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De Lemos Case (second reference to umpire) (interlocutory)

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where responsibility and admitted liability are limited to wrongful seizure, but with this aid the conviction of its untenability is irresistible.

Seizure of property may be rightful or wrongful according to circumstances, hence it was necessary to define the character of seizure concerning which liability was admitted. The admission was intended to cover wrongful seizure only, and therefore it was so written down. The same limitation was intended in the expression " injury to property " and " injury " was selected because in itself it expressed that limitation. It is not to be considered there was intended a difference in responsibility to attach to these acts, and by the umpire's interpretation there is no difference. Without it there would be great and inexplicable difference.

By giving to this word its meaning in law and applying it to a document of peculiar legal importance drawn and carefully considered by minds of profound scholarship and erudition in law skilled in words accurate and apt, in sentences short, clear, and trenchant, it is certain we can do no violence to the thought. By adopting any other interpretation of the language used it becomes ambiguous, indiscriminative, and inapt.

The umpire regards the section quoted from Article III of the same import and value as though it had been written:

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

The question in each case being whether by the law governing the facts in the case there has been such an injury.

The application of this holding to the case pending will admit therein discussion and determination only upon the questions thus involved. Was the shelling of Ciudad Bolivar in all the aspects of the case presented a wrongful or a rightful govermental act?

Was the result to the property of Mrs. Guillermina Dalton de Lemos under all of the facts in the case one which she must endure without recourse as a necessary sequence, or has she fixed responsibility upon Venezuela by some wrongful act or neglect of that country?

An answer to these questions determines the status of this case.

The range of inquiry and of discussion is limited but important.

To the learned and honorable gentlemen composing this Commission the umpire will not assume at this time to specify their limitations with any further particularity. A careful consideration of the question will easily determine for each the bounds within which facts and arguments are relevant, material, and competent.

De Lemos Case (second reference to umpire)

(By the Umpire:)

Evidential value of statements improperly verified

CONTENTION OF BRITISH AGENT

PART I

The umpire has decided that the question for decision in this case is whether the " legal " injury took place, which is then particularized as being the question whether Mrs. de Lemos has fixed responsibility upon the Venezuelan Government by some wrongful act or neglect.

Before determining how the facts of the case are to be applied in answering this question, it is necessary first to inquire what is the standard by which we are to measure whether the act is wrongful or rightful.

In all arbitration under treaty the first and often the only standard is the rules, if any, laid down in the treaty for the conduct of the arbitration and any reservation therein made. The rules of the treaty are the law by which the decisions of the tribunal are to be given.

As long as the treaty lays down definite rules, general principles of international law are irrelevant.

It may here be observed that no point in international law can be said to be entirely free from doubt, so wide is the range and difference of opinion. On the other hand the contracting parties can lay down what they please as the basis of arbitration, and must be taken to have meant what they have said.

In this case the British Government had found it necessary to enforce a blockade of the Venezuelan ports. It was not until the present treaty was signed that arrangements were made to raise the blockade. The treaty must be read in the light of that fact.

What is the standard fixed in this case, and what are the rules laid down?

First of all, in Article III comes a reference of certain claims to arbitration. If that had stood alone the standard to be applied would undoubtedly have been the rules of international law as approved by the tribunal. Had that been what the contracting parties meant they would have said: " The claims shall be referred to the Mixed Commission without reserve."

That they would have done so is plain from the fact that certain claims are referred to the Commission in those words; that is to say, that in those latter claims every principle of recognized international law can be raised by Venezuela as a defense.

As regards the former claims, on the other hand, the Venezuelan Government " admit their liability; " that is to say, they agree not to avail themselves of certain defenses. An admission of liability by a defendant is an undertaking by him not to raise certain defenses otherwise open to him.

When, therefore, a defendant power in an agreement for international arbitration " admits his liability," he thereby implies that he agrees that he is not to avail himself of the principles of international law which might otherwise be considered an answer to the claim.

In the present case the protocol has said: " The Venezuelan Government admit their liability in cases of injury to property," and the question for determination is defined as being, " Has Mrs. de Lemos fixed responsibility on Venezuela by some wrongful act or neglect of that country? "

By what standard is the word " wrongful " to be construed?

It should be construed according to the terms of the protocol; that is, in the light of the words " admit their liability."

