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Waterworks Case (interlocutory)

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and which shall have been presented to the Commission hereinafter named by the Belgian Government or by the Belgian legation. * * *

Consequently, the payment of interest has not been claimed either by the Government of Belgium or by the legation of Belgium at Caracas.

Secondly, I make the following argument:

The cause which has prevented the Venezuelan Government from effecting the punctual payment of the sum named consists in civil war, which possesses the character of *force majeure* and excuses the payment of interest, in accordance with article 1191 of the civil code:

The debtor is not obliged to pay damages if these are the consequences of an accident or force majeure, which has impeded him from refraining to do, or doing, that which he was obliged to do, or that he has done that which was forbidden.

For these reasons I am of opinion that there is no reason to demand the payment of interest with which the Belgian Commissioner has increased the demand.

FILTZ, *Umpire:*

The umpire having studied and examined the documents and the record and considering:

That, the demand for interest has not been presented in the claim itself;

That, besides it is contrary to the terms of the protocol;

For these reasons declares that the demand for interest made by the Commissioner of Belgium is disallowed.

COMPAGNIE GÉNÉRALE DES EAUX DE CARACAS

DECISION ON JURISDICTION

(By the Umpire):

Under the terms of the protocol, the Commission has jurisdiction to examine and decide the claim of a Belgian corporation, even though some of its stockholders may not be Belgians.

DECISION ON MERITS

(By the Umpire):

The failure to perform a contract for the payment of certain bonds issued by the Government of Venezuela in payment for certain properties purchased of claimant gives the claimant a right to claim indemnity, even though the bonds were made payable to bearer.

Where the property conveyed was encumbered by a bond and mortgage, formal registration of a satisfaction of the mortgage can not in equity be demanded when the evidence clearly shows that all but a few of the mortgage bonds have been paid and the claimant is willing to amply secure the grantee against loss on account of the outstanding bonds. The objection to the payment founded on the above would be one of a technical nature, which is expressly barred by the protocol.

Evidence can not be introduced to show that bonds issued for the payment for property were delivered at 40 per cent of their nominal value where the contract of transfer expressly states that the bonds were issued at par.

(The allegations contained in the memorial sufficiently appear in the following opinions. This plea to the jurisdiction was the first step taken by the Venezuela Government in opposition to the claim.)

ANSWER OF VENEZUELA ON JURISDICTION

To the Honorable Members of the Mixed Venezuelan-Belgian Commission:

The undersigned, agent of the United States of Venezuela, has studied the claim presented by the Compagnie Générale des Eaux de Caracas, and respectfully shows to the tribunal:

Before answering the claim upon its merits the undersigned must present to the consideration of the honorable arbitrators a preliminary objection which requires a previous decision.

By the protocol signed in Washington between the two Governments only the claims owned by Belgian subjects can be submitted to the decision of this honorable Commission; it is necessary, therefore, for the claimant company to prove that all the special bonds issued by Venezuela, as the price for the assets of the enterprise, are held by Belgian subjects.

The undersigned considers that this is an essential condition to give jurisdiction to the tribunal.

Moreover, the Government of Venezuela, in refusing to continue the regular payment of the special debt created to make payment for the aforesaid sale, has done so because it considers indispensable the fulfillment of a requirement to which the company is obligated by the internal law — viz, the cancellation of the mortgage which it made, by which it guaranteed the payment of 27,400 bonds at 500 francs each — because it is to be noted that when the enterprise was sold to the Government no mention of this incumbrance was made.

In case the honorable tribunal should consider the objection interposed without foundation, the undersigned will proceed to answer the claim, without any delay, upon its merits.

PRELIMINARY QUESTION AS TO JURISDICTION

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

In his answer, dated July 18, 1903, the agent of the Venezuelan Government sets forth, incidentally, that if Venezuela has suspended the payment of the waterworks debt it has been because of a mortgage which ought to have been canceled according to local legislation.

It would be easy to meet this objection if the explicit prohibition which the protocol provides for recourse to local legislation did not render such refutation completely useless.

The true objection should be formulated thus:

By the protocol signed at Washington between the two Governments only claims owned by Belgians can be submitted to this Commission; it is therefore necessary that the company should prove that all the bonds issued by Venezuela in payment for the assets of the company are held by Belgian subjects. The undersigned considers that this is an essential condition to give jurisdiction to the tribunal.

In case this tribunal should consider the objection unfounded, the undersigned will proceed to answer the claim upon its merits without any delay.

This objection is magnified even more by the Venezuelan Commissioner, who demands not only that the company should prove that all the holders are Belgians, but also that it is the owner of the claim which it presents.

