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American Electric and Manufacturing Company Case (concession)

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September, 1886, and on the 27th of April, 1887, the Fitzgerald contract was as yet legally existing, the Republic of Venezuela could not dispose on behalf of Turnbull of what it already had disposed on behalf of another, and therefore, Turnbull obtained no right whatever of property in the concession under and by virtue of the contract confirmed by Congress on the 27th of April, 1887;

And whereas the mines of Pedernales and Imataca formed part of the still existing Fitzgerald concession, Turnbull's alleged titles to these mines are equally void;

And as all his claims are based on this void contract and these void titles, they can not be allowed.

Lastly, as to the claim of "the Orinoco Company (Limited)," that is not based on the Fitzgerald concession.

Whereas evidence shows that on the 19th of November, 1898, Carlos Hammer, with power of attorney from Benoni Lockwood, jr., in the name of and representing "the Orinoco Company (Limited)," paid to the Venezuelan Government the sum of 120,000 bolivars for rights purchased on a judicial sale on November 18, 1898, which rights, as evidence shows, the Republic could not dispose of, and out of the possession of which rights claimant was expelled by the proper authorities of that Republic;

This unduly received sum of 120,000 bolivars has to be restored to him who unduly paid it.

Wherefore the Republic of the United States of Venezuela shall have to pay to "the Orinoco Company (Limited)" the sum of 120,000 bolivars, or \$23,076.93, with interest at 3 per cent per annum from the 19th of November, 1898, to the 31st of December, 1903.

THE AMERICAN ELECTRIC AND MANUFACTURING CO. CASE

(By the Umpire:)

A clause contained in a contract that "doubts and controversies which may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws" does not preclude the claimant from demanding damages from the Government for the breach by it of a collateral promise.

The breach of a promise to do an illegal act can not be made the basis of a claim, and a promise by the Government to annul an existing contract containing the clause that "doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic and in conformity with its laws" is a promise to do an illegal act.

GRISANTI, *Commissioner* (claim referred to umpire; no opinion by the American Commissioner):

The American Electric and Manufacturing Company deduces a claim against the Republic of Venezuela, adducing as the grounds for it, the facts stated in its memorial, some of which denoting most importance, will presently appear in this statement.

In May, 1887, the Government of Venezuela made a contract in virtue of which they granted Aquilino Orta —

the right to establish telephonic communication within the towns and cities of the Republic and between the same; also in the country districts and country villages and between both; and further, to extend the same communication outside of Venezuela by such means as he may deem most suitable.

In July, 1883, the Government of Venezuela had signed another contract which had the same object, with the Intercontinental Telephone Company of New Jersey, represented by Mr. J. A. Derrom.

After several assignments the claimant company became an assignee of the contract signed with Orta, and at the time of fulfilling the same by establishing some telephonic lines entered into competition with the Intercontinental Telephone Company of New Jersey, in which competition the claimant company was defeated, and ended in its transferring the contract to its competitor.

This simple statement, strictly adhering to the truth, is an abridged record of the case. On what principle, then, of justice or equity can "the American Electric and Manufacturing Company" rely for its claim. From what juridical postulate or from what legal precept does liability arise for Venezuela to indemnify damages caused by the defeat in that struggle of enterprises, considering the political economy as the most efficacious means of ameliorating and rendering products cheaper and developing industrial progress?

The American Electric and Manufacturing Company pretends to found its claim on the grounds of article 8 of its contract, which is worded as follows:

The Government shall not grant similar concessions to any other person or company, nor shall it permit additions to contracts interfering with the present one, during a period of nine years, which shall be reckoned from the date on which it is signed, and may be extended for three years longer, at the option of the Government.

The foregoing article was not infringed, as the Government of Venezuela did not grant any concession that impaired or collided with the right of the claimant company.

It is also adduced as the grounds for the claim that the Government authorities of Venezuela assured the claimant company that as soon as its telephone plant should be in operation the concession of 1883 would be revoked.

Of this assertion, which is inverisimil, not the least proof has been produced; and in case such promise had been given, not being legal, it could not give rise to any right. On the other hand, the principal reason assigned for said revocation, which was the poor service of the Intercontinental Telephone Company of New Jersey, is denied by the real facts, as it defeated the claimant company in competition.

