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Crossman Case (interlocutory)

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XIII

The umpire shall be present at all formal meetings of the Commission, and his decision upon any point may be invoked at any stage of the case. When this decision is pronounced it shall be entered in the records of the proceedings.

XIV

After hearing the case, if the Commissioners are agreed, the tribunal may give its decision as soon as the same can be put in writing. If the Commissioners disagree, but mutually consider that further investigation is necessary, the tribunal may order such further investigation fixing the time and place thereof, and if the Commissioners can then agree, the decision may be rendered as provided in the first part of the article.

XV

No one may attend the sittings of the tribunal except the agents of the Governments, the official secretaries, and the secretary of the umpire. The claimants or their representatives and other persons may attend if they obtain the authorization of the tribunal in writing.

XVI

The secretaries shall keep, besides the register mentioned in Article VI, a book in which they shall enter a record of the proceedings and the decisions of the tribunal in each case, and another in which they shall enter the minutes of the sittings. These books shall be kept in duplicate, one copy in English and the other in Spanish, and shall be verified and approved and signed by the tribunal. When the tribunal shall have completed its labors, the copies in English shall be delivered to the British agent, and those in Spanish to the Venezuelan Commissioner.

XVII

All documents and records of the Commission shall be considered confidential.

INTERLOCUTORY OPINIONS

CROSSMAN CASE

Meaning of " wrongful seizure " in the protocol

PLUMLEY, *Umpire*:

James Crossman is a native of Cornwall, England, now resident at Puerto Cabello, but at the time of the happening of the events hereinafter stated was a resident of Pueblo Nuevo, Aroa, jurisdiction of the State of Lara, and a British subject.

On the 31st day of December, 1899, that division of the liberal restoration army which was under the command of Gen. Rafael Montilla entered Pueblo Nuevo and went into garrison in the fortress there situated. The dwelling house of the claimant was taken and used by General Montilla as quarters for some of his troops while he so remained in garrison. The exact time which elapsed while he was thus in garrison and in use of such dwelling house as aforesaid does not appear, but during the time an officer of this command took from the claimant his horse, a valuable one, and the saddlery. Also while in such occupancy of the house a gold watch of great value, some clothing, and furniture, which belonged to the claimant and were left in the house by him, were

taken from said house, and the claimant attributes this loss solely to the fact that it was so occupied by Government troops. His alleged damages are 2,500 bolivars; 800 for the horse and saddlery and 1,700 for the other property. There is no statement whether or not the troops quartered in his house were private soldiers, officers, or both. In addition to his own memorial and plea he submits two depositions as his proof in the case.

This claim was presented to the Commission on the 11th ultimo, and the learned agent for Venezuela made answer thereto on the 15th instant, using in part the language following:

In the opinion of the undersigned, the most favorable supposition on behalf of the pretext which the claimant can allege is the smallness of the amount claimed, because the evidence which might be derived from the testimonial justification presented is counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment.

It might also be objected that the injurious acts mentioned were of a personal character and that, previously, the individual responsibility of their authors should be prosecuted. The tribunal and the court of Brussels, with the occasion of a claim founded by one Delbrouk of Limbourg, who with the pretext that, on the 8th of August of 1831, soldiers belonging to different corps of the army of Maes had caused him injuries, brought an action against the State for an indemnification. In compensating damages caused by acts of transgression of law, the tribunal said, the action must be brought against those who are civilly responsible for punishable deeds committed by military at their service. (See Fiore, Droit Int. Pub., vol. I, p. 576, note 1.)

In the present case it does not appear confirmed in any way that the troops obeyed superior orders, nor that the nearest military authorities could have avoided the damages done. Therefore the undersigned considers that, even in case the damages alleged by the claimant were true, these constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he resided was, and that the responsibility of Venezuela should not be declared, as an antijuridical precedent would thus be created.[1]

The issue presented raised no question of fact.

On the 17th instant the learned agent for the British Government made a reply to this answer by filing a written objection to the same, as follows:

CLAIM OF JAMES CROSSMAN — PRELIMINARY OBJECTION TO THE ANSWER

This is a claim for wrongful seizure of property. The protocol of 13 February 1903, provides:

"ARTICLE 3. The Venezuelan Government admit their liability in case where the claim is for * * * wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide will only be:

"(a) * * * whether the seizure was wrongful, and

"(b) If so, what amount of compensation is due."