In order to refute the objection of the Venezuelan agent, it is sufficient to determine the nationality of the party claimant.

The Compagnie Générale des Eaux de Caracas is a corporation organized in Brussels on February 3, 1891, before Mase Van Halteren, a notary, as is shown by the copy of the Monitor, which is found in the record.

It is therefore a juridic Belgian person, and in that capacity submits to the Belgian-Venezuelan Commission the fact of the nonperformance on the part of the Venezuelan Government of a contract signed by both parties October 31, 1895.

If the objection of the Venezuelan agent had any merit, that is to say, if it were necessary to deny the benefit of a judgment favorable to the claimant to all the bondholders who were not Belgians, with all the more reason would it have been necessary to claim in all the mixed commissions by separating the stockholders and bondholders of corporations which may have claims pending before them.

Very well, the claims of the German railway and the two English railways have been examined on their merits by the English and German commissions.

The objection to the jurisdiction made by the agent of Venezuela before the Commission is not, therefore, justified.

With respect to the exaggeration which the Venezuelan Commissioner has made, in seeking to make the claimant prove in advance that it possesses all the bonds of the debt issued; it arises from an imperfect idea of the foundation of the claim.

The claim of the company has not been made for the certain number of bonds of the waterworks debt which it may possess, but it has its origin in the contract of 1895, to which the company is a party, a contract which it has executed, and which the Government of Venezuela has not fulfilled; which has given to the first party a cause of action against the second, a right which it is exercising at this moment.

Therefore the proof that the company is the owner of its claim is the contract itself, the text of which and the nonfulfillment of which are undeniable.

Besides, it is well to note the manner in which the company has presented its claim.

The liquidators limit themselves in their memorial to proving the debt which the Government has contracted by reason of the negotiation concerning the waterworks, and have taken good care not to demand that the payment be made to them personally, leaving it entirely to the judgment of the Commission to decide if such a course should be taken or, if it deems it preferable, to make the debt payable to a sound financial establishment which it shall charge with the disbursement to all the bondholders; and consequently the Belgian Commissioner asks that, passing over the objections presented by the defendant, the Commission decide that it has jurisdiction and the claim is admissible.

GRISANTI, *Commissioner* (claim referred to the umpire on question of jurisdiction):

La Compagnie Générale des Eaux de Caracas claims the payment of 10,175,000 bolivars, represented by 20,350 bonds payable to bearer of the *special waterworks debt*, besides 2,967,708.33 bolivars interest on this debt from August, 1897, until June of the present year.

This claim is founded upon the following facts:

By the contract executed on October 31, 1895, La Compagnie Générale des Eaux de Caracas sold and transferred to the Government of Venezuela the contract which it had acquired for developing the distribution of water in Caracas, the ownership of all the works and installations, its properties, and the assets which it had against its creditors, all for the price of 10,792,440 bolivars in bonds of the special debt of the waterworks of Caracas, created by Executive decree of the aforesaid date, October 31, 1895.

This debt is similar to the consolidated debt at 5 per cent created by the law of public credit dated July 8, 1891.

The first and essential requisite which the company should fulfill, and which it has not fulfilled, is to prove in a convincing manner that it is the owner of the claim which it urges — that is to say, that it is the owner of the 20,350 bonds of the special debt which are still in circulation — or, at least, that the owners of these bonds are Belgian subjects, and as these bonds are payable to bearer it can not make other proof than the presentation of these bonds themselves.

These bonds are doubtless owned by individuals of various nationalities, and a great part of them belong to Venezuelan citizens.

Very well, the obscure and irregular manner in which La Compagnie Générale des Eaux de Caracas presents its claims would lead to the absurdity that this Mixed Venezuelan-Belgian Commission constituted to examine and decide Belgian claims — that is to say, claims of the Belgian Government or of Belgian subjects — should examine and decide a claim in which persons of many nationalities are concerned, and it would bring us to a still greater absurdity, if that be possible, if some Venezuelans should appear to be protected in their interests by His Majesty the King of Belgium. This would be a flagrant violation of Article I of the protocol, by virtue of which this tribunal has been created.

The Belgian Commissioner assumes that the Compagnie Générale des Eaux de Caracas has made itself liable with respect to the holders of the bonds of the debt, but besides the fact that this would leave in existence the absurdity already expressed in the foregoing paragraph, this act itself would go to demonstrate that the company is urging a claim which is not owned by it, that it is demanding the payment of a debt which does not belong to it, or at least does not belong to it to the extent of which it is trying to make recovery.

