

other redress is open to claimants. Indeed, we might have rested this branch of the case on those cases, both for the requirements of the Tucker Act and the rights and powers of belligerents, conqueror or conquered. We have restated the propositions declared only in deference to the earnestness and force of the argument of claimants' counsel. And we rest the case on those propositions and do not enter into a consideration of the citizenship of claimants, whether born in Spain and Spanish subjects when their vessel was seized, or Cuban by relation to the time either of the declaration of Cuban independence or of its recognition by Congress, as contended. If Spanish subjects, under the authority of *Hijo v. United States*, their right of indemnity for the seizure and use of their vessel was taken away by the treaty between Spain and the United States.

Judgment affirmed.

DIAZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Argued December 11, 12, 1911.—Decided January 15, 1912.

Herrera v. United States, ante, p. 558, followed as to the nature and effect of, and liability of the United States for, seizures and detention of vessels in Santiago harbor after the capitulation in 1898.

The President's proclamation of July 13, 1898, was not intended to supersede the laws of war, to interfere with the seizure, confiscation, or destruction of property necessary for the operation of war, or to attach to the necessary appropriation of such property by military officers the obligations and remedies of contracts.

43 Ct. Cl. 444, affirmed.

THE facts, which involve the jurisdiction of the Court

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of Claims and the liability of the United States for the use of enemy vessels seized during the war with Spain, are stated in the opinion.

Mr. Howard Thayer Kingsbury and *Mr. Crammond Kennedy*, with whom *Mr. Frank D. Pavey* was on the brief, for appellants.

Mr. Assistant Attorney General Thompson, with whom *Mr. Franklin W. Collins* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued and submitted with No. 89, *Herrera v. United States*, just decided, *ante*, p. 558. As in that case the findings of fact recite the pendency of the war between the United States and Spain, the capitulation of Santiago and the cessation of hostilities in that district between the contending forces, the seizure and capture by the military authorities of the United States of the steamer *Thomas Brooks*, among other vessels and lighters, on the seventeenth day of July, 1898, she then being owned by claimants, and her use for the transportation of troops and munitions of war until September 6th of the same year, a period of fifty-seven days, the United States paying the cost of operating the steamer. Prior to her seizure she had been used to transport Spanish troops and munitions of war. The full and reasonable value of her use was \$125 per day, amounting to the sum of \$6,375, no part of which has been paid.

The other vessels seized and captured were small vessels and lighters, which were used for a time and later returned on the advice or opinion of the Judge-Advocate General of the Army. Their use was paid for by the Government on

some amicable terms. Also, after September 6, 1898, the claimants were, by some amicable agreement between them and the Quartermaster in charge at Santiago, permitted to use and operate the Thomas Brooks at their own expense, they agreeing to transport in her troops and munitions of war and other supplies at one-half the transportation rates. This was done, and the claimants were paid for the service.

On the eighteenth of January, 1899, after the vessel had been turned over to claimants, they executed a receipt and released all claims in the form set out in *Herrera et al. v. United States*.

It was also found by the court as follows, being No. 5 of the findings:

"At the same time, to wit, July 17, 1898, the military forces of the United States took possession of two wharves, the Muelle Lus and the San Jose, with their warehouses and sheds, belonging to claimants, and used the same for the purpose of loading, unloading and storing Government supplies, and in facilitating the movements of troops from July 17, 1898, to March 1, 1899, a period of seven and one-half months, for which use no rental was paid, though the claimants presented bills therefor monthly; and after the Government had surrendered the possession of said wharves the chief quartermaster, Department of Santiago, offered the claimants \$4,000 in full payment for the use thereof during said period, which was refused; and later payment was denied on the ground that the claim was for unliquidated damages (see opinion Judge Advocate General, Dec. 23, 1901, page 83, Senate Doc. 318, 57th Congress, 1st Sess.). During said period said wharves were not used exclusively by the United States, but commercial steamers were permitted to land there and they were used by the merchants of the city of Santiago when such use did not interfere with the handling of Government stores. It does not appear that claimants received any

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compensation from commercial steamers or merchants of the city for such use during said period.

"From time to time said wharves and warehouses were repaired by the United States, and claimant company was employed by the United States at \$32 per day to dredge alongside of same for about three months. Said wharves were returned to claimants in nearly as good condition as when the United States took possession of them.

"The reasonable value of the use of said wharves and warehouses for the period they were used by the United States forces, together with any damage caused thereto by reason of said use, was \$7,300."

The President's proclamation of July 13, 1898, is found as in the *Herrera Case*.

The Court of Claims dismissed the petition on the authority of *Hijo v. United States*, 194 U. S. 315, and the *Herrera Case*.

Claimants urge nothing in this case, because one of them is a British subject, except on the principles expressed in *The Venice*, and of those principles we have commented in the *Herrera Case*. Nor can much be urged on account of the settlement made by the officers of the United States with claimants for the services rendered after the surrender of the vessel and the settlement made for some smaller vessels and lighters, or the tender of payment of \$4,000 by the Quartermaster at Santiago for the use of the wharves as set out in *Finding V*. Indeed, counsel say that "the intention to pay must be the officially declared intention of the Government, evidenced in the cases at bar by the rules and regulations prescribed by the President and promulgated by the Secretary of War in General Orders No. 101, and not the mere temporary mental processes of this or that subordinate officer who happened to be Quartermaster at the time and on the spot, and ignorant or disregarding of the law of the case as laid down by the President." The necessities of the case require claimants to

take that position; but we need not repeat what we said in No. 89 of those orders or of the proclamation. It is not possible to hold that the proclamation of the President was intended to supersede the laws of war and attach to every appropriation by the military officers conducting operations of war the obligations and remedies of contracts. It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction. For the reasons for this conclusion we refer to the opinion in the *Herrera Case*.

Judgment affirmed.

EX PARTE IN THE MATTER OF LEAF TOBACCO BOARD OF TRADE OF THE CITY OF NEW YORK, PETITIONER.

APPLICATION FOR LEAVE TO FILE PETITION.

Original. Motion for leave to file petition. Submitted December 4, 1911.—Decided December 11, 1911.

One who is not a party to the record and judgment is not entitled to appeal therefrom.

The action of the lower court in refusing to permit the movers to become parties to the record in this case is not susceptible of being reviewed by this court on appeal; or indirectly, under the circumstances of this case, by mandamus.

The merely general nature and character of the petitioners' interest in this proceeding is not such as to authorize them to assail the action of the court below. This is the more obvious as the act of the court which is assailed has been accepted by the parties to the record.

THE petitioner states in its petition that it is a corporation of the State of New York and "is composed of more than seventy-five business concerns engaged in the business of selling leaf-tobacco to manufacturers of tobacco products. That the said concerns are vitally in-