Therefore, in this case, the only questions open to the Commission are:

(1) Did the seizure take place?

(2) Was the seizure wrongful or not?

(3) If wrongful, how much is due?

Upon the presentation of this preliminary objection to the tribunal, it then being in session, the issue as made was discussed by the honorable Commissioners of this tribunal, and, failing to agree, the same was there and then referred to the umpire for his opinion thereon.

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[1] Opinion of Venezuelan Commissioner not printed.

Concerning the interlocutory question thus raised, the undersigned, umpire by virtue of his appointment under said protocol, is of the opinion which follows:

The umpire has presented to him the alternative of a strict construction of and a close adherence to the minimum issues involved in the matter submitted to him preliminary to the determination of the question of liability on the part of Venezuela, or a broad and general interpretation of the questions permitting answer under the submission as it comes to him from the honorable Commissioners. To take the first alternative would require of the umpire less care and responsibility, and would be thus far gratifying in its aspect, but it would be much less helpful in the determination of the questions involved in this case, and would aid but little in preparing the way for the determination of other causes which may rest in whole or in part upon the fundamental propositions here made. After much careful consideration of the matter and some hesitancy for fear that he was overstepping the purpose and desire of the learned gentleman who first raised these interlocutory matters and of the honorable Commissioners who made final reference of the same to the umpire, he has decided that it was the wish of all these, and therefore his duty, that he should take the more broad and general view of the questions raised and express to the tribunal his opinion thereon.

If in the case before us there has been a wrongful seizure in its full and complete sense, then, in the opinion of the umpire, Venezuela has admitted her liability without reserve, and it follows that the subdivisions of inquiry suggested by the learned agent for the British Government in his preliminary objection are the only questions open for discussion and determination. There are, however, within these subdivisions main lines of inquiry and of consideration which must be passed upon before there can be an affirmative or a negative answer to the main proposition, and the assent of the umpire to these subdivisions as being exclusive rests upon the assumption that these are understood to be included within his list of subdivisions.

1. In a solemn agreement between nations referring to wrongs which one of the signatory parties thereto claims should be redressed by the other and which it is proposed shall be submitted to a tribunal to determine, what is the import and scope of the word " seizure? " Negatively it may be stated that it is not any wrongful taking of the property of a British subject by Venezuela. It does not mean property taken by robbery, theft, pillage, plunder, sacking, or trespass. Affirmatively it may be said that it is limited to a seizing under and by virtue of authority, civil or military. Necessarily it follows that it is always legitimate to inquire in any case raised under the protocol how, when, where, and by whom it was taken or used.

2. Given that a seizure is made out, there is yet to be established that it is wrongful, and therefore the import of the words in their connection and relation as used in the protocol is a necessary matter to determine. There is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act. It is not enough to know that a wrong has been suffered. Not only must the act be willful or with wrong intent, but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent.

These points, and without doubt others of a kindred nature, are calculated to assist in determining the question, " Has there been a wrongful seizure? " and are therefore relevant, important, and competent.

The meaning of the umpire in what he has here expressed may be illustrated by the case in hand. Was the taking of the horse and saddlery of the claimant

by an officer in General Montilla's command, in the manner and under the circumstances stated and established by the proof, a seizure in its proper sense, taken in its relations as used in the protocol? Is —

> the evidence which might be derived from the testimonial justification presented counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment,

as contended by the learned agent for Venezuela in his answer? Is it established that it was taken under superior orders, as questioned in the same answer? The umpire regards both of these points practically similar in their application as well made and necessary to be considered and determined before it can be said that there was or was not a seizure of the horse in the sense in which that word is used in the protocol.

How is it with the gold watch and furniture taken from the dwelling house of the claimant as established by his evidence? Was such taking a wrongful seizure as contemplated by the protocol? If it was a taking of army supplies for the benefit of the army, and of a character and nature proper subjects of military use, it might make an affirmative answer more easy. If it were the wanton and unauthorized destruction or taking of private property by private soldiers not under orders, and property of a character not suited to military use or to the uses of the military, then it could not be called a seizure under the protocol. And especially is this true if it is not shown to be applied to the use of the soldiers of the Government.