In other words, the Venezuelan Government has admitted that, for purposes of this arbitration only, certain acts shall be assumed to be wrongful which might or might not have been judged to be so, according to the rules of international law.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted on its own standard of right?

To give other than the above meaning to the words " admit their liability " is to say that an entire section of an international treaty, carefully drawn up, is without meaning and without bearing on the effect of the treaty.

If it be suggested that " admit their liability " means that the Venezuelan Government agrees not to raise as a defense that these specially mentioned

claims are a matter for the law courts, it should be pointed out that if a claim which would otherwise be a matter for ordinary litigation is submitted to arbitration that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government " admit their liability " in the class of claims here referred to arbitration would be superfluous and meaningless.

It now remains to state what was intended to be the meaning of the admission of liability, in the light of the words of Article III, the circumstances under which the treaty was made, and, in cases not covered by express words, the general principles of international law.

The meaning is —

(I) The Venezuelan Government will pay compensation where damage has been intentionally or negligently caused to property by the Venezuelan Government, their agents, or persons employed by them, or by any other person for whose acts they must be held responsible, by reason of negligence, or other special circumstances.

(II) The Venezuelan Government will pay compensation wherever any right of possession or quiet enjoyment of property has been interfered with through seizure by any such persons.

The words in their natural and ordinary sense bear this meaning, and it can not be said that these were unreasonable terms for a blockading power to insist upon, from a country which has been for many years in a continuous state of revolution and unsettled government.

Moreover, to hold otherwise would be to render the whole of Article III, except the bare submission to arbitration, meaningless and superfluous.

The above interpretation should therefore be accepted.

In considering the language of the protocol two facts must be borne in mind.

(*a*) The language in Article III was originally proposed by Great Britain exactly as it now stands, and was accepted without alteration or demur.

(*b*) The rights of British subjects in Venezuela are protected by the following treaties:

(1) Treaty of Bogotá, April 18, 1825, incorporated in —

(2) Treaty of London, October 20, 1834.

In Article III of the protocol the admission of liability is, as regards persons, identical in both cases. As regards acts of injury to property, almost the only possible defense in cases likely to arise would be that of military necessity; this defense would probably be raised in cases of extensive damage, and in such cases British subjects have no special treaty protection; therefore Great Britain, holding certain opinions as to the internal affairs of Venezuela for many years past, thought it right to insist on an absolute admission of liability for the acts of persons for whom the Venezuelan Government might reasonably be liable.

In cases of seizure, British subjects are amply protected by treaty. Seizure, in contrast to injury, can in practice be justified on many and very diverse grounds, from some of which Great Britain might not wish to debar Venezuela. Great Britain, therefore, did not think it either necessary or desirable to insist on absolute liability, but thought it right that each case of seizure not covered by treaty should be judged on its merits, limiting the admission of liability to the same persons for whom Venezuela admitted responsibility in cases of injury to property.

It has been said that the words " injury to property " are not to be taken in their ordinary sense, but in their " legal " sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties, words are to be taken, if possible, in their ordinary meanings.

Words are to be taken to be used in the sense in which they are commonly used. (Wheaton, p. 395.)

Common expressions and terms are to be taken according to common custom. (Halleck, Vol. I, p. 246, citing Vattel.)

It should be noted that in this protocol the word " injury " is only used in conjunction with " property."

There will be no dispute as to the common meaning of the expression " injury to property." It means no more than " damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word " injury," it is used in the wide sense of damage, and under the verb " injure " it will be seen that when used in connection with property, the latter is rendered " to damage or lessen the value of, as goods or estate." In classical, then, no less than in ordinary English, when applied to inanimate things, the word is equivalent to damage. It is conceded that no word is to be pressed to include things which would destroy the sense of the whole passage in which they occur.

Injury in English is not the equivalent of " injuria " in Latin, which includes a different element. Except in exceptional circumstances " injuria " is not translated by the word " injury," but by the word " wrong," which word is its equivalent in English law. Moreover, in Roman law, " injuria," which necessarily implies some moral effect on the damaged person, is not, for that reason, joined with inanimate things in the way in which it is used here.

To sum up —

The word " wrongful " must be interpreted by reference to the protocol.

