Special Agreement [1].

EXCHANGE OF NOTES OF MAY 19th, 1927.

[*See No. XLII, pp.* 1587 *et sqq.*]

ESTATE OF EDWARD N. BREITUNG V. UNITED STATES

Decision rendered at Washington, D.C., September 27, 1939.

On June 23, 1939 . . . [there was] submitted to me as Arbitrator a claim against the United States on behalf of the Estate of Edward N. Breitung, predicated upon the alleged illegal detention in 1915 of the American S.S. *Seguranca* by British authorities. The submission stipulated that the decision should be rendered on the basis of certain written pleadings and evidence described as follows:

For the claimant—

Memorial, and evidence listed on sheet attached hereto.
Reply, and evidence attached thereto.
Additional documents as follows:
Memorandum of June 30, 1933.
Memorandum of January 11, 1934, and evidence attached thereto.
Letter of October 26, 1934.
Memorandum of March 13, 1935.

For the United States—

Answer, and evidence attached thereto.
Reply Brief, and evidence attached thereto.
Memorandum of May 31, 1939.

All of the papers enumerated above were duly delivered to me, and all have been read and have received my careful consideration.

The liability of the United States, if any, grows out of an "Executive Agreement" between the United States and Great Britain for the disposal of certain pecuniary claims resulting from incidents occurring during the World War. Section 2 of Article I provides as follows:

> (2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage

[1] See also in this volume the S.S. *Edna* case, p. 1585, and the S.S. *Lisman* case, p. 1767.

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 endeavors 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.

In Article II there is a recital of the consideration moving the United States to make the arrangement, which reads in part as follows:

> 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 been not 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.

No relief in connection with the detention of the *Seguranca* has been sought in the British courts. Hence, a decision favorable to claimant would depend upon a finding that the claim is meritorious and (1) that no remedy is provided in the British courts, or (2) that "for other reasons" the equitable construction of the agreement imposes on the United States a duty of payment.

The position of the United States in this arbitration is that the claim must be denied because a fair construction of all the evidence compels the conclusion that it is not within any one or more of the conditions on which the United States have undertaken to satisfy claims of American citizens against Great Britain.

The position of the claimant is that the claim is meritorious and that resort to proceedings in British courts would be wholly bootless, would involve large expense, and ought not to be required, and that, upon sound principles of equity and justice it is, in view of the agreement between the United States and Great Britain, the duty and obligation of the United States to make payment.

The United States having declined to recognize the claim, the whole matter has by agreement been submitted to me as Arbitrator.

The *Seguranca* was in the early winter of 1915 an American vessel of approximately 3,000 net tons burden then owned by the New York & Cuba Mail Steamship Company. Edward N. Breitung was at the time an American

citizen residing in the State of Michigan and engaged principally in promoting and developing mining properties in the United States and abroad. He had inherited a considerable fortune and was reputed to be a millionaire. His father had emigrated to the United States from Germany approximately in 1850, had been naturalized, and from 1880 to 1885 was a member of the House of Representatives. In December 1914, Mr. Breitung, without previous experience or connection with the shipping business, purchased from the Hamburg-American Steamship Company the German steamship *Dacia*, which at the beginning of the World War had sought asylum at Port Arthur, Texas. He obtained American registry, and in January-February 1915 sailed the *Dacia* with a cargo of American cotton consigned to a German port. The *Dacia* was captured the latter part of February 1915 by a French warship and condemned as a lawful prize. Shortly following his purchase of the *Dacia*, Mr. Breitung acquired the *Seguranca*, and on the 23rd of February 1915 contracted with Interocean Transportation Company of America, a war-time corporation, for the transportation of a general cargo by the *Seguranca* from New York to Rotterdam. The charter party was in the form in customary use at the time and contained the usual provision that the vessel should have liberty to comply with the orders of all rulers and governments without liability for breach of charter party. The management of the *Dacia* and of the *Seguranca* was placed by Mr. Breitung in the charge of Hans Otto Schundler and a kinsman, Max Breitung. On March 15th the *Seguranca* cleared from New York for Rotterdam with cargo consisting principally of oil, lard, borax, sausage casings, hides, green apples, and green coffee. The consignors included Morris & Company and Sulzberger and Sons Company, American packing houses, and the consignees were either the consignors or individuals and firms located in Holland. The loading was supervised by inspectors appointed by the British Consul General at New York, and the master of the *Seguranca* was furnished with a copy of his certificate to this effect. On March 31 the *Seguranca* was stopped in the English Channel at some unidentified point off Dover light by a British patrol boat, and her papers were examined by a British naval officer. By his direction the *Seguranca* anchored in the Downs off Deal in British territorial waters, and that day or the next day her master was advised that the ship and cargo would be held for prize court proceedings unless arrangements were made to reconsign the cargo to the Netherlands Overseas Trust or to have it placed in a bonded warehouse in Rotterdam under the supervision of the British consul at that place. The master of the *Seguranca* communicated with the American Ambassador, who filed a strong protest with the British Government. He also communicated by cable with his owner in New York, and on April 3 was advised that shippers and consignees had consented to reconsignment to the Netherlands Overseas Trust. The delay thereafter and until the 20th was occasioned by the making of arrangements to carry out the reconsignment.

