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Selwyn Case (interlocutory)

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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.

whole or in part, according as the submission was of a whole or a part of the controversy; or, if the submission is such, it may be reported into court in aid thereof or for its final action thereon, but always to the extent of the submission it supersedes action by the court. (*Amer. & Eng. Encyc. of Law*. 2nd ed., vol. 2, 562-568. Also the notes on these pages for cases cited and decisions quoted in support of this proposition.)

It is the judgment of the umpire that the rule above stated is the same, so far as it touches the question before this Commission, where the arbitration is between nations and the submission concerns private claims.

International arbitration is not affected jurisdictionally by the fact that the same question is 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.

Within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts.

Concerning the particular feature here involved this is the limit there set:

> The Venezuelan and British Governments agree that the other British claims, including claims by British subjects other than those dealt with in Article VI hereof, and including those preferred by the railway companies, shall, *unless otherwise satisfied*, be referred to a Mixed Commission constituted in the manner defined in Article IV of this protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim. (Art. III of the protocol of Feb. 13, 1903, and see also par. 1 of the supplementary agreement of May 7.)

It would seem that the claim being otherwise admissible at the time of the making of the treaty, it is not to be affected by anything save its subsequent payment or satisfaction. Whether its is actually pending in court or standing in judgment rendered is not made the test. Instead, and only, the criterion agreed upon is payment or satisfaction.

Under article 7 of the treaty between the United States and Great Britain of November 19, 1794, a Mixed Commission was provided for and given the power to award compensation to claimants who could not obtain it "in the ordinary course of justice."

The especial claims to be considered were those founded on case of illegal and irregular capture or condemnation of the vessels and property of citizens of the United States. In the case of the *Sally*, Hayes, master, which was pending in the admiralty court at the time it was submitted to this Mixed Commission, the British Commissioners objected to its consideration, "as proceedings were still pending before the lords commissioners of appeal. * * * It did not sufficiently appear that compensation might not at the time of concluding the treaty and might not still be had in the courts by judicial proceedings, * * * and that the consideration of the merits of the claim should be postponed until it should further appear that compensation could not be obtained in the ordinary course of justice." The American Commissioners, the umpire agreeing with them, contended to the contrary, and a majority of the Board held in accordance with the latters' contention. The British Commissioners then entered a declaration on the journals of the Board "that they did not think themselves competent under the words of the treaty or of the commission under which they acted to take any share, without the special instruction of the King's ministers, in the decision of any cases in which judicial proceedings were still pending in the ordinary course of justice." And in the course of the discussion of the cases before them it was held in general by the agent for Great Britain that in the class of actions that had been decided in the high court of appeals the Commissioners had no jurisdiction because the sentences of that court were definitive; in the cases still pending before the high court of admiralty and the high court of appeals that the Commissioners had no jurisdiction because, if entitled to

compensation, it might be obtained in the ordinary courts before which for various reasons appeals had not been claimed or prosecuted; that the Commissioners had no jurisdiction because it was in consequence of the neglect of the claimants that they were unable to obtain compensation in the ordinary course of justice.

The matter in dispute was referred by agreement to the lord chancellor, who held that in cases of condemnation in the high court of appeals the decrees must stand so far as they affected the property, but there might exist a fair and equitable claim upon the King's treasury under the provisions of the treaty for complete compensation for the losses sustained by said condemnation. Where there had been decrees of restitution, but without costs or damages, or of condemnation without freight or costs, it might be just that the claimant might receive costs, freight, and damages, and the Commissioners had jurisdiction. In the case where the right of appeal had been lost the claimant might be able in a satisfactory manner to account before the Commissioners for his not having come personally forward with the appeal, and this was undoubtedly a case within the provisions of the treaty. The property could not be restored, but there might be an award, and it must be paid out of His Majesty's treasury. The Commissioners were not a court of appeal above the high court of appeals. They were, however, competent to examine questions decided by the high court of appeals as well as in other cases described in the treaty, and they could give redress, not by reversing the decrees and restoring the identical property, but by awarding compensation.

These decisions were substantially the claims of the American Commissioners and the umpire, so that we have the authority of both England and the United States upon that question. The English authority being a concession against their own pecuniary interests gives it greater force aside from the high judicial character of both the lord chancellor, the American Commissioners, and the umpire. (Moore, 2304, et seq.; 326, et seq.)

Wharton, in his International Law Digest, section 242, volume 2, says:

" It was maintained before the British and American Mixed Commission sitting in London under the treaty of 1794 that a decision of a British prize court estopped the party against whom it was made from proceedings, when a foreigner, through his own government. This was contested by Mr. Pinkney, and his position was affirmed by the arbitration, acting under the advice of Lord Chancellor Loughborough, and is now accepted law."

See the *Alsop* claims, Moore, 1627 - 1628.

See case of the *Neptune*, Moore, 3076 et seq.

See opinion of Mr. Pinkney on the same case, Moore, 3083, et seq.

