and one sailor from the crew of the *Daylight* (the Swedish seamen Peter Johnson) testified before the port authorities on March 25, 1882, that the gunboat at the time of the collision was "doubtless driven by the wind." It is worthy of remark that, according to the evidence, it took the *Independencia* more than half an hour to reach the *Daylight* which was anchored only one mile to the south. When the steamer had reached a distance of about ten fathoms from the *Daylight*, the officer on guard called out in English to the crew of the *Daylight*, expecting that the gunboat working under full steam might pass by the schooner without colliding if the schooner filed away more chain. The mate of the *Daylight* who replaced his captain testified on March 25, 1882, that he "supposed that the steamer was working to drive ahead." Instead, however, of advancing the *Independencia* drifted down backward and fell sternwise upon the schooner. Succeeding this first shock the commander of the gunboat ordered its engines reversed to disengage his ship, but driving back under full steam the entire length of the schooner it struck her again several times so as to tear out her bowsprit, to have her foremast entangled in the yards of the gunboat, and to split her foredeck. The clash threw back the steamer's smokestack. Some ten minutes after the first shock occurred the vessels were disengaged; the *Independencia* proceeded, was soon stopped, and dropped both her anchors some one hundred yards astern of the ill-fated *Daylight*, which has been filling rapidly with water and gradually sank. Neither in the latter part of the night nor on the next morning did the *Independencia* take pains to rescue the crew of the *Daylight*; they were not saved until about 7 : 30 a. m. on March 22, 1882, by a British schooner, the *Busiris*.

3. The great difficulty in this case, as in numerous collision cases, is one of conflicting and insufficient evidence. The only investigation of the facts that has been made was the one by the Mexican port authorities at Tampico who examined the masters and crews of both vessels (the Americans first) within the three weeks following the tragedy. The commander of the *Independencia* stated twice—once in his report of March 23, 1882, and once in the investigation on April 5, 1882—that the danger of the sudden rain storm moved him to seek a safer location. He stated that he

did so carefully, at first maintaining his starboard anchor and going slowly, but that after that he had to proceed under full steam; however, though the engines before and at the time of the collision were working at full speed, the vessel, since it was dragging one of its anchors, was not proceeding full speed. Mexico moreover contends that, if the American vessel had paid out more chain as soon as it was warned, the collision might have been prevented. The United States, on the contrary, contends that the gunboat knew that there was a schooner anchored only a mile off to the south; that under those conditions and with a strong "Norther" blowing the gunboat should not by leaving its perfectly safe position have disregarded the safety of other vessels; that when the steamer's smokestack fell there was a confusion or worse among the crew on board the *Independencia*. Besides, the United States assert-apparently basing its assertion on statements made by the mate and the sailor Oakland on March 25, 1881—that the *Daylight*, after the storm began and before the accident, had paid out all available chain, some thirty fathoms more than she had so far filed; but in the protest before the American consul on March 27, 1882, the captain and crew of the *Daylight* established that the crew "made everything ready to slip said Schooner's chain," but "had no occasion to slip Schooner's chain". The lack of conclusiveness in the evidence as presented on both sides before this Commission, which is the same evidence as was produced in the very next years following the occurrence (1883-1886), would seem to appear from the fact that the American Secretary of State on July 2, 1886, informed the American respresentative at Mexico City of the claimant's being invited "to produce whatever countervailing proof may be in his power," and that such further evidence never was obtained.

4. Among the Mexican evidence there is an inexplicable statement of the commander of the gunboat to the effect that, because of the extreme darkness, the light of the *Daylight* could not be seen until a short time before the collision; though there is evidence that the *Daylight* saw the gunboat from the beginning and that two other ships saw the lights of both vessels. Nor is it sufficiently explained why the *Independencia* after having been overwhelmed by the storm for half an hour could easily come to anchor, with both starboard and port anchors out, instantly after the collision. Among the American contentions, on the other hand, there is the unbelievable assumption that the Mexican commander had left without any reasonable ground a safe and effective anchorage in a dark, stormy, and dangerous night in waters with which he must have been quite familiar, and the dangers of which are well known to every Mexican seamen; in this connection it is worthy of note that one of the sailors of the *Daylight* (Abraham Oakland) testified on March 25, 1882, that after the storm began, but before the crew had noticed any movement of the gunboat, he had been "engaged in trimming the jib sails, so the schooner could put out to sea." The cook of the *Daylight* testified on March 25, 1882, that the mate (who replaced the captain, and who according to other evidence had been on deck when the tempest began) did not return on deck until the gunboat was within ten fathoms to the north of the schooner and the collision was imminent. The statement submitted by the United States that the *Independencia* if left to the current and wind could not possibly have collided with the *Daylight* would seem to indicate that the mere fact of the commander's leaving his original anchorage did not in itself constitute a dangerous act for this neighbouring ship.