The Netherlands Overseas Trust was created at the instance of Great Britain in the Netherlands in the early stages of the World War to facilitate shipments consigned to neutrals in that country. The delivery of shipments to the trust was not a transfer of ownership, nor did it prevent delivery to the named consignee, but the latter was required to execute a bond or satisfactory security that the shipment would not be reconsigned to Germany.

The *Seguranca* anchored in Rotterdam harbor April 21, docked April 22, and on April 26 had discharged her cargo in accordance with the reconsign-

ment agreement. Shortly thereafter she took aboard a return cargo, and on May 1 was on her way to New York.

The one question on the merits which I deem to be decisive of the case is as follows:

Was there probable cause for the detention of the vessel for the 20-day period?

For if there was no such probable cause, then the rules of international law entitle claimant to relief, and if there was such probable cause, then the rules deny recovery on a claim for damages for detention.

In February 1915 the German Government declared the whole of the waters surrounding England, Scotland, and Ireland to be a military area within which enemy merchant vessels would be subject to destruction after February 18. On March 11, 1915, the British Government by an order in Council announced that as a retaliatory measure ships sailing to north German ports or to neutral ports with goods of enemy destination or having aboard enemy property must discharge the goods in a British (or Allied) port, the goods, if not contraband or requisitioned, to be restored on such conditions as were held to be proper by the court. The British Prize Court was given jurisdiction to hear applications by claimants under this order. By proclamation of the same date, the British Government declared that absolute contraband included hides, lubricants, animal oils and fats, etc., for use as lubricants. The cargo of the *Seguranca* consisted of many items within the foregoing. In my opinion, and apparently also in the opinion of counsel for claimant, no question can be raised as to the action of the British patrol boat in stopping the *Seguranca* and making an examination to determine the nature and character of the cargo and whether any part was destined to the German Government. In this view, the question is narrowed to the determination whether the subsequent detention was unreasonable.

An examination of the ship's papers disclosed that the cargo originated in a neutral port and was consigned to a neutral port. If this were all, the detention of the vessel would have been wholly unjustifiable under well recognized principles of international law. On the other hand, the United States having early in the war conceded the right of a belligerent to visit and search, conceded also the right of capture and condemnation, if upon examination a neutral vessel was found to be engaged in carrying contraband intended for the enemy's government or armed forces. They likewise conceded the right to a belligerent to detain and take to its own ports for judicial examination all vessels which it suspected for substantial reasons to be engaged in unneutral or contraband service and to condemn them if the suspicion was sustained.

In the present case the period of detention was 20 days. On the 6th day the British Government, in reply to a protest by the American Government, informed the latter that the cargo of the *Seguranca*, though consisting mostly of "contraband", might go forward if Great Britain were assured it would not reach enemy hands. So far as I know, goods intended for the enemy and useful in the prosecution of the war, are generally considered to be contraband, and this was the position which the United States took in their protest to Great Britain in the *Wilhelmina* case and as their own position after entry into the war.

This, then, brings me to the question: Were there reasonable grounds to believe the cargo of the *Seguranca* was intended for transshipment to Germany?

In discussing that question, I do not think it important to distinguish between the grounds existing at the moment of seizure and other and additional grounds developing subsequently. The question should rather be examined in the light of what evidence might have been introduced in a prize court proceeding held after a full investigation and ascertainment of all available facts. This is the English rule. The *Edna*[1], [1921] 1 A. C. 735, 750, and probably is the American rule. (See The *Olinde Rodrigues*, 174 U.S. 510, 535.) And the rule is of particular application in this case because of the express reservation in the British-American agreement that the United States should in no case be called on to make compensation until after submission to and investigation of the claim in the British Prize Court.

At the time of the detention the *Seguranca* was registered in the name of Mr. Breitung who, as I have said, had not hitherto engaged in the shipping business, and who had some four or five months prior to the time in question purchased a former German ship then in asylum in an American port and, after obtaining her transfer to American registry, publicly declared his purpose to load her with a cargo of cotton and send her to a German port. After her capture and in the subsequent prize court proceedings, there was evidence tending at least to question the *bona fides* of the purchase and transfer. The *Seguranca*'s charterer, Interocean Transportation Company, was organized after the war began by a naturalized American citizen of German origin. That company at or about this time chartered a number of other vessels and shipped cargoes to neutral countries adjacent to Germany. Some were seized and condemned in prize court proceedings as destined to Germany. The two principal shippers of the cargo of the *Seguranca* were American corporations which were considered by the British at that time to be engaged in shipments to the German Government through neutral countries. A number of shipments so made, subsequently were condemned in prize court proceedings. While the *Seguranca* was on the voyage in question Mr. Breitung sold her to a corporation organized by himself and subsequently transferred the stock which he received in payment, to persons declared after our entry into the war to be enemy aliens, as a result of which the stock was seized by the Alien Property Custodian. The representatives of Mr. Breitung in charge of this maritime adventure were Hans Otto Schundler and a relative, Max Breitung. Schundler was a naturalized American and Max Breitung a German subject. The latter was subsequently involved with the United States authorities in connection with alleged illegal German activities in the United States. And, finally, there was the *Dacia* episode in which Mr. Breitung, Schundler, and young Breitung were the principal actors.