See Garrison's case in Moore, 3129, decision by Lieber, umpire, in the United States - Mexican Commission, in which appears the following language: " It is objected that the case has been adjudicated by the proper Mexican court and can not be reopened before this Commission; that therefore it ought to be dismissed. It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decisions of a court of another country, which nevertheless the law of nations universally allows in extreme cases. *It has done so from the times of Hugo Grotius.*

In the case of Reed & Fry, United States - Mexican Commission, convention of July 4, 1868, the case was heard of a vessel seized in Mexico by the proper officers and libeled in a court of competent jurisdiction on the charge of violating the revenue laws, and the court decreed confiscation. The Commission heard the case, found that the court should be sustained, and dismissed the claim. This, therefore, is authority on the question of jurisdiction after judgment by a local court. Idem., 3132.

See Bronner *v.* Mexico, Moore, 3134, United States - Mexico, convention of 1868, Sir Edward Thornton, umpire, where the question in issue had been passed upon adversely to the claimant by the courts of Mexico and an award was given in his favor by the umpire.

See case of J. L. & Co., in same Commission, before the same umpire, who considered the merits of the case and disallowed the claim.

In Moore, 3148, case of Young, Smith & Co. *v.* Spain, United States - Spain, convention of November 10, 1879, Baron Blanc, umpire, holds that " article 5 of the agreement of 1871 confers upon this Commission jurisdiction of all claims for injuries

of that character. It makes no exception against those parties who may not have resorted to or *exhausted the remedies* offered by the courts of Cuba. The umpire, therefore, is constrained to hold that this is a proper case for the exercise of the jurisdiction of the Commission, and that he is himself bound to decide upon the merits of the demand presented by the claimants."

"Where the claimant in a foreign country has, by the law of such country, the choice of either the judicial or the administrative branch through which to seek relief and selects the latter, this does not make the arbitrary decision of the latter against him final and conclusive." (Mr. Fish, Sec. of State, to Mr. Nelson, Jan. 2, 1873.)

The same position of the United States with regard to the decision of the courts not being a bar to the claim by a neutral, which was held in the Commission with Great Britain, above referred to, was taken by the United States in claims growing out of the French Revolution, and was conceded by the United States when the relations were with reference to the claims arising from the late civil war (see Wharton, vol. 3, sec. 242, Appendix), and was further insisted upon by Mr. Bayard, Secretary of State, discussing a similar question with Mexico, who claimed that the matter had been duly adjudicated upon and was therefore barred from further consideration. (See sec. 243, p. 974, in vol. 3 of Wharton.)

"It may be said that the claimants, according to the ordinary practice in British courts, had a right of appeal to the lords of appeal, and that, as they did not avail themselves of that right, they must be presumed to have acquiesced in the decision of the admiralty courts. * * * [To this] it may be answered that the claimants have incurred great expense in the prosecution of their rights before the admiralty court and had not the means for carrying the cause further in the form in which it was there presented." (Wharton, vol. 2, sec. 241, p. 677.)

Indeed, since objection No. 1 applied not at all to the merits of the case or its rightfulness as a claim in itself, it may well be regarded as falling within the class of technical objections which this Commission is expressly instructed not to regard by the provisions of the British-Venezuelan agreement of May 7, 1903.

To hold that this Commission has jurisdiction of a claim notwithstanding its pendency in the courts of Venezuela is in harmony with the action of other commissions now sitting in Caracas.[1]

If the pending suit of Selwyn in the local courts is based upon the contract, then, as it appears later in the opinion of the umpire, this claim is fundamentally different from the pending action, and hence from the sole objection that his action is so pending the question of jurisdiction can not be successfully interposed, even if the umpire considered, as he does not, that if the pending action and the claim were alike objection No. 1 must be sustained.

For the reasons above given it is the opinion of the umpire that objection No. 1 can not be sustained.

Concerning the next objection, the umpire bases his decision upon the ground that the claim before him has in no particular to deal with "any doubts and controversies * * * regarding the spirit or execution of" the contract in which such terms appear. His reasons therefor will appear in his statement concerning preliminary objection No. 3.

The fundamental ground of this claim as presented is that the claimant was deprived of valuable rights, of moneys, properties, property, and rights of property by an act of the Government which he was powerless to prevent and for which he claims reimbursement. This act of the Government may have proceeded from the highest reasons of public policy and with the largest regard for the State and its interests; but when from the necessity or policy of the Government it appropriates or destroys the property or property rights of an alien it is held to make full and adequate recompense therefor.

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[1] Rudloff case, *supra*, p. 254.

Pradier-Fodéré (sec. 402) says:

It is the duty of every state to protect its citizens abroad * * *. It owes them this protection when the foreign state has proceeded against them in violation of principles of international law — if, for example, a foreign state has despoiled them of their property.

Vattel says:

Whoever uses a citizen ill indirectly offends the state, which is bound to protect the citizen, and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety. * * * But if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the nation as the real author of the injury. (Book 2, ch. 6, secs. 72 and 74.)