In the protocol the Venezuelan Government admit their liability, and thereby agree that for the purpose of this arbitration, injury, such as is found in the case of de Lemos, is not to be held justified — that is, they agree that for the purposes of this arbitration such injury is to be considered wrongful; therefore, the damage being admitted in principle, the claimant is entitled to an award.

PART II

If this case has to be decided on general principles of international law without any reservation, the decision must depend upon the answer to the question whether the Venezuelan Government can prove justification. In other words the shelling of a town being an act of violence otherwise injustifiable, can the Venezuelan Government prove that the act was a military necessity and so escape the liability otherwise incurred?

In matters such as these the decision must depend on the facts of each particular case, and historical instances of bombardments are of little value, firstly, because it is impossible to ascertain with sufficient accuracy whether the facts were or were not identical with the case under discussion, and, secondly, because incidents which would have been considered right and proper proceedings in warfare at the beginning of the last century and even later would to-day be held most reprehensible.

Fortified places are alone liable to be besieged; towns, agglomerations of houses or villages which are open or undefended can not be attacked or bombarded. (Wheaton, *Elements of International Law*, 3d ed., p. 543.)

If a town is as a whole open, with only one or two defended points (as distinguished from a fortress), and any shelling takes place, it is upon the attacking force to show that —

(1) Imperative necessity demanded the bombardment, and

(2) That the shelling was confined, both as regards direction and amount, to the necessities of the case.

As regards (1) the necessity must be proved to demonstration, and the evidence scrutinized with the utmost rigor, since the bombardment of the unfortified parts of towns is at best a cruel and barbarous proceeding, and repugnant to the principles of modern international law.

On this point reference may be made to Hall's International Law on page 556 (4th ed.), where the shelling of the private houses of even a fortified town during a siege is described as an exceptional proceeding, and clearly disapproved by the author on principle.

It may even be said that so great is the risk of needless and useless suffering and damage to noncombatants from this particular method of using shells, and this may be so widespread and so entirely beyond the control of the commander of the attack, that it is the modern rule of international law to discourage such a proceeding altogether (i.e. the shelling of the open parts of towns), and therefore, though it may be inexpedient to fix criminal responsibility on the commander, yet his government incurs the liability of having to compensate nonbelligerents for injury, should any such occur. There is nothing in the recognized modern authorities to negative the justice of this principle, and it is supported by the fact that governments not unfrequently compensate their own as well as foreign subjects for damage done under such circumstances, showing that compensation in such cases is right and proper.

If, then, a government carries out a bombardment of the kind found here, it must be prepared to show that the State was in imminent danger, that there was no other way of meeting the difficulty, and if shelling be held justified at all, it will have to go on to show that the unfortified parts, as distinguished from the forts, must be mercilessly shelled.

In considering the facts of this case it is to be noticed first of all that this town is not a fortified town in the accepted sense, nor did this shelling take place in the course of a siege (Hall, *loc. cit.*). This being so from 1,400 to 1,500 shells were nevertheless fired into the open parts of the town.

It is submitted that these facts at once fix the Venezuelan Government with liability, as constituting an act not sanctioned by any rule of war.

The Venezuelan Commissioner does attempt to justify the above procedure and does so by urging the plea of military necessity; he has not, however, in any way proved this, and the difficulties in his way will appear upon consideration of the admitted facts.

In this case there was no fortified town and no siege, both of which circumstances are essential, it is submitted, to make a bombardment lawful. The shelling seems to have been for the purpose of harassing the insurgents and peaceful inhabitants indiscriminately, without at the time any prospects of being able to take or even invest the town, and in any case the shelling was in excess of the necessities of the occasion.

It is also a not unimportant consideration that the bombardment was unsuccessful, and the town was not taken in consequence; and in the second place when the town was recently taken, no injury to private property took place. This will be seen from the following passage taken from the official telegram from General Gomez, announcing the capture of the town:

Del bombardeo de nuestra escuadra no hubo ninguna víctima en los habitantes pacíficos ni tampoco daños en los edificios particulares.

These facts go to prove that the shelling, so far from being necessary, was utterly inexpedient and unnecessary, and the natural inference then would be that, even if there were any intention of capturing the town, the attack was made with a force so inadequate to the purpose that, instead of a serious attempt to meet a military necessity, it was a reckless, useless, and unjustifiable resort to a cruel procedure.

