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**RECUEIL DES SENTENCES
ARBITRALES**

Kelly Case (on merits)

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involving the obligation of compensation. He cited 3rd Phillimore, 42, and Dana's Wheaton, 152, n.

The Commission unanimously made an award in favor of the claimant for \$ 37,392. (Moore, 3791.)

In the case of the brig *Ophir*. In the mixed commission between the United States and Mexico, under the convention of April 11, 1839. This vessel was detained at Vera Cruz in consequence of an inhibition issued by the local authorities of the territory of the departure of a vessel from the port. This inhibition was based upon the existence of local political disturbance. The umpire awarded \$ 400, with interest, for its detention. (Moore, 3045.)

See also Moore, 3119-3120, 3624-3625, 4612-4617; Maxims of Heffter, adopted and found in Woolsey's International Law, 85-86.

It does not appear to this Government a sufficient or just reparation for a wrongful act, admittedly perpetrated by the Spanish officers of the consulate at Key West since 1876, to give orders that hereafter the wrongful tax shall not be collected. The case is conceived to be one where no less a reparation than the return of the illegally collected excess could satisfy either the right pertaining to the United States or the high sense of justice of Spain. (Wharton, vol. 1, sec. 37, p. 158.)

The umpire is not disregardful of the claim of the honorable Commissioner for Venezuela that, since the duties were not, in fact, again paid, the claimant company has suffered no loss, and hence, in equity, has no rightful demand for their repayment; but it is the opinion of the umpire that an unjustifiable act is not made just because, perchance, there were not evil results which might well have followed. The claimant Government has a right to insist that its sovereignty over its own soil shall be respected and that its subject shall be restored to his original right before consequent results shall be discussed. The umpire having found that the requirement of import duties before clearance was an unlawful exaction and a wrongful assumption of Venezuelan sovereignty on British soil, it is just and right, and therefore justice and equity, that these duties be restored to the claimant company.

The honorable Commissioner for Venezuela having objected to an allowance for expenses attending the preparation of this claim the umpire allows only so much thereof as was incurred in making translations for the use of this Commission, which sum he deems just and equitable.

The umpire expresses his hearty appreciation of the able and thorough manner in which this case has been presented to him both orally and in writing by the members of this Commission who have performed that duty for their respective Governments.

The umpire allows interest at the rate of 3 per cent per annum for one year, and holds the respondent Government liable to the claimant Government in the sum of £ 214, for which amount the award may be prepared.

KELLY CASE

Participation in a revolutionary movement so as to deprive the claimant of the right of intervention by his government, must be proved beyond all reasonable doubt in order that it may be pleaded as a valid defense to a claim for the value of neutral property destroyed by government troops.

PLUMLEY, *Umpire*:

This is the case of James Nathan Kelly, a native of the island of Trinidad, a British subject, and who for some thirteen years prior to the 12th of March, 1901, had lived near Río Grande, not far from Guiria, and was a shopkeeper and the owner of a cocoa plantation, and was also the owner of a cutter of about 3 tons. He complains that in January, 1900, some \$ 100 worth of goods

were taken by one Tomasito Guerra, at the head of a regiment, understood by the umpire to have been Government troops, and that in January, 1901, the Venezuelan troops under Colonel Rueda, the chief in command being General Faia, came, and this time he was ruined; that he was arrested and taken before a court-martial. While he was gone his shop was broken into, his dwelling house entered, his furniture destroyed, his clothing and jewels taken, as were 40 bags of cocoa and \$ 947; that, later, to protect his wife from outrage he sent her under cover of night over the hills and rivers from Río Grande to Guiria on foot, and that she paid her passage money of \$ 18 and sailed from Guiria to Trinidad; that he himself was concealed in the woods for nearly a month, when he made his escape to Trinidad, where he still remained at the time of giving his affidavit, December 23, 1902. He claims his losses to consist of —

Cash (\$ 150 and \$ 947)	\$ 1,097
Cocoa, 40 bags, at \$ 41 per bag (200 pounds)	1,640
Shop goods	150
Furniture	250

The claimant himself and his wife make their several affidavits. He also introduces the affidavit of one Julio Cortes. By this witness it is stated that the shop was fairly stocked; that Kelly was arrested; that they took away a good deal of cocoa belonging to Mr. Kelly, and that Mr. Kelly had a very fine cocoa estate, which yielded very well. There is no statement by this witness as to the amount, condition, character, or value of the furniture in the house, or that Kelly lost any furniture, and there is no statement by either Mr. Kelly or his wife as to the amount, condition, or character of his furniture or any description of the contents of his shop or what kind of business he was doing as a shopkeeper.