Halleck says:

There can be no doubt with respect to its [the state's] responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the Government, so far as the acts are done in their official capacity. (*International Law*, 3rd ed., Vol. I, Chap. XIII, p. 442.)

How much of the claim comes under this head it is not necessary to consider. The question of jurisdiction is determined if in any part the case falls within this class. The umpire has above stated that such is the fundamental feature of this claim, and hence that it is not a matter of contract, and is open to neither of the last two objections of Venezuela.

Holding thus, it does not become necessary, and it is therefore inexpedient, to pass upon the contention of the respondent Government that the protocol does not include matters of contract.

As stated at the outset of this opinion, the umpire does not herein pass at all upon the merits of the claimant's case, but only upon the jurisdictional question, assuming, as he must for such purpose, that the facts are as stated in the reclamation. What in truth the facts are remains to be determined upon the full proofs, which are in no sense prejudiced or predetermined by this opinion. That they may be ascertained and settled by this Commission in equity and justice, the umpire returns the case to the Commissioners for their consideration and action.

ADDITIONAL AUTHORITIES FURNISHED BY UMPIRE PLUMLEY

(1) Wharton, vol. 2, sec. 238, p. 671: The defense of res adjudicata does not apply to cases where the judgment set up is in violation of international law.

(2) Wharton, vol. 3, sec. 329*a*, p. 198 (prize courts): The prevalent opinion now is, that in international controversies a sovereign can no more protect himself by a decision in his favor by courts established by him, even though they be prize courts, than he can by the action of any other department of his government.

(3) Wharton, vol. 2, sec. 238, p. 670: A suit brought in Honduras courts by a citizen of the United States to recover estates in Honduras must be left to the determination of the courts in which it is brought, unless a positive denial of justice be shown. (Mr. Frelinghuysen, Sec. of State, to Mr. Hall, June 18, 1882.)

(4) Wharton, vol. 2, sec. 242, p. 697 (case of Wheelock *v.* Venezuela): A foreigner's right to ask and receive the protection of his government does not depend upon the local law, but upon the law of his own country. * * *

(5) Wharton, vol. 2, sec. 238, p. 670: A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering the judgment. (Mr. Evarts, Sec. of State, to Mr. Foster, Apr. 19, 1879.)

(6) Wharton, vol. 2, sec. 238, p. 679: A claimant in a foreign state is not required to exhaust justice in such state when there is there no justice to exhaust. (Mr. Fish, Sec. of State, to Mr. Pile, May 8, 1872. MSS. Inst. Vene.)

(7) 13 Howard, 115 (Mitchell *v.* Harmony): Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay, or the danger must be immediate and impending. But in such cases the Government is bound to make full compensation to the owner.

(8) 13 Wall., 623 (see Wharton, vol. 3, sec. 328, p. 247): Where private property is impressed into public use during an emergency, such as a war, a contract is implied on the part of the government to make compensation to the owner.

(9) Wharton, vol. 2, sec. 248, p. 710: If the nation disposes of the possessions of an individual the alienation will be valid for the same reason; but justice demands that the individual, be recompensed out of the public money. (Vattel, Book 1, Ch. 22, sec. 244.)

(10) Moore, 3720-3721 (Elliott's case; Lieber, umpire): It was held that General Corona had undoubtedly a right to appropriate Elliott's property if necessary for defense or to devastate it, if the war required it, but the Government must pay.

(11) Wharton, vol. 2, sec. 248, p. 711 (Meade case): On these facts the following conclusions were reached by the Court of Claims:

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A debt due to an American citizen from a foreign government is as much property as houses and lands, and when taken for public use is to be paid in the same manner.

The cases hereinbefore quoted and referred to were considered by the umpire in making up his decision in this case, and are submitted to be incorporated into said opinion as authorities in support of the same. Nos. 1, 2, 3, 4, 5, and 6 go to sustain the position of the umpire as to objection No. 1. Nos. 7, 8, 9, 10, and 11, his position as to objections Nos. 2 and 3.

STEVENSON CASE

An international claim is not barred by prescription when it appears that there has been no laches on the part of claimant or his government in its presentation for payment.

PLUMLEY, *Umpire*:

This case came to the umpire solely on the preliminary objection of the honorable Commissioner for Venezuela that it was barred by limitation. The history of the case discloses that it was presented to the British Mixed Commission sitting at Caracas in 1869; that the Venezuelan Commissioner refused to consider the case in the ground that the proofs were formalized posterior to the date of the convention for the settlement of pending claims. It resulted that this, with several other cases similarly objected to, was withdrawn on the part of Her Majesty's Government, with the express reservation that such withdrawal was to be without prejudice to the claims.

Reference is made to this claim by Her Majesty's minister resident at Caracas in a letter dated at Caracas, April 25, 1872, and addressed to the claimant at Trinidad, in which, after stating the course of the claim before the Commission, this statement appears:

and that since the Venezuelan Government have declared that owing to civil warfare they can not attend to the arrangement or payment of foreign claims.