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William A. Parker (U.S.A.) v. United Mexican States

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diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or delay of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise. I have no hesitation in concurring in their decision that any provision attempting to bind the claimant in the manner mentioned in this paragraph would have been void *ab initio* as repugnant to the rules and principles of international law.

Article 18, as thus construed, in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof. Mexico's motive for expressly incorporating this rule as an indispensable provision of the contract, which could be ignored by the claimant only by subjecting itself to the penalties flowing from its breach of the contract seems both obvious and reasonable and in harmony with the spirit and not repugnant to the letter of the rules and principles of international law. The provision as thus construed should be treated both by claimant and its Government with the scrupulous and unflinching respect due any legal contract.

Accepting as correct my fellow Commissioners' construction of article 18 of the contract, I concur in the disposition made of this case.

Edwin B. PARKER,
Commissioner.

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 35-42.*)

NATIONALITY, PRESUMPTION OF—NATIONALITY, EFFECT OF ESPOUSAL OF CLAIM BY GOVERNMENT. Fact that a Government espouses a claim does not create a presumption that claimant is of nationality of espousing Government.

NATIONALITY, PROOF OF. Nationality is a fact, to be proven as any other fact, to the satisfaction of the tribunal. Evidence *held* sufficient to establish nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RULES OF EVIDENCE.—ADMISSIBILITY OF EVIDENCE. The tribunal is not bound by municipal rules of evidence and the greatest liberality will obtain in the admission of evidence.

EVIDENCE, DUTY OF BOTH PARTIES TO SUBMIT. It is the duty of the two Agents to co-operate in submitting to the tribunal all relevant facts. Each Agent should present all the facts that can be reasonably ascertained by him without regard to what their effect may be.

PRIMA FACIE CASE. After claimant has established a *prima facie* case and respondent Government has offered no evidence in rebuttal, latter may not insist that evidence be produced to establish allegations beyond a reasonable doubt.

BURDEN OF PROOF.—EFFECT OF FAILURE TO PRODUCE MATERIAL EVIDENCE. No international rules exist relative to a division of the burden of proof between the parties. Nevertheless, an unexplained failure to produce material evidence peculiarly within the knowledge of one of the parties may be taken into account by the tribunal in reaching a decision.

AFFIDAVITS AS EVIDENCE. In a claim for goods sold to the Mexican Government, affidavit of claimant *held* to establish fact of sale and delivery.

QUASI-CONTRACT OR UNJUST ENRICHMENT AS A BASIS OF CLAIM.—LACK OF AUTHORITY OF OFFICIAL AS A DEFENCE. Where respondent Government has received and retained for its benefit goods sold to various officials by claimant, it is responsible therefor without regard to question of authority of such officials.

OWNERSHIP OF CLAIM. Where record raises a doubt as to ownership of claim by claimant, final decision postponed in order that effort may be made to obtain further evidence on this issue.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 174; Annual Digest, 1925-1926, pp. 240, 243, 414; British Yearbook, Vol. 8, 1927, p. 183.

Comments: Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d. ser., Vol. 19, 1937, p. 98 at 101; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. It is alleged in the memorial that William A. Parker, who was born and has ever remained an American national, was, on and prior to December 8, 1911, until March 27, 1918, engaged in the City of Mexico as a dealer in typewriters, typewriting and general office supplies and repair of typewriters; that on the last named date, he caused a corporation to be formed under the Mexican law, designating it *Compañía Parker S. A.*; that at sundry times between December 8, 1911, and March 27, 1918, claimant sold and delivered, or rendered services in the nature of repairs to typewriters to various departments of the Government of Mexico, at prices which were agreed upon at the time of delivery or at the time the services were rendered; and that, after giving to the Government of Mexico all proper credits, there is due claimant \$39,090.05 which remains unpaid. The claim of William A. Parker against the United Mexican States has, on his behalf, been espoused by the United States of America and submitted to this Commission for decision. A Mexican motion to dismiss the claim was overruled by this Commission on March 2, 1926.