The danger of allowing, under such circumstances, the immunity from liability of a government for the acts of its military commanders needs no demonstration, and the disapproval of an international tribunal should be specially emphasized in the case of a country where revolution is the rule rather than the exception.

The Venezuelan Commissioner has quoted at length the work of M. Calvo. As regards the opinions of that author, it is submitted that, although his erudition and powers of research will always render his work valuable, yet his bias as a native of South America renders his judgments unsound on matters concerning civil war and the responsibility of governments.

As regards other authorities quoted or referred to in the answer of the Venezuelan Commissioner, they in no way contradict the present proposition, which is, that though there may be cases where shelling may be carried out under such circumstances that no liability attaches, there are other cases where without question liability does arise; that each case must be judged on its merits, and that upon the facts and circumstances found there the Venezuelan Government are liable for the damages claimed in this case.

As regards the contention that *locus regit actum* and the objection taken to the affidavits, reference should be made to the protocol of May 7, 1903:

> The Commissioners, or, in case of their disagreement, the umpire, shall decide all claims on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislation.

GRISANTI, *Commissioner*:

Part I of the British agent's reply is limited to supporting the interpretation which in his opinion must be given to Article III of the protocol of February 13, of the current year, and which openly contradicts the reasonable and proper interpretation given it by the honorable umpire in his very learned decision made on July 24 last. I consider this part of the statement irrelevant, because the decisions of the honorable umpire are definite and conclusive, according to the protocol signed at Washington May 7 last. Nevertheless I shall make some observations with regard to this part.

A treaty must be interpreted in the light of its own clauses, with due consideration of all circumstances preexistent to its execution and coexistent with the same; and this is precisely what the honorable umpire has done in a very masterly way.

The difference of the interpretations lies in the fact that the honorable umpire takes the word " injury " in its juridical meaning, and the learned agent for Great Britain thinks that the ordinary meaning should be attributed to this word.

To show the superiority of the former opinion over the latter, it suffices to compare the reasons set forth in support of each case.

In his award the umpire states:[1]

> It is the opinion of the umpire that the word " injury " was chosen because of its legal adaptation and significance, and not in its colloquial sense. To think otherwise

[1] *Supra*, p. 367.

would be to hold that the seizure of property occupied in the minds of the high contracting parties, and should occupy before this Commission, a position different from that of injury to property, a holding not consistent, for both are governed by the same general rules and spring from similar general conditions. To make a ruling that any injury to property and none but wrongful seizure of it was the purpose and purport of the protocol does not address itself to sound judgment.

The character of the signatory parties, the importance of the document, the evident care and skill with which it was drawn, its conciseness and precision, its rigor of expression, deny the assumption of a careless and indifferent use of words where care and discrimination was most required. It is therefore the opinion of the umpire that the word " injury " was taken by the signatory parties to import a legal wrong and in accordance with its fixed and determinate use in law as involving and imparting ipso facto an *intentional wrongdoing* on the part of those responsible therefor. This supplies the conditions concerning injury to property which are found in the protocol concerning the seizure of the same, and brings the two to a common level where, in the judgment of the umpire, they were placed by the high contracting parties. Without this reading of the word " injury " the two parts are dissimilar without reason, and with it they are similar with reason.

The learned agent for Great Britain states: [1]

It has been said that the words " injury to property " are not to be taken in their ordinary sense, but in their legal sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties words are to be taken, if possible, in their ordinary meanings. " Words are to be taken to be used in the sense in which they are commonly used." (Wheaton, p. 395.)

" Common expressions and terms are to be taken according to common custom." (Halleck, p. 298.)

It should be noted that in this protocol the word " injury " is only used in conjunction with property.

There will be no dispute as to the common meaning of the expression " injury to property." It means no more than " damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word " injury," it is used in the wide sense of damage, and under the verb " injure " it will be seen that when used in connection with property the latter is rendered " to damage or lessen the value of, as goods or estate," etc.

Although it is true that the common words used in a treaty should be taken in their ordinary meaning, this rule can not apply to technical terms; to which a meaning can not be attached other than the one they have in the science or art in which they belong.