5. The evidence as to fault on either side being greatly at variance, such as to leave the cause of the collision unascertainable, it is essential to determine whether some special rule as to burden of proof, or some presumption, can be invoked.

6. In the *Queen* case between Brazil and Norway, which was a case of a collision (1870) in Paraguayan waters between an anchored Norwegian sailing vessel and an aviso of the Brazilian navy under way at full speed, the arbitrator used as a basic rule the general principle that the burden of proof is incumbent upon the claimant government (Norway), and rendered an award in favor of Brazil (Lapradelle et Politis, *Recueil*, II, 708). In paragraphs 6 and 7 of its decision rendered March 31, 1926, in the case of William A. Parker (Docket No. 127), the Commission set out the grounds why this rule as to burden of proof is inapplicable to its proceedings. As to whether in case of collision between a ship at anchor and a ship under way the burden of proof by way of exception falls on the latter one, it may be stated that such a rule of evidence, where it exists, is usually considered and construed rather as a presumption of fault on the part of the ship under way than as a rule concerning evidence.

7. The United States contends that such a presumption in favor of ships at anchor, and another presumption in favor of sailing ships when colliding with steamers, are recognized by universal maritime law, and should be applied by this Commission which is bound to decide in accordance with the principles of international law, justice, and equity. Mexico, on the other hand, asserts that, as the collision occurred in Mexican waters, Mexican law is applicable, and that the Mexican law on collision in force in 1882—the *Ordenanzas de Bilbao* of 1737, confirmed in 1814—did not contain these presumptions. There would seem to be no doubt but that with reference to the present collision the law of Mexico is applicable. In the *Sidra* case the British-American arbitral tribunal held that "according to the well-settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States" (Nielsen's *Report*, 457; see the *Canadienne* case, Nielsen's *Report*, 430). In 1888, as its session of Lausanne, the *Institut de droit international* considering the problem of collisions both from the viewpoint of existing law and from that of a future uniform law, resolved in its drafts covering both viewpoints (under the guidance of such experts as Messrs. Lyon-Caen and Renault from Paris) that the law applicable is the law of the land where the collision took place a solution qualified by Mr. Fenault as required even by "ordre public"—and the Institute identified collisions within territorial waters with collisions in the interior of a country. If Mexican law in this matter were in open conflict with a universally recognized provision of international law the Commission should take such conflict into account; but even those international awards and authors who contend that in collision cases the Anglo-Saxon presumption in favor of the ship at anchor "is a universally admitted rule of maritime law" or is "*reconnu par tous les pays maritimes*" (Nielsen's *Report*, 485; Lapradelle et Politis, II, 708) do not go so far as to establish that a disregard of this presumption constitutes a conflict with binding provisions of international maritime law. There certainly is a quite reasonable element in these presumptions for collisions under normal weather conditions; but under conditions so abnormal as this Tampico storm any generalization would seem objectionable. One of the first codes embodying the presumption in favor of ships at anchor, the maritime code promulgated by the Emperor Charles V

for the Low Countries in 1551, contains an express reservation relative to "a great tempest" and similar causes (Article 48 of said Code). In 1888 at Lausanne the presumptions were not included in either draft of the *Institut de droit international*; in 1898 at the Maritime Law Conference in Antwerp the question of the desirability of a specific provision for collision between a ship at anchor and a ship under way was unanimously answered in the negative by all of the affiliated national associations; and in the Brussels Convention of 1910 on collision law (Article 2, paragraph 2; and 6, paragraph 2) all presumptions, and especially that regarding ships at anchor, were abandoned.

