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Bembelista Case

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Italy-Colombia, 1892; Spain-Venezuela, 1861;[1] Spain-Ecuador, 1888;[2] Spain-Honduras, 1895; Belgium-Venezuela, 1884;[3] France-Mexico, 1886;[4] France-Colombia, 1892;[5] Germany-Mexico; San Salvador-Venezuela, 1883.[6]

These are identical in principle with the one between Germany and Colombia of date 1892, which is here quoted:

> It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there is due want of diligence on the part of the Colombian authorities or their agents, for the injuries, vexations, or exactions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government.

The umpire allows the sum of 6.164 bolivars, which is the sum of 5,737.20 bolivars for which he holds the Government of Venezuela responsible, including interest for two years and six months at 3 per cent, and disallows the claim of 13.513.04 bolivars, and judgment may be entered accordingly.

BEMBELISTA CASE

No compensation will be allowed for injuries received in the course of battle, and in the rightful and successful endeavor of the Government to repossess itself of one of its important towns.

It will always be presumed that the Government will be careful in the direction of the fire of the troops.

The general rule is that the bombardment of an open city is not admissible.

PLUMLEY, *Umpire:*[7]

This case came to the umpire on the disagreement of the Commissioners.

This claim is founded upon injuries to the claimant's dwelling house, furniture, and ware service by the Government troops in the engagement which took place at Puerto Cabello on the 11th day of November, 1899, which damages the claimant estimates at 1,900 bolivars.

The proofs show that the house was situated about 12 meters distant from one of the intrenchments of that town, and that it sustained serious injuries by the bullets during the severe fight which resulted in the taking of said town by the Government forces under the command of Gen. Ramón Guerra, the town being defended by the troops under General Paredes. The proofs further show that this house was at one of the points where the attack upon the town had been most formidable.

There seems to be no question as to the facts being as alleged by the claimant, but these facts indisputably show that the injuries complained of were received at a time and under such conditions as to forbid any recovery from the Government by the claimant. His injuries were received in the course of battle and in the rightful and successful endeavor of the Government to repossess itself of one of its important towns and ports. The Government owed a duty to the

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[1] Idem, Vol. 53, p. 1050.
[2] Idem, Vol. 79, p. 632.
[3] Idem, Vol. 75, p. 39.
[4] Idem, Vol. 77, p. 1090.
[5] Idem, Vol. 84, p. 137.
[6] Idem, Vol. 74, p. 298.
[7] For a French translation see Descamps-Renault *Recueil international de traités du XX*eme *siècle, 1903*, p. 874.

claimant and to all the inhabitants of Puerto Cabello to become the government in fact of the town in question. And as their repossession of it was resisted by the troops then in charge it became the due course of war to take and carry the intrenchments of the town. It was the misfortune of the claimant that his building was so near to one of the principal intrenchments, where there was the most serious resistance, and the injuries occasioned his property were one of the ordinary incidents of battle. Had his property been situated in such a part of the town as was out of the line of the intrenchments and the usual and proper course of battle, the case would be different. There is always a presumption in favor of the Government that it will be reasonable and will not be reckless and careless, and in this case the facts proven prevent any possible removal of that presumption. The Government bullets were directed toward the place required to insure success, and that there was so far a misdirection of those bullets as to do harm to his property located in such close proximity was a mere accident attending the rightful performance of a solemn duty. The most careful inspection of the case shows nothing that puts this property within the list of exceptional instances, but rather they all place it in the immediate line of battle, and in the very track of flagrant war.

The rules laid down concerning bombardment, in article 32 of the Manual of the Institute of International Law, are in part as follows:

> It is forbidden:
> *(a)* To destroy private or public property if that destruction is not compelled by the imperious necessity of war.
> *(d)* To attack and bombard Localities which are not defended.

The destruction of these intrenchments and the carrying of the town by the Government troops were compelled by the imperious necessity of war. The intrenchments and the town were defended. The better rule seems to be that the bombardment of an open city — that is to say, one which is not defended by fortifications or other means of attack or resistance for immediate defense, or by detached forts situated in its proximity — for instance, at a maximum distance of 4 to 10 kilometers — is inadmissible in ordinary cases. But an unfortified town may be bombarded for the purpose of quelling armed resistance. Since this was a fortified town, of course the rule prohibiting bombardment in general does not apply, and if the bombardment of unfortified towns were permissible under the circumstances named, much more would it be true that towns intrenched, as was Puerto Cabello at the time complained of, might be attacked and bombarded without just cause of complaint.

It was held in Cleworth's case, American and British Claims Commission, Moore, 3675, that the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during bombardment could not be recovered against the United States. This was the unanimous opinion of the Mixed Commission. So held in Dutrieux's case, Moore, 3702, Commission under convention between the United States and France, January 15, 1880. The claimant was the owner of two houses at Charleston, S.C. These houses were injured by shells striking them during the bombardment of that city by the United States. This case was carefully discussed and ably considered, and in the end the claim was disallowed.

In Lawrence on International Law, page 443, quoting from Brussel's Code, articles 15-17, Manual of the Institute of International Law articles 31-34, it is stated that —

> Even in bombardments it is now deemed necessary to spare as far as possible churches, museums, and hospitals, and not to direct the artillery upon the quarters

inhabited by civilians unless it is impossible to avoid them in firing at the fortifications and military buildings.

Lawrence, says, page 344:

But had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open and undefended village been fired into, the person responsible for such proceedings would have been justly accused of barbarity forbidden by modern usage.