Nationality of the claim

2. The nationality of the claim presented has been challenged on several grounds. In response to this challenge it is contended that when a Govern-

ment espouses a claim of one of its nationals against another Government the private nature of the claim and the private interest of the claimant therein ceases to exist and the claim becomes a public claim of the espousing Government. From this premise the proposition is deduced and pressed that the espousal of a claim by either Government before this Commission and the allegation in the memorial of facts as distinguished from conclusions from which it would follow that the claim possessed the nationality of said Government is *prima facie* evidence that it is impressed with such nationality, subject to rebuttal by affirmative evidence to the contrary which may be offered by the opposing Agent. This contention is rejected by the Commission. It is clear that the Treaty of 1923 does not deal with any government-owned claims but does deal throughout with private claims of citizens which have been espoused by their respective Governments. Provision is even made in certain cases for a restitution of a "property or right * * * to the claimant" (Article IX of the Treaty). However, the Commission does hold that the control of the Government, which has espoused and is asserting the claim before this Commission, is complete. In the exercise of its discretion it may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When, on such request, a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.

3. The nationality of the claim is challenged on account of insufficiency of the proof offered in support of the American nationality of the claimant (a) because it is only supported by the affidavits of three witnesses, one of whom is the claimant, the second a brother of claimant and the third a friend of long standing who could not have positive information with respect to the fact of his birth; (b) because no birth certificate is presented, nor is its absence explained; and (c) because two of the affidavits were taken before an American vice consul in Mexico who is not authorized to administer oaths under the laws of Mexico where the affidavits were taken. Article III of the Treaty of 1923 provides that "either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim * * * in accordance with such rules of procedure as the Commission shall adopt". Section 1 of Rule VIII adopted by the Commission in 1924 provides that "The Commission will receive and consider all written statements, documents, affidavits, interrogatories, or other evidence which may be presented to it by the respective agents * * * in support of or against any claim, and will give such weight thereto as in its judgment such evidence is entitled in the circumstances of the particular case". Under these provisions of the Treaty and the rules of this Commission, the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them—is for this Commission to determine and in so determining their pecuniary interest and family ties will be taken

into account. But, the contention made that the Government is the sole claimant before this Commission, hence the personal, business, or other relations between the private owner of the claim and third persons whose testimony is here offered can be taken into account only by the claimant Government in determining whether it will or will not espouse the claim, but not by this Commission, illustrates the extreme lengths to which the theory of the national character of the claim may be carried and is rejected. An unsworn statement may be accepted in evidence, but the weight to be given it will be determined by the circumstances of the particular case. Under the statutes of the United States, an American vice consul in a foreign land to which he is accredited is authorized to take the affidavit of an American citizen, and the mere fact that no such authority is conferred upon him by the laws of Mexico does not affect either the admissibility or the weight of the affidavits filed herein. In those jurisdictions where the local laws require registration of births a duly certified copy of such registration is evidence of birth in establishing either American or Mexican nationality by birth; but such evidence is not exclusive, and while ordinarily it is desirable that certificates of registrations of birth, which are usually contemporaneous with the fact of birth, should be produced when practicable in support of a claim of nationality by birth, or the absence of such certificate explained, it by no means follows that proof of birth can not be made in any other way. While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven. On the record as presented, the claimant himself, his brother, and a third witness all testified to facts from which no other conclusion can be drawn than that claimant was born, and has always remained, an American national. The Mexican Government offers no evidence in rebuttal, but relies on the insufficiency of this proof. On the record as presented, the Commission decides that the claimant was by birth, and has since remained, an American national.

4. The nationality of the claim was further challenged on behalf of Mexico on the ground that claimant on March 27, 1918, had conveyed all of his property, rights, and interests, including the claim here put forward, to the Compañía Parker S. A., a Mexican corporation and impressed with Mexican nationality; and therefore, in the absence of allegations and proof that this claimant had a substantial and *bona fide* interest in the said corporation and in the absence of presenting to this Commission an allotment to the claimant by said corporation of his proportion of the loss or damage suffered by him through the corporation, the claim on his behalf does not fall within the provisions of the Treaty. On the hearing of this case the Commission requested both Agencies to present further evidence fully disclosing the facts with respect to this contention, in response to which request each Agent has presented a telegram. That filed by the Mexican Agent states in effect that the claimant Parker had conveyed all of his properties including this claim to the corporation formed by him and bearing his name; while that filed by the American Agent is to the effect that this claim was never conveyed to the corporation. This unsatisfactory state of the record will be hereinafter referred to.

Rules of evidence

5. For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.

6. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary, it holds that it is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain who among the men ordering typewriting materials from Parker and signing the receipts of delivery held official positions at the time they so ordered and signed, and who did not. On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.

7. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision. The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between Governments in their own right, as in

those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time. Neither the Hague convention of 1907 for the pacific settlement of international disputes, to which the United States and Mexico are both parties, nor the statute and rules of the Permanent Court of International Justice at The Hague contain any provision as to a burden of proof. On the contrary, article 75 of the said Hague convention of 1907 affirms the tenet adopted here by providing that "The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case".

8. In the present case, the sufficiency of the proof has been challenged (a) with respect to the sale and delivery by the claimant of typewriters and supplies to the Mexican Government, which involves (b) the power of the individual purporting to represent said Government to bind it.

9. The allegations of sales made and deliveries effected to a designated agent at a designated place on the dates and at the prices specified and the failure of the Mexican Government to make payment are supported by the affidavit of the claimant, and the Mexican Agent has offered no evidence in rebuttal. The facts alleged are peculiarly within the knowledge of the respondent Government, which should make a full disclosure thereof. It is suggested that due to disturbed conditions or otherwise many of the records of that Government have been destroyed or misplaced, but it should seem that the respondent could at least definitely state whether or not the individual to whom claimant alleges he made deliveries was in its employ at the time and place designated and the actual or apparent scope of his authority. But whether the individuals to whom deliveries were made had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it.

10. Especially on account of the difficulty of ascertaining whether a person acting for either Government was entitled to do so, there has been embodied in Article I of the Treaty of 1923 a provision conferring jurisdiction over claims originating from acts of officials "or others acting for either Government". Reading this provision in connection with that contained in the first clause of Article I, the Commission is of the opinion that this provision should be so construed as to include all claims against one Government by the nationals of the other for losses or damages suffered by such nationals or by their properties, even when there is no evidence that they originate from acts of competent authorities, whether officials or others with a limited jurisdiction, but where there is merely evidence that they originate from acts of others acting for either Government. Where the regularity of a government administration is doubtful, as the administration of Huerta 1913-1914, the quantum of proof required might be greater than in the case of an entirely regular and well-established Government (compare Moore's *Arbitrations*, 3561). But in this case, the Mexican Agency has contented itself with the mere denial of authority without offering any evidence in support of such denial or throwing any light on the actual facts.

11. As pointed out in the foregoing paragraph No. 4, the proof with respect to the ownership of this claim is meager and unsatisfactory. While the Mexican Agent has failed to prove to the satisfaction of the Commission that

claimant Parker has sold and conveyed this claim to a Mexican corporation and hence it might be justified in making an award in favor of the United States on behalf of the claimant, nevertheless the Commission is not satisfied with the evidence which has been presented to it on this issue, although the truth may be readily and definitely established.

Interlocutory decision

12. The Commission therefore decides the several questions presented in accordance with the foregoing opinion, but expressly reserves its decision with respect to the ownership of this claim and the amount thereof. The Agents are requested to cooperate in discovering the facts with respect to the ownership of this claim and the interest, if any, of the claimant Parker or the Compañía Parker S. A. or others therein and file evidence herein on or before July 1, 1926, fully disclosing such ownership. The Commission suggests that this evidence may take the form of a stipulation of facts signed by both Agents. Should it appear that this claim is the property of the Compañía Parker S. A. or other Mexican corporation in which the claimant Parker has a substantial and *bona fide* interest, an allotment by such corporation to the claimant Parker made in accordance with the Treaty provisions may be filed and will be considered by the Commission.

GEORGE W. HOPKINS (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 42-51.*)

RESPONSIBILITY FOR ACTS OF DE FACTO GOVERNMENT.—EFFECT OF DECREES OF NULLITY.—NON-PAYMENT OF MONEY ORDERS. Respondent Government *held* responsible for non-payment of money orders of Huerta Government on ground they involved acts of an unpersonal character. Responsibility for acts of Huerta Government of a personal character will depend on whether at the time in question it had control over a major portion of the territory and a majority of the people of Mexico. Decrees of nullity subsequently issued by Carranza Government *held* not binding on the tribunal.

NON-RECOGNITION BY CLAIMANT GOVERNMENT AS ESTOPPEL. Claimant Government *held* not estopped by its non-recognition of Huerta Government to present claim involving acts of such Government.

PRIVILEGED STATUS OF ALIENS UNDER INTERNATIONAL LAW. The fact that a decision of the tribunal may result in extending to an alien a privilege not accorded Mexican nationals under Mexican law will not prevent the tribunal from reaching such decision, if it be dictated by international law.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 161; Annual Digest, 1925-1926, pp. 229, 232, 417; British Yearbook, Vol. 8, 1927, p. 180.