8. It is to be considered, then, what the Mexican law in force in 1882 provided with reference to a collision of the present type. The existing federal Code of Commerce which contains a division (book the third) embodying maritime law was not in force at the time; it was not enacted until September 15, 1889. In 1882, the year of the occurrences discussed here, the Mexican Constitution of 1857 was already effective and it provided that all controversies relating to maritime law should be under the cognizance of the federal courts (Article 97, paragraph II). Said courts, in those days, applied as positive law the *Ordenanzas de Bilbao*, which had been the first mercantile law of the Mexican Republic in the period which elapsed between the date of the country's independence and May 16, 1854, the date of the promulgation of the first Mexican Code of Commerce, styled the *Lares Code*, after the Minister who sponsored its passage. The *Lares Code* was set aside by Article I of President Alvárez' decree of November 23, 1855, providing that the administration of justice should conform itself to the laws in force on December 31, 1852, and that the state courts with general jurisdiction should take cognizance of commercial law suits conformably to the ordinances and laws peculiar to each branch. At that time, in 1852, the law in force was the decree of November 15, 1841, which in Article 70 provided that, pending the enactment of a federal Code of Commerce, the law suits of this branch should be decided in accordance with the *Ordenanzas de Bilbao*, in so far as these ordinances had not been set aside. Therefore these ordinances had to be applied by the federal courts of Mexico, to which the Constitution of 1857, as stated heretofore, had transferred the jurisdiction in cases of maritime law. In the Bilbao ordinances the subject of collision is found under Chapter XX (*De las averías ordinarias, gruesas, y simples; y sus deferencias*; 36 articles), in Article 34, of which the general rule of responsibility for fault is reproduced without the introduction of any presumption. It can not be maintained that this silence on legal presumptions renders the Mexican law of the time incomplete and requires that it be supplemented by provisions drawn from the maritime law of a group of other countries.

9. In collision cases the first question to be answered is not which vessel is at fault, but whether either of the colliding vessels is at fault. Fault should be proven; absence of culpable fault must be surmised in cases where the cause of the collision can not be ascertained. There being no sufficient evidence before the Commission enabling it to hold that either commander or captain was guilty of culpable negligence or unskillful navigation, and there being no presumption, or specific rule for the burden of proof, in the Mexican law as it stood in 1882, culpable fault on the part of the *Independencia* can not be assumed.

10. There appears, however, in the record a circumstance which might raise serious doubts as to the respect felt for human lives on the part of

the *Independencia*. The commander of the gunboat knew that his ship had seriously damaged another vessel, and he might have suspected the danger arising out of the collision to the crew of the *Daylight*. Nevertheless there is no evidence as to any effort made by him either in the latter part of the night or even the next morning to render aid to the crew or the ship itself. It was left for a British schooner to save them, a long time after sunrise. Though this situation leaves a most unfavorable impression, the United States did not press it, and no opportunity was given the *Independencia* to explain her aloofness. Even if no good motive for this inhuman behaviour could be given, it would not furnish a legal ground for assuming culpable negligence with respect to the collision. At the Brussels Maritime Conference of 1905 it was expressly stated that, in cases of collision, failure on the part of one vessel to render assistance to the other vessel in distress does not in itself create a legal presumption of culpability for the collision (*Procès-verbaux du 17 octobre 1905*, pp. 7-10; Brussels Convention on collision law, 1910, Article 8, paragraph 3).

11. Mexico contends that there was laches on the part of the United States either in making the claimant present his claim in due form according to Mexican law, or in supplying further evidence. The first contention would seem untenable because of the fact that the reasons why the United States Government, rightly or wrongly, did not wish redress to be sought before Mexican administrative and judicial authorities were fully explained in the diplomatic correspondence of the years 1883-1886. Neither can laches be maintained with regard to the supplying of evidence, as the United States submitted all the evidence it could obtain. Once the diplomatic correspondence having come to a deadlock (1886), the United States, if unwilling to resort to force, could only wait.

12. For the reasons stated the claim should be disallowed.

Nielsen, Commissioner:

I concur in the Presiding Commissioner's conclusion that the case should be dismissed, although the record discloses evidence indicating that the Mexican war vessel may have been guilty of very faulty navigation.

There is no question as to the responsibility of a government under international law for damages caused by a public vessel, the improper management of which may be the cause of the injury to a merchant vessel belonging to another government.

