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Norman Tucker Tracy (Great Britain) v. United Mexican States

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The three Commissioners, i.e., the United States Commissioner, the Mexican Commissioner, and the Presiding Commissioner, Dr. Van Vollenhoven, unanimously decided that the said claim should be dismissed, because they did not hold that the charge of negligence brought against the Government of Mexico had been sufficiently proven by means of the unsupported statement of Tolerton, the claimant. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States and Mexico*, page 402, Vol. I.)

The American Government, on behalf of G. L. Solis, before the General Claims Commission, Mexico and the United States, claimed from the Government of Mexico the sum of \$ 530.00, United States currency, for the theft of some cattle by revolutionary forces belonging to Huerta, having imputed to the Mexican Government lack of diligence in the pursuit and punishment of the parties responsible. The aforesaid Commission, presided over by their learned President, Kristian Sindballe, declared Mexico not liable for the said claim, by a unanimous vote, having founded their opinion on the fact that there was not, beyond the claimant's own deposition, proof sufficient of negligence on the part of the Mexican authorities. This decision is based on the opinions handed down in other International Commissions, also worthy of respect, such as those between Great Britain and the United States, and Great Britain and Venezuela. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States of America and Mexico*, p. 48, Vol. II.)

The selfsame General Claims Commission, Mexico and the United States, reports (Vol. II, p. 56) the claim of Bond Coleman *v.* the Government of Mexico, which was espoused by the American Government, and in which the three Commissioners unanimously dismissed the claim on the ground that proper proof had not been shown of negligence on the part of the Government of Mexico.

As will thus be seen, all International Claims Commissions agree that negligence in punishing crime must be proved by the demandant Government, the alternative, in case of failure to do so, being that the claim must be dismissed.

In virtue of the whole of the foregoing, the Mexican Commissioner now expresses an opinion dissenting from that of his learned colleagues, to the effect that as no negligence on the part of the Mexican Government in punishing the parties responsible for the loss sustained by the claimants has been shown, and still less in suppressing the insurrection which gave rise to the said losses, the said claims should be dismissed.

NORMAN TUCKER TRACY (GREAT BRITAIN)

v. UNITED MEXICAN STATES

(*Decision No. 13, February 15, 1930, separate opinion by British Commissioner, undated. Pages 118-124.*)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavits of claimant *held* not sufficient evidence. An affidavit of claimant supported by an affidavit of another person in a position to know the facts of loss, which was made shortly after loss, *held* sufficient evidence.

RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. A seizure of a mine by the Constitutionalist Government held not to entrain responsibility under terms of *compromis*.

1. The facts on which the British Government in their memorial base the claim are the following:

Mr. Tucker Tracy was employed as manager of the Compañía Minera Jesús María y Anexas S.A. Mines and Hacienda at San José de Gracia, Sin., Mexico. On the 16th May, 1913, a .303 Winchester carbine with 100 cartridges and on the 30th May a .3 Luger automatic pistol with 100 cartridges were delivered personally to Melquides Melendez under threat of search and confiscation. It was impossible to obtain a receipt for them.

In May 1913 the Constitutionalist forces occupied the mine after the Federal forces which had been garrisoning the town had been dislodged, and disposed of a quantity of precipitate of cyanide, valued at \$35,000. They were obliged by Federal troops to evacuate the place after a few days.

On the 3rd June, 1913, when the Federal garrison announced its intention of withdrawing from the town for the second time, Mr. Tracy considered it prudent to remove himself and his family to a place of greater safety. When he returned in January 1914 he discovered that a saddle mule, three horses and equipment, part of the household effects and almost all the clothing had been lost.

At the end of November 1913 the mine was seized with the aid of military forces by persons commissioned by the Constitutionalist Government of the State of Sinaloa and in February 1914 the administration was taken over by the Constitutional Federal Government. There was no reason in accordance with the civil laws operating at the time that might be offered as a pretext for the seizure of the Company's properties. There was no previous warning nor civil legal proceedings prior to the seizure. The property was returned to the Company on the 1st September, 1916. Mr. Tracy was refused permission to continue his employment as manager of the mine during the time the Government authorities had control. He consequently lost the salary which he would have earned during this period (annex 4). Information of the salary which Mr. Tracy would have earned is given in the affidavit signed by Miguel Tarriba, then president of the Company (annex 2).

