REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868

Case of McManus Brothers v. Mexico, opinion of the Umpire, Sir Edward Thornton, dated 26 November 1874 and case of Francis Rose v. Mexico, decision of the Umpire, Sir Edward Thornton, dated 13 September 1875

Commission mixte constituée en vertu de la Convention conclude entre les États-Unis d'Amérique et le Mexique le 4 juillet 1868

Affaire concernant les frères McManus c. Mexique, opinion du Surarbitre, Sir Edward Thornton, datée du 26 novembre 1874, et Francis Rose c. Mexique, décision du Surarbitre, Sir Edward Thornton, datée du 13 septembre 1875

13 September 1875

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some Spanish subjects suffered insults and damages. When the Government of Spain made the claim, the American Secretary of State, the illustrious Daniel Webster, while expressing the sorrow his government felt at what had happened, and while promising to punish the delinquents, peremptorily declined all responsibility and the payment of indemnification. The Spanish Government subsequently declared that it was completely satisfied.

After these precedents it is painful to see the claimant cite in support of his pretension the course followed by England, France, and Spain in making the celebrated tripartite convention of London concluded in October 1861 for the purpose of claiming indemnity for the alleged damages sustained by the subjects of said powers in Mexico at the time of the civil wars. Everybody knows what was the real and true design of those three governments, and that they did not succeed in their enterprise. On the other hand, it was very strange that such precedents should be invoked by a Mexican, and in a claim supposed to be made in the name of the same government which considered itself highly offended by the conduct alluded to.

This is my opinion on this question, which induces me to concur with my distinguished colleague in the point that the claim preferred by D. Salvador Prats against the United States before this commission ought to be rejected.

Case of McManus Brothers *v.* Mexico, opinion of the Umpire, Sir Edward Thornton, dated 26 November 1874[*] and case of Francis Rose *v.* Mexico, decision of the Umpire, Sir Edward Thornton, dated 13 September 1875[**]

Affaire concernant les frères McManus c. Mexique, opinion du Surarbitre, Sir Edward Thornton, datée du 26 novembre 1874,[***] et Francis Rose c. Mexique, décision du Surarbitre, Sir Edward Thornton, datée du 13 septembre 1875[****]

Tax imposition on foreigners–forced loans levied in accordance with the law shall be equally distributed amongst all inhabitants, whether natives or foreigners–forced

[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3415.

[**] *Ibid.*, p. 3421.

[***] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3415.

[****] *Ibid.*, p. 3421.

loans not considered as equivalent to seizure of property–enforcement of payment of a forced loan should be by judicial proceeding and not by menace, arrest and detention.

Treaty interpretation–practice in other treaties to have qualified exemptions for payment of forced loan–silence of the treaty viewed as allowing such forced loan.

Imposition fiscale des étrangers–les emprunts forcés prélevés conformément à la loi doivent être repartis également entre tous les habitants, qu'il s'agisse d'autochtones ou d'étrangers–les emprunts forcés ne sont pas considérés comme équivalents à la saisie de biens–exécution du paiement d'un emprunt forcé par voie de procédure judiciaire et non par le biais de la menace, l'arrêt ou la détention.

Interprétation du traité–la pratique relative à d'autres traités fait état d'exonérations qualifiées du paiement d'emprunts forcés–un tel emprunt forcé est considéré comme autorisé en cas de silence du traité.

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Opinion of the Umpire in the case of McManus *v.* Mexico

The case of *McManus Brothers* v. *Mexico,* No. 348, involves two claims, one for what are called in the memorial "involuntary" contributions, and the other for forced loans, levied upon the claimants by Mexican authorities. With regard to the first of these the two commissioners appear to be agreed that the claimants are not entitled to compensation, and no observations are therefore needed from the umpire.

The second question is whether forced loans could properly be exacted from citizens of the United States by the Mexican authorities. The principal argument of the claimant is that treaty stipulations between the United States and Mexico exempt them from the payment of forced loans. The umpire, after examination of the treaties between the two countries, can find no mention of forced loans and no stipulation which accords or implies the exemption of United States citizens from their payment.

Article VIII of the treaty of 1831 stipulates that the "citizens of neither of the contracting parties shall be liable to any embargo." This can not imply the nonpayment of forced loans; and further, "nor shall their vessels, cargoes, merchandise, or effects be detained for any military expedition, nor for any public or private purpose whatsoever, without corresponding compensation." If it were possible to imagine that "the detention of effects" implied the payment of forced loans, these could not be exacted without corresponding compensation. But the compensation could only be either the immediate return of the money, which would be absurd, or its repayment at some future date. Now, there is no evidence that the claim—ants ever

made any application to the Mexican Government or were refused repayment. The defensive evidence asserts that those who applied were repaid, and the claimants do not rebut this assertion.

