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Underhill Cases

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Naturalization in the United States, without any intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities to which without it, he would be subject, ought to be treated by this Government as fraudulent. (14 Op. Atty. Gen., 295; Wharton, Int. Law Dig., sec. 175.)

The evidence presented in these cases convinces the Commission that Elias A. Flutie did not "reside" in the United States for the continued term of five years nor any considerable portion thereof prior to the 2nd day of July, 1900; that the facts necessary to give the court jurisdiction did not exist, and therefore that the certificate of naturalization was improperly granted.

It follows that these claimants have no standing before the Commission as citizens of the United States, and their claims are therefore dismissed for want of jurisdiction, without prejudice, however, to their presentation in a proper forum.

UNDERHILL CASES

(By the Umpire:)

Claim of J. L. Underhill, as successor in interest of her deceased husband, G. F. Underhill, disallowed because of failure on her part to show succession in interest. Damages allowed for unlawful detention of claimant, J. L. Underhill, in Venezuela by the governmental authorities refusing to furnish passport.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

I am unable to agree with my honorable colleague in regard to this claim. At the time of the alleged transfer of the waterworks, Underhill was not, in my judgment, enjoying that freedom from restraint and equality of position as a contracting party which are necessary to give validity to every contract. Furthermore it appears to me that Mrs. Underhill is entitled in *propria persona* to an award for her unlawful detention.

As this claim must go to the umpire, however, it is unnecessary to discuss in detail the evidence upon which the foregoing opinion is based.

PAÚL, *Commissioner* (claim referred to umpire):

Both of these cases represent a claim for an indemnity amounting to \$ 232,316.28 for personal injuries, insults, abuses, and unjust imprisonment. The claim of George Freeman Underhill includes an indemnity for having been forced to sacrifice, or abandon, his property; having been obliged to leave the place of his residence.

George Freeman Underhill died in the city of Havana, Cuba, on the 26th of October, 1901, and his widow, Jennie Laura Underhill, presented on the 17th of June of this year, to the Department of State in Washington, a supplementary memorial as administratrix of the estate of her deceased husband, although it is not proven that she had obtained from the surrogate's court of the county of New York, State of New York, the appointment to said charge.

Underhill's death put an end to any claim that could arise from personal injuries, insults, or other offenses, because these facts require, to serve as a reason for an indemnity, to be preceded by the consequential trial for responsibility against the perpetrator of said offense, and Underhill, as it is proven, limited himself, in his lifetime, to entering an action of responsibility against Gen. José Manuel Hernandez, in the city of New York, and both the circuit court and the Supreme Court of the United States, decided that General Hernandez's acts were not of such nature as to be properly brought within

the jurisdiction of the United States courts. This last judgment of the Supreme Court took place seven years before Underhill's death, and during all those years he never tried to enter before the Venezuelan courts any action of responsibility for the alleged personal offenses, all rights of civil action thus perishing with his own death.

Besides these considerations, it appears, as evidently proven that Underhill never was subjected to any personal illtreatment, nor to any imprisonment from the moment of the taking of the city of Bolívar by General Hernandez, as chief of the revolutionary forces called "Legalista," until Underhill's departure for Trinidad. The facts mentioned by Underhill in his memorial addressed to the Department of State, and which facts took place on the 11th of August, 1892, in reference to his wife and himself, only prove that there existed an excited feeling of the people of Ciudad Bolívar who tried to prevent the sailing of the Underhills, husband and wife, on the steamer *El Callao*, with the chiefs of the party vanquished at the battle of Buena Vista on the previous day, and while there was not in the city any regularly established authority.

It is not true, as it is asserted by the memorialist, that in consequence of said happenings, he was put in prison with his wife, as from his own statement and those of the witnesses produced by him, it appears that from the wharf the Underhills, husband and wife, went to their hotel, and stayed in it until their departure from Ciudad Bolívar.

The report made by the commander of the U.S. man-of-war *Kearsarge*, Mr. A. T. Crowninshield, and addressed to Rear-Admiral J. G. Walker, dated at Trinidad on the 18th of November, 1892, after having obtained from the United States consul at Ciudad Bolívar and from other respectable gentlemen of the same city, all named by the commander in his report, all the necessary information to arrive at the truth of what had occurred at Ciudad Bolívar to the Underhills, very clearly says that far from having the Underhills suffered any humiliating treatment of any kind from General Hernandez they were, on the contrary, protected by him from the feeling of general hostility existing against Underhill amongst all classes and all citizens of Ciudad Bolívar, according to the very words of the commander of the *Kearsarge*.