Considered in this aspect, I am perfectly clear that there was at the time of the detention probable cause to warrant suspicion that the cargo of the *Seguranca* was of German ownership and destination. In the United States the accepted definition of probable cause is: circumstances such as will warrant a reasonable ground of suspicion that the vessel is engaged in illegal traffic. I am constrained to the opinion that the evidence produced by the United States meets this test; and in this view the detention of the vessel seems to me not to have been unreasonable. Upon examination of the vessel's manifest, the British authorities offered the master the alternative of prize proceedings or reconsignment, and the master in turn advised his owner by cable. Breitung promptly agreed to the reconsignment proposi-

[1] See this volume, p. 1585.

tion. and the delay thereafter was in obtaining consent of all consignees to this method of handling the difficulty. When the consent was finally obtained, the ship was allowed to proceed. I do not mean to hold or even to suggest that the unwillingness of neutral consignors or consignees of a cargo to consent to a different disposition would excuse detention, but in this case the suggestion of reconsignment was an alternative to prize proceedings, which in the circumstances would have been reasonable, and the release of the vessel was an act of grace, doubtless, impelled to some extent by the insistence of the American Government. The election of the cargo owners to take advantage of the British proposal and the delay and damage in making it effective are not, in the circumstances, chargeable to Great Britain.

Nor is it chargeable to the United States under their agreement with Great Britain.

In the agreement the United States, in announcing their determination not to request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by Great Britain, specifically provided that such nationals should be referred for remedy to the British Prize Court. Failing this, the United States undertook to satisfy the claim only where upon full consideration the United States were of opinion that it was meritorious and either that there was no remedy in the British courts or that "for other reasons the equitable construction of the present agreement calls for a settlement". Admittedly, claimant has not sought recovery in any British court, and the only explanation is that such proceedings would have been a useless formality. Counsel state in support of this conclusion that decisions of the British Prize Court indicated a settled disposition to deny claims similar to the one in question, but I think this is not a sufficient excuse. At least one case is cited by counsel for the United States in which, in circumstances in many respects similar, damages for detention were awarded by the Prize Court. In that case the court said:

> The damages for detention which were adjudged to him were rightfully given, if the representatives of the Crown had been guilty of undue delay, and this the learned Judge found to have been the case. It is not contested that the foundation of such a claim must be exceptional and unreasonable delay, or that the reasonable decisions which the representatives of the Crown are obliged to take, require, in adequate and ample measure, time and opportunity for inquiry and deliberation, but there was evidence on which the learned Judge could find, as he did, that the delay was nevertheless "undue", and their Lordships were not invited to differ from his decision on a mere question of quantum.

In still another case the British Court said:

> If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause" justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages.

The present claim comes within the scope of these principles and, if it had merit, would have entitled claimant to a recovery. In any event, both by the terms of the agreement as well as upon equitable considerations the United States were entitled to have that question submitted upon a full disclosure of the evidence for both sides. For undoubtedly the United

States, in stipulating that claims on behalf of American nationals should first be tried out in the courts of Great Britain, had in view the opportunity thus presented of a full and complete factual record, and in reserving the right to award compensation notwithstanding the decision of such courts, the United States undertook no more than to review such record and in their discretion to correct any injustice, if there should be any, to American nationals. If that procedure had been followed in the instant case, many lapses in the present evidence would have been supplied, and much that is now indefinite and uncertain would have been made clear. The proof submitted to me in behalf of the claim consists almost entirely of documentary evidence in relation to the purchase of the *Seguranca*, her charter to the Interocean Company, the exchange of telegrams between her master and owner after her arrest, her log, and her manifest. And upon this *prima facie* showing of neutral ship and neutral goods, the claimant relies to support the equitable considerations which would warrant payment by the United States. I am of opinion that this is not enough.

The United States have a right under the agreement to demand not only a proper showing of the above facts but also that the *bona fides* of the adventure be proved by clear and convincing evidence. The evidence at hand, as I have indicated, falls short of satisfying this requirement. I am, therefore, of opinion that the claimant has failed to place himself in a position to make claim against the United States, first, because of his refusal to submit his claim to the British courts, which by an order in Council were at all times open to him, and, second, because of his failure to produce at this hearing such evidence as upon fair and equitable considerations imposes upon the United States a duty to pay the claim.

D. LAWRENCE GRONER,
Arbitrator.