Dans tous les cas d'amphibologie ou d'équivoque les mots doivent en général être pris dans leur acception ordinaire, dans leur signification usuelle, et non dans celle que leur donnent les savants ou les grammairiens; toutefois, les mots empruntés aux arts et aux sciences doivent s'interpréter suivant leur sens technique et conformément aux définitions données par les hommes compétents. — (Calvo, *Le Droit international théorique et pratique*, 3e éd., vol. I, p. 670, sec. 715.)

Technical terms must [says Bello] be taken in the proper sense given them by the professors of the respective science or art, except when it is known the author was not well versed in the matter. (Principles of International Law, 4th ed., p. 136.)

Can it be maintained with a semblance of reason that the eminent men who wrote and signed the protocol did not have a profound knowledge of the juridic meaning of the technical words they used in it? Such an opinion is inadmissible.

On the other hand, accepting the interpretation of the learned agent for Great Britain, the result would be an inexplicable difference in the cases of the

[1] *Supra*, p. 371.

claim being for the seizure of property and those being founded on injury to the same. In the first instance it is a necessary condition for the fixing of liability on the Government that the seizure be wrongful; in the second place that the liability always attaches, whatever be the nature of the injury, justified or unjustified, intentional or accidental.

The learned agent for Great Britain persists in trying to prove said difference, but he has not succeeded. The principles of law are adverse to him, and it is not possible to struggle against them successfully.

Ninety-eight per cent of all the claims are for injury to property, and according to the idea of the agent for Great Britain, said claims are already decided by the protocol in favor of British subjects. If this were so, what would the functions of this Mixed Commission be? With what object would England have sent out a lawyer of such great learning as His Britannic Majesty's agent, if it were not to argue on the grounds of justice and law? Reason can not conceive a court that does not pass judgment nor a juridic document from which law is excluded.

The interpretation insisted on by the British agent leads to an absurdity, and must therefore be rejected.

It is necessary to set aside every interpretation that might lead to absurdity. (Bello, International Law, 4th ed., p. 136.)

PART II

Ciudad Bolívar revolted at the time when a revolution had broken out against the Government in the whole Republic. The Government was under the unavoidable obligation of reducing the insurgent city, and this they had to carry with the only means at their disposal, which were the war ships at anchor in the port. The attention of the Government was occupied by many and serious events; it was forced to repair actively and energetically to different places to quell the civil war which was devastating the country; it was obliged to redouble its efforts. Perhaps the forces employed were not sufficient to subject the rebel city to the dominion of law; perhaps it was thought that the rebels would not offer such vigorous and indomitable resistance as they did. These circumstances, impossible to be foreseen or avoided, concur in proving, with irrefutable evidence, that the shelling of the city was not a deliberate act of the Government, but an act imperatively demanded by the force of circumstances.

On the other hand, war is nothing but the struggle of force against force, and the events which take place must not be considered as amid the repose and tranquillity of a cabinet, nor in the light of a high juridic philosophy. European and American statesmen have strived in vain, with extraordinary efforts and unremitting zeal, to mollify the conduct of war — it continues violating rights — wasting the treasure of civilization.

From the failure of the assault on the city, the British agent infers that it was not carried out with force proportioned to such an undertaking. The rigid rules of logic are not always applicable to affairs pertaining to war, and it is not possible, in all cases, to reach definite conclusions from the results of battles. History teaches us that military operations, maturely premeditated and executed with the most suitable means to attain a happy end, have failed, and that victory has at times been attained by plans emanating from a diseased and delirious mind.

Neither is it a juridic principle that unfortified cities should not be bombarded. The rule is that every city that offers resistance, be it fortified or not, must be

attacked with the means available, including bombardment; and that it is illegal to attack a city that opens its gates to the foe.

Toute ville qui se défend, peut, quoique ville ouverte et non fortifiée, être attaquée et soumise comme le serait une fortification; mais il faut une résistance sérieuse, une véritable défense se manifestant par des maisons crénelées, des barricades, etc. Quelques coups de fusils sont insuffisants pour autoriser le recours au bombardement. Le siège et les bombardements des places fortes et défendues est une mesure de guerre légitime et même nécessaire. La légitimité de l'agression ne dépend pas du fait de la fortification, mais de la défense à main armée d'une place. Il est illégitime de bombarder une forteresse qui ouvre ses portes. Il est nécessaire d'attaquer une ville ouverte qui est défendue militairement. Il est défendu de bombarder des villes ouvertes qui ne prennent aucune part à la guerre. Toutes les autorités du Droit International sont d'accord là-dessus. (*Manuel de Droit international public*, par Henri Bonfils, 3e éd., 1901, p. 608, sec. 1082.)