This feeling was strengthened by the knowledge that Mr. Underhill had entertained at his residence General Carreras and other officers of the Government's army the day before their departure from Ciudad Bolívar, when they went out to meet the revolutionary forces, which were approaching the city under the command of General Hernandez; [and further] I could not find any evidence to support the statement of Mr. Underhill that he was confined in his own house by orders of the new Government; or that guards were placed about his residence, as he states, for several weeks.

From August 11 to September 23, Mr. Underhill made repeated applications to General Hernandez to leave Ciudad Bolívar by every steamer, but permission was invariably refused; first, on the ground that it would be unsafe for Mr. Underhill to leave on one of Mr. Mathison's steamers; second, that the presence of Mr. Underhill was necessary in order to operate the aqueduct. A passport was, however, offered to Mr. Underhill, provided he would obtain some reliable merchant in Ciudad Bolívar to give security for his return, but this proposition Mr. Underhill declined.

It must be noticed that no mention is made in this report of the commander of the *Kearsarge* of the complaints that, later on, Mrs. Underhill has pretended to adduce, in reference to herself, for illtreatment and unjust imprisonment, as a ground to claim the sum of \$ 100,000; but it does appear as proven that General Hernandez did offer to said lady a passport for Trinidad, which was delivered on September 27, and she embarked on board the steamer *Bolívar* on the 2nd of October, next.

In regard to the claim of Mr. Underhill for an indemnity for having been forced to sell his rights of exploitation of the aqueduct of Ciudad Bolívar, having to leave the city, it will be sufficient to read the contents of his letter of September 24, 1892, addressed by said Underhill to Gen. J. M. Hernandez, in answer to his official note, No. 278, in regard to the importance given by that civil and military chief of the city, to the work of putting in activity the service of the aqueduct, to maintain the supply of water to the city, in accordance with the contract entered into by Underhill with the Government. In said letter are found the following expressions:

On the 14th of July, when I was obliged to cease pumping, it was my intention to start up again as soon as the works had become dry. But since the occurrence of the 11th of August, and the insults I have received, and your refusal to give me a passport on any steamer that has sailed from this port during the term of six weeks, I have come to the following decisive conclusion pertaining to the aqueduct: I shall never run the aqueduct for the city of Bolívar again.

I left the works in perfect order on the 14th day of July, and so they can be found to-day, unless made otherwise by malicious hands.

If it is your right to take possession of that business, you must know and can act accordingly. All buildings outside of the pump house are my private property. My stock and tools contained in the office building are also my private property.

A few days after the date of this letter, on the 18th of October of the same year, Underhill celebrated a contract of sale, in favor of Mr. R. Tomassi, yielding to this latter all his rights in the aqueduct of Ciudad Bolívar for the sum of 6,500 pesos, which he received in cash; this contract of sale appears as made of his own and free will.

It is to be noted, as an appreciation of the character of those facts, the final part of the judgment of the Supreme Court of the United States in the suit brought by Underhill against General Hernandez:

We agree with the circuit court of appeals that the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks for the benefit of the community and revolutionary forces, and that it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive, and we concur in its disposition of the ruling below. The decree of the circuit court is affirmed.¹

For the above reasons I am of the opinion that the claim of the widow Underhill, per se, and as administratrix of the estate of her deceased husband, should be entirely rejected.

GEORGE F. UNDERHILL CASE

BARGE, *Umpire* :

A difference of opinion having arisen between the Commissioners of the United States of North America and the Republic of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol as well as the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas in this case there are presented to the Commission two separate claims: One of George Freeman Underhill for an indemnity for personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice

¹ 168 U. S., 250.

of a property, and one of Jennie Laura Underhill for damages for detention, these claims have to be examined separately, and may be separately decided upon.