In Bequet's *Repertoire du Droit Administratif*, the following principle is stated (23 p. 175):

"It is not only the army which by its acts can occasion accidents to individuals. The navy causes even more formidable ones and collisions between vessels of commerce and ships of war have sometimes extremely serious results. It is admitted without dispute that if there has been fault on the part of the officers of the fleet, faulty manoeuvering negligence, or imprudence on their part, the government is responsible."

International tribunals have frequently decided that compensation should be made for damages resulting from collisions between merchant vessels and public vessels. (See, for example, the case of the *Madeira*, Moore, *International Arbitrations*, vol. 4, p. 4395; the case of the *Confidence*, *ibid.*, vol. 3, p. 3063; the case of the *Sidra*, *American Agent's Report*, American and British Arbitration under the Agreement of August 18, 1910, p. 453; and the case of the *Lindisfarne*, *ibid.*, p. 483.)

Whether international practice justified the Mexican Government in taking the position when the United States presented a claim for the destruction of the *Daylight* that there should be a resort to local remedies is a question with which the Commission is not concerned. And the failure of the owners of the vessel to seek redress from Mexican administrative or judicial authorities is a matter which cannot be raised in defense to the claim at this time in view of the provisions of Article V of the Convention of September 8, 1923.

It is contended in behalf of Mexico that the only law applicable to the collision was the law of Mexico and not the law of the United States. The rule appears to have been laid down in two cases decided by the tribunal under the Special Agreement concluded between the United States and Great Britain August 18, 1910, that the law applicable to the determination of questions of fault with respect to collisions occurring in territorial waters is the *lex loci delicti commisi*. See the case of the *Canadienne*, *Agent's Report*, p. 427, and the case of the *Sidra*, *ibid.*, p. 453. This rule would appear to be sound as a general principle. But the recognition of the proper application of the rule in any given case would, I think, not necessitate the conclusion that an international tribunal would be impotent to determine liability based *on the general rule of international law* and the facts in a case in which it may appear that there is no applicable local admiralty law or is a law the effect of which may be to deny responsibility for a clearly wrongful act. In situations of that kind an international tribunal should, I think, determine the question of responsibility in the light of facts and general, applicable principles of law, as responsibility is determined, for example, in the case of wanton, negligent, or unnecessary destruction of property by some other agency for which the government is responsible.

It is maintained in the brief of the United States that maritime law is a part of the general law of nations, and it is argued that an examination of maritime codes reveals that at the time of the collision between the *Daylight* and the *Independencia* there was incorporated into the law of Mexico the principle of the often-stated rule which creates a presumption of fault against a ship in motion which comes into collision with a ship at anchor. In behalf of Mexico it is contended that no such rule was recognized in Mexican law in 1882. The statement has at times been made that admiralty law is international law. Admiralty law, although largely the product of principles and practices developed by maritime nations over a long period, can probably not be regarded as international law from the standpoint of the fundamental characteristics of the law of nations, namely, that it is a uniform law governing the conduct of nations which cannot be altered by a single nation. It can perhaps be said that certain principles of admiralty law have been so generally assented to that they are international law to which members of the family of nations should give effect. There may be some conventional international law. What is spoken of as general maritime law is the groundwork of all maritime codes, but nations generally do not consider themselves precluded from making modifications or additions. International law recognizes the right of a nation to subject foreign vessels within its jurisdiction to its authority, and to apply to them its maritime code. Aside from this particular point I think that clearly there are principles of law to which the Commission can give application in the instant case. And it should be noted that counsel for the United States apparently does not rely entirely on a rule with respect to presumption of fault, but argues

that evidence furnished by the Mexican Government reveals faulty navigation in several respects on the part of the war vessel.

In the opinion in the *Sidra case*, *supra*, signed by Monsieur Henri Fromageot, a distinguished authority, deeply versed in the law of nations, in the civil law, and in admiralty law, we have the following statement with regard to the requirements imposed on a moving vessel coming into collision with a vessel at anchor:

> According to the well-settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships, one of them being moving and the other at anchor, the liability is for the vessel underway, unless she proves that the collision is due to the fault of the other vessel.