In my statement of July 11, last, I maintained, moreover, that the claim is not proved. In fact. Consul de Lemos brings forward as a proof, in the first place, his own testimony. As regards this point, I stated:

As a general rule, the testimony of a person in support of a fact is not admissible when that person is greatly interested in the establishment of said fact.

In the second place, the testimony of Benjamin Waithe and Antonio Villalobo, delivered in presence of the consul, Mr. de Lemos himself, is absolutely void;

and with regard to this testimony the undersigned stated the following opinion:

The said consul can not be a judge in his own cause, and on receiving and authorizing those declarations he has sought to be one, trying to assume two positions entirely incompatible. Besides, in the taking of the proofs, the universally acknowledged and respected rule of locus regit actum has been violated.

If my observations with regard to the testimony presented as proof are carefully read, it will be seen that these observations are not based on dispositions of any determined legislation, but on inferences drawn from a close study of the frailty of human nature. When a man is interested in testifying that a certain act took place his testimony can not inspire firm belief. The United States has fixed wise rules to which the claims against foreign governments are subject, and among them is the one copied below, which is very pertinent to the matter under consideration.

6. All testimony should be in writing and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified. (Department of State Circular, March 6, 1901.)

The act of taking the depositions of Messrs. Waithe and Villalobo, done by the consul, Mr. de Lemos, thus usurping functions which belong to the local courts of justice, is an attack upon the sovereignty of Venezuela, and therefore the Venezuelan commissioner hereby protests energetically against the behavior

of the consul, Mr. de Lemos, which behavior constitutes the infringement of laws he was under the obligation of respecting, not only in his capacity as a resident, but also in his capacity as a consul.

It is the opinion of the writer that the claim of Consul de Lemos should be disallowed.

PLUMLEY, *Umpire*:

When this case was sent to the umpire for his decision, it was requested by both Governments that the umpire should take his earliest opportunity to indicate to the tribunal whether he should require more evidence on behalf of the claimant than was placed before him in the papers filed in the case. Answering this proper request the umpire takes this occasion to state his position thereon.

When the case was first presented to the tribunal it contained a memorial, the printed affidavit of Consul de Lemos, and the declarations of Benjamin Waithe and of Antonio Villalobo. Upon the facts therein stated the case rested.

That portion of the affidavit of Charles Herman de Lemos, which states the fact of bombardment of Ciudad Bolívar on the 20th, 21st and 22nd of August 1902, by the Venezuelan gunboats *Bolívar* and *Restaurador*, is a matter of history.

At the time that the preliminary objection of His Britannic Majesty's agent was made there was before the tribunal the answer of F. Arroyo-Parejo, the Venezuelan agent before this tribunal, which was made on the 18th of June, 1903. In this answer is to be found the following:

> The history of this case is as follows:
>
> A garrison in the capital of the State of Bolívar, disloyal to their duties, rebelled against the National Government legally constituted. The Government, not only in virtue of the right of defense, but in the fulfillment of a duty of a pressing nature, on account of the irreconcilable attitude of the revolutionists, ordered the attack of the city, which attack was put into execution by maritime forces on August 20, 21, and 22, 1902. The consequence of the attack, a natural and unavoidable one, was that several houses of the city suffered damages, among them two which belonged to the claimant's wife.

Then follows in the answer propositions of law governing these facts and claiming therefrom immunity to Venezuela as claimed by said learned agent.

To the preliminary objection of His Britannic Majesty's agent the honorable Commissioner for Venezuela made reply, and in such reply the historical facts were admitted and extended in paragraphs 7 and 8, followed by an argument concerning the immunity of Venezuela under such facts, with citations and quotations of authority therefor, and at the bottom of the seventh page and throughout the eight page of said reply the question is raised that the claim is not legally in proof for the reasons therein given.