It is the opinion of the Venezuelan Commissioner that on the strength of the reason stated the claim specified, which the American Electric and Manufacturing Company deduce, should be disallowed.

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 fully taken into consideration the protocol and also 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 the claimant in this claim was the proprietor of a contract made between the Government of Venezuela and one Aquilino Orta about the establishment of telephonic communication, and claims for damages suffered by him through the fault of the Venezuelan Government in his enterprise to realize the object of this contract;

And whereas article 10 of this contract reads as follows:

Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws

the honorable agent of the United States of Venezuela opposes that before coming to this Commission the claimant company ought to have attempted to recover the pretended damages before the judges chosen by itself with its contractor.

Whereas, however, it is clearly shown by the evidence before the Commission that at the moment Aquilino Orta made said contract with the Venezuelan Government that Government was bound by a prior contract with another party, which contract, if not annulled, would make so much as void the contract passed with said Orta, wherefore, as is shown in the evidence, the claimant company and his predecessors did not cease to ask for the annulment of the prior contract, basing their demand on the pretended promise of the Government to annul that contract, and wherefore the honorable agent of the United States of America in his replication (which replication at the same time bears the character as a brief on behalf of the claimant) cites: "The failure on the part of the Venezuelan Government to fulfill its promise with respect to this cancellation of the (prior) concession" as cause of claimant's losses for which damages are claimed;

Whereas, therefore, not the contract, but the pretended promise from which the contract had to deduce its value, shows itself as cause of this claim, no article of the contract seems apt to interfere with the question of jurisdiction about a claim originated in the nonfulfillment of a promise by which only that contract would obtain its full force and proper value;

Wherefore the fact that the claimant company did not first go to judges chosen by itself in this contract does not disable it to come to this Commission for decision in a claim, originated in pretended promises whereon the force of the contract depended.

And now as to the main question:

Whereas article 1 of the contract made in 1887 with Aquilino Orta, afterwards transferred to the claimant, reads as follows: "The Government grants to Aquilino Orta the right to establish telephonic communication *within the towns and the cities of the Republic and between the same*; also in the *country districts and the country villages and between both*," etc., while article 1 of a contract made in 1883 between the same Government and one J. A. Derrom (law of 31 July, 1883), reads as follows: "The Intercontinental Company of Telephone pledges itself to establish telephonic lines in the *interior of the cities and between the principal cities and communities of the Republic where this may be deemed necessary*," being followed by these words of article 3:

"The Government pledges itself during the time of fifteen years, beginning from this date, not to give equal concession to any other person or company." It is clearly shown that the concession given to Aquilino Orta was in flagrant opposition with the rights granted to the Intercontinental Company, and that the contract with Orta could never obtain its main effect as long as this contract with Derrom existed, wherefore the cancellation or the annulment of this prior contract was the condition sine qua non for the contractors of the later contract to attain the main effect of their act; and

Whereas the evidence laid before the Commission shows that claimant and his predecessors were well aware of this fact, as they never ceased to appeal to the Government for the revocation of the contract under which the Intercontinental Telephone Company was operating; while it may be regarded as very characteristic for the way the contract with Orta was looked upon by its possessors that this contract a few months after its origin, being already transferred into the hands of the fourth possessor — this fourth possessor (the American Telephone Company, Consolidated, from which the claimant company

afterwards purchased it) — refused to pay it with \$100,000, but agreed, as the evidence says, “only to give in payment thereof one million two hundred and fifty thousand dollars in shares,” thus valuing its own shares at the very outset of the enterprise at less than 8 per cent; and

Whereas further on the former legal attorney of the American Telephone Company, who transacted the purchase of the contract by that company (from which, the company, the claimant company, in turn purchased its rights), declared under oath, as the evidence shows, that “it was with the explicit understanding that *the Intercontinental Company was to be entirely removed* that the American Telephone Company undertook to establish the telephone business in that country (Venezuela).”

By all these facts it is clearly shown that to the knowledge of the claimant company and its predecessors the contract with Orta was in flagrant opposition with the prior contract made with Derrom, and could not have its main effect without the annulment of this prior contract, which annulment the possessor of the Orta contract pretended and pretends was promised to them by the Venezuelan Government, and that therefore not the contract itself but the nonfulfillment of the promise that had to give the contract its force — or, as the honorable agent of the United States puts it in his answer, “the failure on the part of the Venezuelan Government to fulfill its promise with respect to the cancellation of the Intercontinental Telephone Company” is to be regarded as the cause of this claim.