" En fait de meubles la possession vaut titre " is a principle sanctioned by article 2279 of the Belgian civil code, by article 1141 of the French civil code, by article 1126 of the Italian civil code, and by article 1100 of the Venezuelan civil code, and said principle applies to bonds payable to bearer.

568. Le principe que les créances peuvent être revendiquées reçoit exception quand elles sont constatées par des titres au porteur. Cela est admis par tout le monde; cependant le code ne parle pas plus de l'exception que de la règle, mais l'exception et la règle se justifient par les raisons qui ont fait établir la maxime qu'en fait de meubles la possession vaut titre. Pourquoi la possession est-elle considérée comme un titre de propriété quand il s'agit de meubles corporels? Parce qu'ils se transmettent de main en main, sans qu'on dresse acte de la transmission. Or, il en est ainsi des effets au porteur: le nom qu'on leur donne prouve que le payement doit être fait à celui que est porteur de l'effet; il est donc réputé créancier, c'est-à-dire propriétaire. Ainsi il n'y a aucune différence entre ces titres et les meubles corporels en ce qui concerne le mode de transmission, donc ils doivent être soumis à un seul et même principe.

La cour de cassation l'a jugé ainsi par un très ancien arrêt, sur le réquisitoire de Merlin. Dans l'espèce, il s'agissait de vingt-six récépissés d'un emprunt, conçus en forme d'effets au porteur. Ces effets avaient été acquis par une société de commerce; l'un des associés en disposa au profit d'une concubine; les associés les réclamèrent contre le possesseur. La cause de la défenderesse était on ne peut pas plus défavorable; le premier juge se prononça contre elle, mais sa décision fut réformée par le tribunal d'appel de Bruxelles. En principe, dit la cour, les effets au porteur sont réputés être la propriété de celui qui en a la possession, à moins que celui qui les revendique ne justifie qu'ils lui ont été volés ou qu'il les a perdus et qu'ils ont été trouvés par le possesseur. (Laurent, *Principes de Droit Civil*, vol. 32, p. 585.)

If the owner of a bond payable to bearer has not got the right to recover it from its actual possessor, except it may have been stolen or lost, how can it

be just that the Compagnie Générale des Eaux de Caracas should claim from the Government of Venezuela the payment of all the bonds of the special debt of the waterworks of Caracas, without showing that it is the owner of all these bonds?

The Compagnie Générale des Eaux de Caracas is not vested with any legal right to represent the bearers of the bonds of the waterworks debt nor does there exist between it and them any legal relation; and this being so, on what principle of equity and justice can it rely to demand the payment of the total sum of said debt?

The undersigned does not deny that the Compagnie Générale des Eaux de Caracas is a juridic person in so far as it is necessary to accomplish its liquidation, nor that its nationality is Belgian. What he denies is, that this company is owner of the claim which it advances.

For the reasons expressed it is the opinion of the Venezuelan Commissioner that the true creditors of the Government of Venezuela for the waterworks debt are the holders of the bonds; so that the Compagnie Générale des Eaux de Caracas ought to show that it is the legitimate holder of the 20,350 bonds, the payment of which it demands, or to limit its claim to the number of bonds which it has in its possession.

FILTZ, *Umpire:* [1]

The umpire having examined and studied the documents in the record and considering:

That Article I of the protocol of Washington declares that the Commission has jurisdiction to examine and decide all Belgian claims against the Republic of Venezuela which have not been settled by diplomatic agreement between the two Governments, and which may have been presented to the Commission by the Belgian Government or by the legation of Belgium at Caracas;

That the present claim has not been settled by diplomatic agreement between the two Governments, and that it has been presented to the Commission by the agent of the Government at Caracas;

That the claimant company's Belgian character has not been disputed, and that it has not lost it, because among the holders of the bonds which have been issued by the Government of the Republic persons of a different nationality are found;

For these reasons declares that the Commission has jurisdiction and orders that it proceed to decide upon the merits without delay.

ANSWER OF THE VENEZUELAN AGENT ON THE MERITS

Honorable Members of the Mixed Venezuelan-Belgian Commission:

In conformity with the decision rendered by the honorable umpire of this Commission, deciding that it has jurisdiction to examine and decide the claim presented against the Government of Venezuela by the Compagnie Générale des Eaux de Caracas, the writer, as agent of the Republic, proceeds to make answer to the claim upon its merits.

By Article I of the contract entered into by the minister of hacienda and public works, duly authorized by the President of the Republic and by virtue of the authorization given by the National Congress on May 25, 1895, on the one part, and Noberto Paquet, as representative of the aforesaid company, on

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[1] For a French translation see: Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 883.