An act of pillage, plundering, or sacking is a direct antithesis of an act of seizure. The first implies not only a lack of authority, but an act done in immediate contravention of all authority. It disclaims and denies governmental responsibility, and is in direct opposition to that authority. To seize directly implies authority, warrant, and executive responsibility. In peace it ordinarily requires an officer duly commissioned, armed with a warrant duly issued. In war it likewise requires a condition of authority and power.

It is important in this connection to ascertain from the proof if the gold watch or furniture or any part thereof has been shown to have been in the possession of any of General Montilla's troops, and if anything has been shown in that regard further than the disappearance of the property while his army was garrisoned in the town and had quarters in this dwelling house.

These matters are all involved in the position taken by the answer of the learned agent for Venezuela in the parts heretofore quoted and are therefore matters of issue, and in the opinion of the umpire the facts admit of such issues.

On the other hand, if the umpire has the right conception of the learned agent's contention in the third paragraph of his answer, it is a point not well taken, but the issue there made is expressly excluded by the admitted liability of Venezuela in that part of the protocol quoted by the learned agent for the British Government in his preliminary objection thereto.

There is another view of that part of the case covering the taking of the gold watch and furniture which is raised by the answer of the learned agent for Venezuela in the expression " nor that the nearest military authorities could have avoided the damages done " which, in the judgment of the umpire, is of material importance in the final determination of this case, and under that head it is a proper matter of consideration to determine whether the taking of the house of the claimant by General Montilla as quarters for some of his troops did not place upon him and the officers of his command a special responsibility by proper and sufficient guards to prevent pillage, plunder, robbery, or sacking of the dwelling house of the claimant by his troops or by anyone while he, through his officers, had exclusive possession and control of the house and the

property therein. The measure of duty resting upon the Government, through its officers, in this regard may determine the question of its liability in this case.

The umpire is aware that he has not touched upon many questions that might well be raised to assist in the determination of the issues in this case, and it has not been his purpose to write exhaustively thereon but to pass only upon such points as seemed to him certainly material and probably helpful in the final settlement of the case. It may be stated in general to be the position of the umpire that everything which helps to determine the primary question of a wrongful seizure under the facts and circumstances of this case so related to the Government of Venezuela that it is responsible therefor, and has admitted its liability concerning in Article III of the protocol, are properly before the Commission for its discussion and determination, and whether or not the facts and circumstances of this claim —

> constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he (claimant) resided was, and that the responsibility of Venezuela should not be declared, as an antijuridical precedent would thus be created,

as contended by the learned agent for Venezuela in the conclusion of his answer, or a rightful duty and responsibility be cast upon Venezuela to recompense the claimant for his losses, will all depend upon the answer to the questions involved, in the consideration and decision of which the opinions of the umpire here expressed may be in some degree helpful and determinative.

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De Lemos Case

Meaning of " injury " in the protocol

CONTENTION OF BRITISH AGENT — PRELIMINARY OBJECTION TO THE ANSWER

The Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim, any such answer being against the terms of the protocol of February the 13th, 1903, which expressly provides for such cases:

> Article III. The Venezuelan Government admit their liability in cases where the claim is for injury to * * * property, and consequently the questions which the Mixed Commission will have to decide will only be:
>
> (a) Whether the injury took place, * * * and (b) if so, what amount of compensation is due?

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

I regret to differ from the British agent's interpretation of the protocol signed at Washington on the 13th of February last, as stated in his preliminary objection in which he states that the Venezuelan agent has no right to introduce any matter of principle in his objections to Mr. Ch. de Lemos' claim.

In my opinion, the Venezuelan Commissioner, as well as the agent of the Republic, always has the right of setting up the philosophical and juridic principles applicable to the case under examination, so that it is morally impossible that Great Britain, which ranks deservedly among the most enlightened nations of the world, should obtain a juridic decision, abstracting therefrom the principles of justice and the postulates of law, which comprise the most precious treasure of civilization.

The Venezuelan and British Claims Commission is a court, and to exclude justice, right, and equity from its deliberations is the same as depriving a man