And whereas no direct proof of this promise is to be found in the evidence:

But whereas the fact that the Government decided to make the Orta contract in flagrant opposition with the prior Derrom contract, and the fact that the Government has not contested the different protests of the claimant company and its predecessors as to the nonfulfillment of this promise, might seem to point to the probability of such promise having been (at least orally) given.

Whereas, on the other side, the facts —

First. That the Government never interrupted the acts of the Intercontinental Telephone Company when this company continued to carry out the prior contract;

Second. That no proof of any sign of difficulties between the Government and the Intercontinental Telephone Company is given except the complaint of the company not reducing their tariffs;

Third. That the Government, on the contrary, always behaved in respect to the Intercontinental Telephone Company in a way which made the claimant company and its predecessors speak about the Intercontinental as about “the favored company” and complain of the Government’s predilection for that company, and which even made the honorable agent of the United States of America point to “the favors shown to the Intercontinental Telephone Company” as to one of the reasons for the ultimate sacrifice of the undertaking of the claimant company and its predecessors; seem to speak for the improbability of the Venezuelan Government ever intending to cancel the prior contract in favor of the second, and consequently for the improbability of any formal promise as to that cancellation — for all which reasons the fact that the Government of Venezuela promised to the claimant company and its predecessors the cancellation of the Derrom contract can not in equity be said to be sufficiently proved.

Whereas further on article 8 of the Derrom contract reads in the same words as article 10 of the Orta contract:

Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws,

and

Whereas, therefore, even if, as claimant assures, the Government wanted to finish up with the Derrom concession, and for that reason promised its cancellation, this promise would be a promise to do an illegal act; as the Government as well as the other party was bound to this article, and therefore to the laws of the country, which laws, in complete accord with general principles of law, would not allow the Government to cancel the contract on its own authority, but would require that the annulment be declared by an adverse judgment between the contracting parties.

For which reason such a promise, even when proved to have been given, would not give rise to any right as being illegal, and with relation to the contract (which without it would be void of its main value) would stand as a condition explicitly given orally and implicitly contained in the contract, which condition, according to the laws of the country as well as according to the general principles of law, would be null, and make null the contract that depends on it.

Whereas, therefore, whatever may be or might have been the wrong of the Government in making a contract in flagrant contradiction with a prior contract, or in promising to do an illegal deed so that the later contract might have its force, absolute equity forbids to recognize a right to a claim founded either on the breach of a contract that could only get its force by the fulfillment of a promise to do an unlawful deed, or on the nonfulfillment of this unlawful promise itself.

The claim of the American Electric and Manufacturing Company has to be disallowed.

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RAYMOND ET AL. CASE

(By Bainbridge, Commissioner):

The expenditure of money in necessary repairs of a vessel creates a lien thereon in favor of the party advancing the money and the lien follows the vessel no matter into whose hands she may fall.

The acceptance of an assignment in payment of the debt thus contracted releases the lien.

(By Grisanti, Commissioner):

The assignment of property in payment of a debt amounts to a sale of said property, and the acceptance of such an assignment releases the debtor.

BAINBRIDGE, *Commissioner* (for the Commission):

It appears from the evidence that on May 1, 1867, one Charles M. Burns, a subject of Great Britain, being indebted to Ovide de Sonnevile, a French subject, in the sum of \$35,000, executed and delivered to the latter at New Orleans a mortgage or bottomry bond upon a certain steam vessel owned by Burns, called the *Irene*. At the same time Burns gave De Sonnevile power of attorney to sell the vessel or to make contracts for the affreightment or charter party thereof, and to collect all sums that may be due said steamship.

De Sonnevile took possession of the vessel and made a voyage first to Barbados, and thence to the island of Trinidad. Near Barbados the *Irene* collided with another steamer, and in order to pay for the repairs rendered necessary by the accident, De Sonnevile, on October 9, 1868, borrowed from Charles Raymond, a citizen of the United States, the sum of \$2,500.