Wharton, volume 3, sec. 349, page 338, says:

The bombardment of unfortified towns is not permitted by the law of nations. (See Calvo, 3d ed., vol. ii, 137.) An exception to this rule is recognized in cases where the inhabitants of an unfortified city oppose by barricades and other hostile works, the entrance of the enemy's army, or wantonly proceed in the destruction of his property and refuse redress.

Lawrence's report, page 274: [1]

The American rule of international law was early adopted, that the Government was under no obligation to compensate its citizens for property destroyed or damages done in battle, or by necessary military operations in repelling an invading enemy.

And ibid, page 275:

No government, but for a special favor, has ever paid for property, even of its own citizens, destroyed in its own country, on attacking or defending itself against a common public enemy, much less is any government obliged to pay for property belonging to neutrals domiciled in the country of its enemy which may possibly be destroyed by its forces in their operations against such enemy. (Citing Perrin *v.* U. S., 4 C. Cls., 547.)

Mr. Seward, Secretary of State, said, in relation to a claim upon the United States by a French subject for property destroyed by the bombardment of Greytown, in July, 1854, that " the British Government, upon the advice of the law officers of the Crown, declared to Parliament its inability to prosecute similar claims. In 1857 Lord Palmerston applied the decision in the case of Greytown as a precedent for refusing compensation to British merchants whose property in a Russian port had been destroyed by a British squadron during the Crimean war. (See note in Lawrence's Wheaton, p. 145.)

" The governments of Austria and Russia have applied the doctrine involved in the Greytown case to the claims of British subjects injured by belligerent operations in Italy in 1849 and 1850. (See note p. 49, vol. 2, of Vattel, Guilaumin & Co.'s edition, 1863.)

" We have applied the same principle in declining to make reclamations for citizens of the United States whose property was destroyed in the bombardment of Valparaiso by a Spanish fleet, and in resisting the claims of subjects of neutral powers who sustained injury from our military operations in the Southern States during the recent rebellion. It will probably be found a sufficient answer to the reclamations of many of our citizens who have sustained losses from belligerent operations on both sides during the recent occupation of Mexico by French troops."

This is the rule recognized by Vattel, who says: " But there are other damages caused by inevitable necessity; as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents. They are misfortunes which chance deals out to the proprietors on whom they happen to fall. * * * No action lies against the State for misfortunes of this nature, for losses which she has occasioned, not willfully but through necessity and by mere accident, in the exertion of her rights." (Vattel, book 3, ch. xv, sec. 232, p. 403.)

The umpire has made careful examination of nearly all of the international law text-books, and finds the principles herein laid down to receive their unqualified sanction. Hence he is compelled to say that in this case there is no

[1] H. R. Report 134, 43d Cong., 2d sess.

just ground for complaint against the Venezuelan Government and no claim thereon arises because of the injuries received.

The claim is disallowed, and judgment may be entered accordingly.

SALAS CASE

The Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents whom the Government could control and not otherwise. That the Government of Venezuela was negligent in a given case must be alleged and proved.[1]

PLUMLEY, *Umpire:*

In this case the commissioners failed to agree and it came to the umpire for his decision.

The claimant is a Dutch subject resident at Barquisimeto. He claims an amount of 26,906 bolivars on account of damages upon his buildings and the personal property therein contained, which he sustained during the siege of Barquisimeto by the revolutionary troops under Gen. Luciano Mendoza in the month of June, 1902.

There seems to be no dispute concerning the facts, and they are substantially as follows: That the injuries and losses to the claimant occurred at the time when Barquisimeto was besieged by revolutionary forces; that during the besiegement the mercantile establishment of the claimant was occupied by these forces; the merchandise and furnishings of his store were taken and carried away by them, also a large deposit of stamps and national stamp paper, and the money in the drawer, as well as his account books, which were in the safe of said establishment, which safe was broken open; that starting from the partition wall between the house of the claimant and the one inhabited by one of the witnesses, and continuing up to the room where the office of Mr. Salas was kept, there were evident signs of walls and doors having been broken; the stands, wardrobes, and shelves of his lemonade factory were destroyed; the furniture generally broken; some excavations were made in the floor of the building, and there were places in the walls made to be used by the soldiery of the revolutionary army through which to fire their arms; all his mercantile stock and his machines for the manufacture of lemonade and gaseous waters were destroyed, and everything about the building was left in a decided ruin.

There is no claim that any injury was received to the buildings or property from the Government troops, which had been occupying the town, and which fought to maintain their possession thereof, but the proof is that all of the injury was caused by the voluntary acts of the revolutionary troops during their successful attack upon the city. As a result of this attack the Government troops were driven out of the city and the revolutionary forces were the victors and occupied the city for some time thereafter.

While the attack upon Barquisimeto was successful and the revolutionary party for the time became the dominant force in that immediate vicinity, the revolution itself was unsuccessful. There can be no question that the injuries were received from the hands of revolutionary soldiers, who for the time being and within that city were beyond the control of the Government. The Government in fact was defeated and was driven out of the city, so that in no way can it be held that they could have prevented these acts, and they can not be charged with a neglect of duty in not having done what they could not do.

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[1] See Sambiaggio case, *supra*, p. 499; Aroa Mines case, vol. IX of these Reports, p. 402; Kummerow case, *supra*, p. 370; J. N. Henriquez case, *supra*, p. 713.