Inspection of the testimony of Mr. and Mrs. Kelly shows serious contradiction on an important matter. He says that at the time of this raid by Colonel Rueda he had 12 bags of dried cocoa in his house, and that this was taken by these troops. He also states that he had 28 bags of dried cocoa in his house, which he was about shipping, which were also *taken by them*. Mrs. Kelly says that at the time of this raid they had 12 bags of cocoa, which were partly under the bed, and which were taken away, and that *on a former occasion* 28 bags, which her husband was about shipping, and which were *then on the beach*, were taken; that these 28 bags were not in the house at this time, but had been placed upon the beach for shipment, and while on the beach were taken — by whom or when she does not say. Her statement is too vague to be of probative value taken alone, but it is absolutely contradictory to that of Mr. Kelly, and if she is to be believed he can not be on that point.

By witnesses on the part of the respondent Government, some of whom treat the case apparently very fairly, it is learned by combining their testimony that the furniture in the house consisted of seven chairs, two cedar tables, two benches, one old bed and mattress on two benches; and it seems to the umpire that their estimate of value at 200 bolivars, or \$ 40, is a very liberal estimate. It conforms altogether better with the umpire's judgment as to the probabilities of value than the claim of Mr. Kelly in that regard.

The umpire also thinks that the value placed on the stock of goods in the shop by some of these apparently open-minded witnesses called by the respondent Government is much nearer the actual facts than the claim of Mr. Kelly, and that a valuation of \$ 60 is very liberal. But as the umpire understands the claim of \$ 150 to cover both the instance of 1900 and of 1901 he is inclined to allow it without reduction.

Since it was the duty of Mr. Kelly to give such a detailed statement of the conditions underlying the claims made as to put the triers of his case into as close a relation to the facts as can be done reasonably, he has entirely failed in this regard both as to his furniture, which he claims was taken or destroyed, and as to the goods which comprised the store of which he claims to have been deprived. It is important in a case of this kind to know whether the goods taken were such as might properly enter into the use of the Government of Venezuela, so that it could be said to be benefited in any way by the taking. From the general trend of the evidence for the defense — and it is there we are obliged to look for all the details and for all the supporting evidence in matters of detail, at least for Mr. Kelly — we find that he is accredited with a plantation substantially as he has alleged, but that he is not accredited with having on hand any large deposit of cocoa at any one time. This does appear, however, that Mr. Kelly was heard to demand of Colonel Rueda a return of 3 bags of cocoa, which he claimed were taken by the troops of this officer while under his command. It also appears there were 9 bags of cocoa, which were taken from his boat at the time he was prevented from making his trip to Trinidad by the advent of the Government steamer *Augusto*, and when returning to the beach he stored his cocoa, evidently awaiting an opportunity to take it to Trinidad when he would not be intercepted by the Venezuelan Government. So that Mr. Kelly is supported through different sources in his claim concerning cocoa to the extent of 12 bags in all, and 12 bags is all that his wife says were taken at this time, and as to the 28 bags there is no evidence excepting the thoroughly contradicted evidence of Mr. Kelly himself that these were ever taken by Government troops.

The evident exaggeration by Mr. Kelly as to his stock of foreign goods and the cocoa makes the umpire very uncertain as to the amount of money which he lost; but as he and his wife support one another substantially as to the \$ 947, he stating the precise sum and she saying that it was nearly \$ 1,000, and as there is nothing to antagonize that claim either in the claim itself as being improbable, or as being improbable that it should be kept in the house by people who are living remote from a large town or city, and who are well known to be jealous of banks, and as Mr. Kelly and his wife are evidently thrifty people, industrious and saving, so far as the umpire can gather from all the testimony, he is inclined to credit their statement and accept it for the sum of \$ 947. He does not find proof satisfactory to him of any other sum of money to be added to this.