The claim of George Freeman Underhill arises out of facts and transactions which took place in the months of August, September, and October, 1892;

Now, whereas Underhill died on the 26th day of October, 1901; and

Whereas, the first ingredient necessary to make a claim is a claimant, it has to be considered by whom this place as a claimant is now legally filled; and

Whereas, whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offences, it has at all events to be stated in these cases as well as in cases of claims for financial damages to whom this right to claim was legally transferred by the claimant's death;

Whereas further in this case the only person who claims this right is Jennie Laura Underhill, the deceased's widow; and

Whereas Jennie Laura Underhill declares that she is entitled to administer upon her late husband's estate, but

Whereas no proof whatever of this statement is to be found in the documents laid before the Commission;

Whereas, on the contrary, she stated on the 17th of June, 1903, that she on that day only "was about to make application to the surrogate's court of the county of New York, State of New York, for letters of administration thereon", whilst up to this day (October, 1903) no evidence as to the result of this application has reached the Commission; and

Whereas it does not appear whether claimant at his death left a last will or not; whereas, at all events, nothing about the contents of such a last will, if existing, is known to the Commission; and

Whereas it is merely stated in the exhibit that Underhill married in 1886, and that in that year his wife went with him to Ciudad Bolívar, but not where they married or under which law or on what conditions, the Commission has no opportunity to investigate and testify which right might result for Underhill's widow out of the fact of this previous marriage; whilst out of the declaration sworn to by Jennie Laura Underhill on the 22nd of November, 1898, that at that date and at the time of its origin, the entire amount of her claim belonged solely and absolutely to her, it seems to appear that during the marriage there was no community of financial interests whatever established by law or by acts between Underhill (now deceased) and his (then) wife, Jennie Laura Underhill.

Whereas, therefore, no evidence exists for the rights of Jennie Laura Underhill to appear as a claimant in the place of her deceased husband; and

Whereas, as it was said before, no one else claims this rights before the Commission. the claims of George Freeman Underhill have to be dismissed for want of a claimant.

JENNIE L. UNDERHILL CASE

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having taken fully into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas Jennie Laura Underhill on or about the 23d day of November, 1898, filed with the Department of State of the United States of America a memorial whereby she claimed damages against the Government of the United States of Venezuela in the sum of \$ 100,000 for facts that had occurred in 1892, which claim, however, was never presented by the Department of State of the United States of America to the foreign office of the United States of Venezuela; and

Whereas this claim was presented to this Commission by the honorable agent of the United States of America on June 16, 1903; and

Whereas the honorable agent of the United States of Venezuela opposed this claim in his answer dated July 9, 1903;

Whereas at the 16th of July, 1903, a brief prepared by the attorneys of the claimant was submitted by the honorable agent of the United States of America "in replication," as he says, "to the answer of the Venezuelan Government in the above-entitled case, thus making this brief the replication of the United States of America to the answer of the United States of Venezuela;

Whereas, further on, claimant says in her claim filed at the State Department: "I claim for assault, insult, abuse, and imprisonment;" and

Whereas the honorable agent of the United States of America, in the first brief, stated that the claim was for damages for personal injuries, insults, abuse, and false imprisonment.

But whereas the brief of attorneys, that has to be regarded as the replication of the United States of America after the answer of the United States of Venezuela was given, formally states that the claim arises out of unlawful arrest and imprisonment, and afterwards repeats, "Her claim is entirely for damages for detention of her person," it is shown that, after the replication, the claim has to be looked upon as a claim for unlawful arrest and detention (which opinion seems to be enforced by the opinion of the honorable Commissioner of the United States of America, when stating his inability to agree with the honorable commissioner for the United States of Venezuela, he declares that it appears to him that Mrs. Underhill "is entitled to an award for her unlawful detention"); and

Whereas perhaps practically the admitting of the other causes named in the claim and in the first brief would be of no great influence, as the evidence shows that, whatever may or might have been proved to have happened to claimant's husband, George Underhill, there is no proof of any assault, insult, or abuse as regards Jennie Laura Underhill, except what happened in the morning of the 11th of August, 1892, when an irritable and exasperated un-governed mob — which believed the Underhills to be partial to the very unpopular party with whose chiefs and officials they were on the point to escape from the city, which conviction was not without appearance of reason, fostered by the fact that the Underhills entertained the commanding general and chiefs of that party on their departure to fight the then popular party called "Legalista" — prevented her leaving the city and assaulted, insulted, and abused her, for which assault, insult, and abuse of an exasperated mob in a riot, the Government — even when admitting that on that morning there was a *de facto* government in Ciudad Bolívar (*quod non*) — can not be held responsible, as neither according to international, national, civil, nor whatever law else anyone can be liable for damages where there is no fault by unlawful acts, omission, or negligence; whilst in regard to the events of the morning of August 11, 1892, there is no proof of unlawful acts, omission, or negligence on the part of what then might be regarded as local authority, which was neither the cause of the outrageous acts of the infuriated mob nor in these extraordinary circumstances could have prevented or suppressed them); still,

equity to the contending parties seems to require that, after the replication of the honorable agent of the United States of America, unlawful arrest and detention be looked upon as the acknowledged cause of this claim.