Article 7 of the rules of procedure provides for the written answer of the Venezuelan Commissioner and states what such answer may and should contain. In effect it requires that there and then be raised all of the exceptions and objections to the testimony, of form or fact, which it may seem necessary to raise at any time in said cause, and to therein set forth in addition the counter facts relied upon by Venezuelan in refutation of the claimant's proofs and to bring into the record with such answer all such evidential facts as are by him deemed important.

Articles 9 and 10 of the said rules provide for the registry of such answer, notice to the British agent, his right of reply thereto within fifteen days, its

presentation and registry and notice to the Venezuelan Commissioner or agent, in whom there is a right of counter reply within fifteen days.

In this case the answer was made by the Venezuelan agent instead of the Commissioner, but it was the answer provided for under article 7 of the rules and was received as such. It conceded all the facts alleged by the claimant and stated the facts upon which Venezuela relied for its protection in the given case, and to these facts brought upon the record by the Venezuelan agent the reply of the British agent was in the way of a preliminary objection raising the questions of law and equity upon the facts stated in the claim and in the answer of the Venezuelan agent, which reply admitted for the purpose of that objection the truth of the facts as stated by the agent of Venezuela in his answer.

When, therefore, there is found in the counter reply of the honorable Commissioner for Venezuela the points referred to above they must be read in view of the concessions as made by the Venezuelan agent in his answer, the logical results flowing from the British agent's preliminary objection, together with the status of the case and the rights of the parties as established by the rules of procedure above referred to.

It was the judgment of the umpire at the time of rendering his interlocutory opinion that it was not competent for, neither was it the intention of, the honorable Commissioner for Venezuela to attack or reverse the concessions and admissions made by the learned agent for Venezuela in his answer, but simply to call attention to the irregularities and informalities of the said testimony. It followed, therefore, that the umpire in such opinion on the first and second pages thereof assumed as admitted facts the claim as made in the affidavit of Mr. de Lemos.

Subsequent to the filing of such opinion by the umpire the learned British agent presented his counter reply to the aforementioned answer of the Venezuelan agent and reply of the honorable Venezuelan Commissioner, and this was followed by the counter reply of the honorable Commissioner for Venezuela, restating his objections to the proof of the claim and quoting in part from his first reply and including a quotation from the rules of the United States of America prescribed for the taking of testimony in such matters. No one, in the opinion of the umpire, would question the wisdom and value of the rule thus quoted.

In said counter reply of the honorable Commissioner for Venezuela he also makes the point that the act of taking the depositions of Messrs. Waithe and Villalobo, effectuated by Consul de Lemos, was in usurpation of functions belonging to the local courts of justice and was thereby an attack upon the sovereignty of Venezuela.

The umpire has thus brought upon the record the matters deemed by him substantial and important in the determination of the immediate question before him, which is: Does he require further evidence on behalf of the claimant in order to be satisfied of the truthfulness of his case?

The historical facts are unquestioned, and to those historical facts may be added the consulship of Mr. de Lemos, his residence and his nativity, as all these matters must be in the knowledge and possession of the Venezuelan Government, since for about twenty-five years he has been the consul of Great Britain resident at Ciudad Bolívar, and under the exequatur issued by the Venezuelan Government.

The matters to be determined from the affidavit of Consul de Lemos are the name of his wife, her ownership of the property in question, the fact that 1,400 or 1,500 shells were thrown into the heart of the city, and that her buildings were injured thereby to the amount of £300.

The declarations of Waithe and Villalobo, in the opinion of the umpire,

amount to no more than a carefully written statement over their respective signatures and are accepted by him as such only. They are not affidavits and they are not formal declarations. Mr. de Lemos could not in this case act in his official capacity and thereby make them such; but they are written documents or statements, and being such they come clearly within the provision of the protocol which provides that the Commissioners or umpire, as the case may be,

shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the Governments, respectively, in support of or in answer to any claim;

and

shall decide all claims upon a basis of absolute equity without regard to objections of a technical nature or the provisions of local legislation.

The evidential value of such statements is left to the decision of the tribunal when it considers them; but there is no question that they are to be received and to be given such value as in the given case they seem to be worth.