The rule so stated does not—at least not in terms—establish a presumption. But in taking account of the relative situations of two colliding vessels, it is probably in principle the same as the broad rule often stated by writers on admiralty law to the effect that there is a *prima facie* presumption against a moving vessel which collides with one at rest. The rule is obviously grounded on a sound principle. Whether the rule is so stated that it may be regarded as a rule of evidence or differently framed so that it may be considered, as I think it logically should, a substantive rule of admiralty law, it is probably formulated too broadly, unless it takes account of the situation of the vessel at rest. From an examination of decisions of courts of the United States in which effect has been given to the principle underlying the rule it would appear that the rule is best framed, substantially, in the language employed by Mr. Parsons, as follows:

> "If a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel otherwise at rest is run into."

See on this point the *Clara Clarita*, 23 Wall. 1, and the *Oregon*, 158 U.S. 186.

It does not appear from the record that the *Daylight* was improperly anchored, or that it failed to comply with any requirement of local law with respect to lights, or that any fault for the collision can be attributed to it.

Whether the rule as stated by Monsieur Fromageot or the general rule asserted by American courts is incorporated generally into maritime codes of nations at the present time, is not, it seems to me, a material point. The collision took place in 1882, and it is, of course, pertinent to have in mind the obvious principle that the effect of an act is to be determined by the law of the time when the act was committed. But the precise terms of any pertinent rule existing in that year appears to me not to be of controlling importance. The condition of the weather at the time of the collision in any given case can not affect the question of the proper application of the rule invoked by the United States or a similar rule, although, of course, it may be a very material point in determining whether a moving vessel was actually at fault. Evidence that unusual weather conditions rendered a ship unmanageable may be conclusive proof of lack of fault. Whatever may be the precise terms of any proper, applicable rule, it seems to me that it can scarcely fail to take account, in determining the question of fault, of the fact that one vessel is properly anchored and another is in motion, whenever collision results under such conditions.

The effective analysis of evidence in the record by counsel for the United States to my mind strongly suggests several reasons pointing to fault on

the part of the *Independencia*. It may be difficult in the light of the record to question the wisdom of the youthful commander of the war vessel—he was 23 years of age—in leaving the position where his ship was anchored. Undoubtedly the storm which he noted was equally violent at the place of anchorage of each of the vessels that came into collision. And if the merchant vessel by its anchor maintained its position with apparently but slight motion, it would seem strange that the war vessel should have been unable to keep its place of anchorage by the use both of its anchors and its engines, or should have been forced into the collision. It is strange, too, that the war vessel should be unable to check itself from coming into collision with the merchant vessel, when the former, after having been injured by the collision, and after its crew was apparently, as the evidence shows, to some extent demoralized, could drop anchor and come to a stop following the collision approximately one hundred yards distant from the merchant vessel. It seems strange also that it could promptly reverse its engines and pull away from the merchant vessel after the collision but could not reverse the engines in time to avoid an impending collision of which it had warning. Other facts mentioned in the brief of the United States tend strongly to indicate faulty handling of the war vessel.

Another point which is mentioned in the Presiding Commissioner's opinion, seems to me to be a pertinent one and one of which it is proper to take account, namely, the failure of the crew of the war vessel to observe what has been called "the first law of the sea"—to give assistance to seamen in distress and danger. By a statutory enactment of the United States the duty is imposed on the master of each vessel in case of collision to render all practicable assistance to the other, and if he fails to do so the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, negligence or default. (26 Stat. L. 425.) A similar provision is found in the British Merchant Shipping Act of 1894 (Sec. 420). Doubtless provisions of this nature are found in the laws of other countries.

It is solely in the absence of more conclusive evidence to rebut the testimony which the members of the crew of the *Independencia* all gave to the effect that the unusual condition of the weather was an unavoidable cause of the accident that I concur in the decision that the claim be dismissed.

I agree with the views of the Presiding Commissioner that the principle of laches can be given no application in the present case. A fundamental point in any proper application of that principle must be delay in the time or presentation of a case by a claimant government. A claim was presented by the United States as soon as a proper investigation had been made of the facts leading to the collision and was vigorously pressed thereafter for a considerable period of time.

Fernández MacGregor, Commissioner:

I concur with the statements of fact and law made by the Presiding Commissioner and with his conclusion that the claim must be disallowed.

Decision

The Commission decides that the claim of George W. Johnson, Arthur P. White, Executor, and Martha J. McFadden, Administratrix, must be disallowed.