Now whereas in investigating the evidence laid before the Commission in this claim, it has to be remembered that, if it be true, what the honorable agent of the United States of America remarked about the deposition of General Hernandez (chief of the government in Ciudad Bolívar after 16th of August, 1892), viz, that this gentleman, notwithstanding his honor, integrity, and high position, had been so intimately connected with the acts out of which this claim arises, that he could scarcely be expected to be able to make an unbiased statement in regard to it, at least the same reflection must be borne in mind respecting the memorials and depositions of Jennie Laura Underhill and her husband, which form the main part of the evidence; and

Whereas, according to the brief of the attorney's, the claim arises out of unlawful arrest and imprisonment from August 11, 1892, to September 27 of that same year; and

Whereas the evidence shows, that on the 11th day of August, although the mob shouted: "to the carcel with the Underhills," the Underhills were not arrested and brought to the carcel, but fled in the Union Hotel, where the mob did not follow them, but where a guard was placed before the door, whilst the evidence does not show whether this guard was placed there to protect the Underhills by preventing the mob to enter the hotel, or to prevent Mr. Underhill from leaving the house;

Whereas, further on, Mrs. Underhill herself declares that in the afternoon of that same day: "she hastened from the hotel (where she just before declared herself to be imprisoned) went to the prefect's office, and afterwards, together with her husband, left that place and returned — not to the hotel, where she declared she was imprisoned — but to her home;" and

Whereas, as evidence shows, claimant declared before the United States circuit court, eastern district of New York, that on the 26th of September "she went to General Hernandez in person, to his house;" that afterwards "she went to the Government building and saw Hernandez there;"

Whereas, therefore, no evidence is to be found of claimant being arrested and imprisoned; but on the contrary her own declarations rather show that there scarcely can be question of imprisonment whilst she could leave the hotel and leave the house.

The investigation of the evidence laid before the Commission compels it to come, in regard to claimant, to the same conclusion as that to which it arrived in regard to her husband.

The Commander, Crowninshield, of the United States Navy (after investigating the case on the place itself and almost immediately after the facts occurred, and after hearing the prominent citizens of Ciudad Bolívar by him enumerated — for the most part foreigners) that no evidence of imprisonment could be found;

Wherefore the charge against the Government of Venezuela of claimant's unlawful arrest and imprisonment must be rejected.

But as, furthermore, claimant claims award for damages on the charge of detention of her person;

And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

Whereas it is shown in the evidence that claimant wished to leave the country, which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27

such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

And whereas for this detention the sum of \$ 2,000 a month — making \$ 3,000 for a month and a half — seems a fair award, this sum is hereby granted.

TURINI CASE

(By the umpire:)

Damages allowed successors in interest of a contractor who, although contract was violated by both parties, before any renunciation of the contract by the Government of Venezuela, performed certain work in pursuance thereof.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

On July 28, 1896, a contract was executed between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, residing in New York City and a naturalized citizen of the United States, whereby it was agreed:

1. On the part of Giovanni Turini that he would execute for the Government of Venezuela three statues, one equestrian of Gen. José Antonio Páez, another of Liberty, and a third of Bolívar, the latter destined to be presented by the Government of Venezuela to the city of New York; that he would deliver the statues of Páez and Liberty on board ship at the port of New York two months before the day set for the inauguration of the same, being for the first statue April 2, 1897, and for the second July 5, 1897; that these two monuments would be made in conformity with the Executive decrees of July 3 and 4, 1896, in reference thereto, and also in conformity with the sketches of said statues delivered by Turini to the secretary of public works; that the equestrian statue of Bolívar would be a replica or copy of the statue of Bolívar erected in the Plaza Bolívar in Caracas, with one change, that the dimensions of the one to be built should be one-fourth larger than natural size; that the materials for the pedestal as well as the statue would be of the same kind as those used for the aforesaid monument, which was to serve as a model; that Turini would deliver the statue of Bolívar to the representative of Venezuela at New York, would engrave on the pedestal such inscription as the Government of Venezuela might suggest to him, and would place such statue in New York at the spot to be designated.

2. On the part of the Government of Venezuela that it would pay Turini for the execution of the three statues the sum of \$ 43,000 gold or 227,900