The facts testified to by Mr. de Lemos are not obscure in their character, not at all dependent upon his personal knowledge for their establishment, and are easily disproved if untrue. The claimed injury resulted from the bombardment, which is a historical fact, the official particulars of which are unquestionable in the possession of the Government of Venezuela, and it would be impossible to make such claims of injury and not have them susceptible to immediate denial and disproof if untrue, since the damage if it existed was easy to be seen, and if not existent easy to be determined to the contrary. The fact of ownership is a matter of registry as well as of general notoriety in that vicinity, and thus easily susceptible of denial and disproof if untrue. There is nothing about the case as it is presented to the umpire to raise a suspicion of its verity, and there is nothing to suggest any purpose to defraud Venezuela or to mislead the umpire in arriving at a just decision. The case seems to be shorn of such characteristics.

Taking into consideration the elements in this case as presented, including the concessions and admissions of the learned agent for Venezuela, and the fact that neither agent or Commissioner for Venezuela has denied anywhere that the facts are as alleged by the claimant, the ease with which the claim could have been refuted if not well laid, the general reasonableness of the facts asserted, the official position of Consul de Lemos, all tend to eliminate doubts from the mind of the umpire, to give respectability and character to the claim, and to permit him to say that he is satisfied that the facts are as alleged and to find the same to be true, leaving only for determination the questions raised as to the law and equity in the case.

The umpire will here state that it must be considered there was no intended offense to Venezuela in the act of Consul de Lemos in authenticating the declarations of the two witnesses used in this case, since it is to be remembered that from the time of the injury to these buildings until within a few days there have been no courts at Ciudad Bolívar loyal to the Venezuelan Government or representative thereof, and it was expressly stated in open tribunal by the learned British agent that these declarations were thus presented only because of the impossibility of obtaining any evidence through the regular procedure of Venezuelan law. It is in recognition of this state of affairs that the umpire more readily consents to their consideration.

Notwithstanding this holding, if the honorable Commissioner for Venezuela considers that the fact is not that 1,500 shells substantially were thrown into the heart of the city on the occasion of the bombardment in August, 1902; that Mrs. de Lemos is not the owner of the houses in question; that they were not

damaged in the way and to the extent substantially as claimed in the affidavit of Consul de Lemos; that injustice would be done to Venezuela by assuming such to be the facts, and that he desires opportunity to show that such are not the facts, the umpire may deem it necessary on a proper showing to grant an opportunity at this late hour for such proof, and in such event may deem it proper to permit the British agent to fortify his evidence by cumulative and rebuttal proof if he should desire.

SELWYN CASE[1]

Within the limits prescribed by the convention, an international tribunal created thereunder is a tribunal superior to the local courts, and it is not affected jurisdictionally by the fact that a question submitted for its decision is pending in the courts of one of the nations. Such international tribunal has power to act without reference thereto and, if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.[2]

PLUMLEY, *Umpire*:

This case came to the umpire upon the disagreement of the honorable commissioners over the jurisdictional question raised by the Government of Venezuela.

In determining this question it is necessary that the umpire assume the truth of all the assertions on the claim. This is in no sense finding that they are true, but an assumption merely, and wholly for the purpose of this preliminary inquiry, and in event the jurisdiction is held this assumption ceases ipso facto and absolutely.

The grounds of objection to the jurisdiction of this tribunal as stated are three:

(1) That, if this claim is admissible otherwise, it is barred by the fact that a suit is now pending in the local courts, wherein the claimant is the plaintiff and Venezuela is the defendant, based upon the same right of action; and having elected to pursue his remedy there he can not change the forum of his own selection and present his claim to this Commission, especially since there has been no delay in court except through his own inaction.

(2) A certain provision of the contract between the Government and the claimant, because of which contract this claim exists, the language of which provision follows: "Any doubts and controversies that may arise regarding the spirit or execution of this present contract will be settled by the tribunals of the Republic and according to their laws without their being in any case a matter for an international claim."

(3) That this is a claim under a contract and that controversies of a contractual character, excepting the railway claims, are not submitted to this Commission, but instead, injuries to property of British subjects and matters akin thereto, as is to be seen by inspection of the protocol, which by specifically including the railway contractual claims inferentially and impliedly excludes all other contract claims.

Pending a decision in court parties may always agree to submit to arbitration the whole or any substantive part of the matter or matters in issue; and when the award is made it can be pleaded by the defendant in bar of the action in

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[1] For a French translation see: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 795.

[2] See additional authorities, *infra*, pp. 384, 385.