The question then arises whether the facts shown by the Venezuelan Government by their witnesses are sufficient to establish practically beyond a reasonable doubt that Mr. Kelly was a revolutionist; that he was so entangled in the political affairs of Venezuela that he had practically denationalized himself, and had rendered it impossible for the British Government to intervene in his behalf.

As this charge is a very grave one, involving acts which are treasonable if he were a citizen of Venezuela, justice and equity require that even in a civil matter the facts themselves and the deductions to be made therefrom should rest upon indubitable proof, and so strong and forceful as to practically do away with all doubt concerning the charge made. Concerning this we have, first, the negative facts, which after all have an affirmative value, of the witnesses for the respondent Government from the vicinity of Mr. Kelly's home, none of whom assert any knowledge that Mr. Kelly had been a leader in revolution or a revolutionist at all. On the contrary they say that they know nothing of that kind, although one or two state that they had heard he was mixed up in political matters, but knew nothing to that effect. So much of the evidence for the respondent Government taken from his own vicinage counts in Mr. Kelly's favor

quite decidedly. Then there is the testimony of the man who says that he saw Kelly as a revolutionary leader with one guerilla, and that Kelly apologized or explained his being in the revolutionary ranks by saying that he had been compelled to do this as he had been robbed by the Venezuelan Government.

The testimony tending to establish the fact of Mr. Kelly's relation with revolutionary matters is to show that he was assisting in the revolution of General Hernandez, and we have the authority of the honorable Commissioner for Venezuela that this revolution began on the 22nd of October, 1899, and ended in June, 1900. This claim for damages is based on the wrongful acts of Government troops in January, 1901; and it appears that after these damages occurred Mr. Kelly hid in the woods for a month, and then took boat to Trinidad, where he remained and where he was at the time of giving his affidavit in this case, which was the 23rd of December, 1902. So that it is absolutely impossible that the witness can be correct in this statement. He either has mistaken his man or he has mistaken the facts. In either case he becomes a doubtful witness, and his testimony is too badly shaken to place any reliance upon it in a matter so important. In the matter of the evidence tending to show that Mr. Kelly made some preparations in association with some of his neighbors to meet with force the anticipated raid from the war sloop *Augusto*, it is sufficient to say that it amounted to nothing. Nothing is shown to have been done, excepting that for a few days or nights they were banded together and took turns on sentry duty; but they made no attacks upon anyone, and, so far as it appears, were not attacked, and their fears were fortunately groundless and their labors happily fruitless. It does appear that there were well-grounded fears that the advent of Government troops, no less than revolutionary troops, meant pillage, plunder, devastation, destruction, and anticipated outrage of their women, instead of protection, peace, security in property and person, which is the relation that the troops of the Government should sustain, so far as possible, in the midst of revolution, and that under such conditions men arm and even shoot in defense of their property and their homes is to be commended, and the umpire finds nothing in this to criticise and nothing in it to extract a single grain of proof that Mr. Kelly was a revolutionist. Again, the witnesses who claim to connect Mr. Kelly with the army of the revolution attach him to General Ducharme and make him so intimately connected with this general as to be the bearer of his dispatches and his confidential personal oral orders, so that it is impossible not to conclude that if Mr. Kelly had been thus associated with him he would have known of the fact. Hence the importance of his testimony, which is that Mr. Kelly was never engaged in any of the political matters of his district and has never been connected with him in any of his revolutionary efforts. The testimony of two other witnesses who claim to know assert positively that Mr. Kelly was not engaged in any way in the political matters of Venezuela.

Out of this conflicting testimony the umpire can certainly find no fact so settled and so certain as therefrom to establish that Mr. Kelly had been so far engaged in any political matters in Venezuela or so opposed to the Government of Venezuela as to deprive him of his rights as a neutral subject of Great Britain to the intervention of his Government for protection, when such intervention is otherwise permissible.

It is therefore the opinion of the umpire that the claim of Mr. Kelly should be allowed in the sum of £ 297, which amount is the sum allowed for damages to property and 3 per cent interest thereon from the 12th of March, 1901, the date when this claim was first presented to the Venezuelan Government, to October 20, 1903, the date of this award.