Article IX of the same treaty stipulates that "the citizens of both countries, respectively, shall be exempt from compulsory service in the army or navy; nor shall they be subjected to any other charges, or contributions, or taxes, than such as are paid by the citizens of the States in which they reside." Forced loans may well be included in "charges, or contributions, or taxes", and the clear inference is that if the citizens of the State were subjected to forced loans, hard and impolitic as they might be, citizens of the United States were not exempt from them.

For it appears by the evidence, and the claimants do not deny, that these forced loans were distributed amongst the whole of the inhabitants, whether native or foreign, of the republic or of the particular State.

In the treaties, then, between Mexico and the United States, there seems to be no mention of forced loans. But in certain treaties made by the former with some other nations there is a stipulation with regard to them. If, however, this stipulation implies an exemption from their payment, it is a qualified exemption. In the treaty with Great Britain it is stipulated that "no forced loan shall be levied upon them," whilst the Spanish version is that "no forced loans shall be levied specially upon them." A stipulation precisely similar to the treaty with Great Britain is to be found in the treaties with the Netherlands, Denmark, Chile, Peru, Prussia, the Hanse towns, and Austria. The umpire considers that it implies that forced loans may be levied upon the citizens and subjects of the contracting parties, provided they be not levied especially upon them without at the same time and in the same proportion being levied upon all the other inhabitants of the respective countries, whether natives or foreigners.

The umpire also observes that the claimants made continuous payment on account of forced loans for several years; yet there is no evidence that during that time they made any representation upon the subject to their government, or, if they did so, that the United States Government addressed any remonstrance to the Mexican Government against the exaction of these forced loans; it possibly felt that the terms of its treaties with Mexico would not justify such a remonstrance.

The agent of the United States in his argument before the umpire in the case of *Francis Rose* v. *Mexico*, No. 344, has stated that the liability of Mexico for the forced loans must be regarded as settled by the old precedents of decision in this commission, and, as he thinks, by the case of *Geo. Pen Johnson* v. *Mexico*, No. 357. With regard to his own opinion in that case, the umpire must be allowed to observe that he expressed none as to the right of the Mexican authorities to impose forced loans upon United States citizens. He did not enter into that question, because in that case he found that there was not suf-

ficient proof that the "forced loans" were actually paid, or if so paid, that they were not refunded afterward.

In the memorial in the case now before the umpire, it is stated that one of the claimants, George L. McManus, was arrested and imprisoned because he refused to pay a forced loan. The umpire does not consider that this is the proper way of enforcing the payment of any tax, and it might have entitled the claimant to compensation, but of this fact there IS no evidence but that of the claimant, which the umpire does not consider sufficient.

The umpire is therefore of opinion that in the case of *McManus Brothers* v. *Mexico*, No. 348, the claim on account of forced loans and of the arrest and imprisonment of G. W. McManus must be disallowed.

Decision of the Umpire in the case of Francis Rose *v.* Mexico

With regard to the case of *Francis Rose* v. *Mexico,* No. 344, as the question of forced loans has been so earnestly discussed the umpire thinks it right to make some further observations. But he can not see that there is any force in the argument that his predecessor has given different decisions upon such questions. He regrets that it should be so, but if these matters are to be settled entirely by such precedents the umpire does not understand why, where there has been a decision upon the matter by a previous umpire, the question should be referred to the present umpire at all. It can only be with the intention that he should express his unbiased opinion upon the matter.

The umpire has already expressed his opinion in other cases that United States citizens residing in Mexico are not by treaty exempt from forced loans. This opinion he maintains. But he must explain his understanding of a forced loan. A forced loan is a loan levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether natives or foreigners. It is a tax which becomes smaller or greater according as it is repaid sooner or later, partially or not at all. If the foreigner is reimbursed at the same time as the native, or if neither of them are reimbursed at all, the foreigner has no ground for remonstrance. As long as the foreigner is placed upon the same footing as the native he can not complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good ground for complaint. A forced loan equitably proportioned amongst all the inhabitants is a very different thing from the seizure of property from a particular individual.

In the case now under consideration it is not shown that there was any partiality shown against the claimant or that Mexicans were not in as bad a position as himself. Indeed, although witnesses alleged that the claimant was made to pay a forced loan of $550, no receipt is shown for that amount, and there is no proof that he was not reimbursed.

With regard to the other sums which are stated to have been exacted as forced loans, and for a portion of which receipts are shown, no proof is even given that they were really forced loans, the receipts themselves purporting that the money was freely given.

But the mode employed by the authorities of enforcing the payment of the forced loan of $550 the umpire does not think justifiable. If the forced loan was legally imposed, there must have been means of enforcing its payment by judicial proceedings, and the arrest and subsequent detention of the claimant, though it is not proved that the latter was of long duration, and the menaces to which he was subjected, were not justifiable and entitled him, in the opinion of the umpire, to some small compensation.

The umpire therefore awards that there be paid by the Mexican Government on account of the above claim the sum of five hundred Mexican gold dollars ($500).