The amount of the claim is 510 Mexican pesos for the objects and animals which he lost, plus 14,403.68 dollars, United States currency, for the loss of salary, and interest.

2. The evidence consists in three affidavits made by Mr. Tracy, the *first* on the 26th March, 1914, before the British Vice-Consul at El Paso (Texas), the *second* on the 20th September, 1916, before the British Vice-Consul at Mazatlán (Sinaloa), the *third* on the 30th September, 1927, before a notary public at Socorito (Sinaloa), and in an affidavit made by Señor Miguel Tarriba before the British Consul at El Paso (Texas) on the 15th December, 1914. Señor Tarriba was at that time the president of the Mining Company, which employed Mr. Tracy, and he supports the latter's claim for loss of salary.

3. The Mexican Agent pointed out that, as regards the claim of 510.00 pesos for the loss of property, there exists no other evidence than the affidavit of Mr. Tracy himself. The Agent has more than once argued that such uncorroborated statements cannot be accepted as proof.

In connexion with Señor Tarriba's affidavit he drew the attention of the Commission to the fact that the document had been sworn by a Mexican citizen before a British authority residing in the United States. He doubted whether this authority was in a position to know Señor Tarriba or to have information about his profession. In his opinion, the affidavit, drawn up without cross-examination, carried very little weight, if any.

He failed to see any evidence as to the nature of the confiscation of the mine. Nothing showed that this act was a military act, or a revolutionary act or an act committed by one of the forces falling within the terms of Article 3 of the Convention. But even if it had been satisfactorily proved that the mine was confiscated under the circumstances provided in that article, still the claim could not be allowed, because what Mr. Tracy asked was not the compensation of any direct loss or damage, but the indemnifying for the loss of prospective earnings. The Agent distinguished between *damnum emergens*, which in his opinion the Convention had solely in view, and *lucrum cessans*, which was outside the agreement between the two Governments. Mr. Tracy claimed for indirect damage, for speculative damage, for salary, which he had lost, which he might have earned, but just as well not have earned, because the duration of his employment was not guaranteed.

The Agent declined also any obligation on the part of his Government to pay interest on the sums awarded. The Convention does not speak of it and as Mexico only *ex gratia* undertook to compensate in certain cases the losses and damages suffered on account of civil war and revolutions, this country could never be deemed to be in delay, which would be the only ground on which the granting of interest could be based. Moreover, if the Commission were to decide that interest must be paid up to the date of payment of the award, it was obvious that such decision would exceed the life, and consequently the competence of this body.

4. The British Agent considered the statement of the losses suffered by Mr. Tracy, before he had to leave the mine, as a *prima facie* evidence, to which more value was to be attached than his colleague was inclined to do.

The affidavit of Mr. Tarriba was in his view a very important corroboration not only of the facts, which claimant alleges in the annexes 2 and 5 of the Memorial, but also of what he puts forward as to the character of the confiscation and of the forces who effected it.

The loss suffered by Mr. Tracy, because he lost his employment, was not prospective or speculative, but most real and direct, being the immediate consequence of the confiscation of the enterprise, where he earned his livelihood. Mr. Tracy's work was interrupted by revolutionary acts. His damage was similar to that of the Mining Company, both were involved in the same injury. He was General Manager, a man in control of the enterprise, and his prospects and future employment were so safely assured that his relation to the business had a permanent character. This was confirmed by the fact that he was restored in his function, when the mine was handed back.

The Agent could not see that the Convention excluded the awarding of interest, and the words *ex gratia* in Article 2 of the Convention could not be detached from the rest of this article, in which the principles of justice and equity are invoked, which principles in his opinion would not be complied with, if on the ascertained amount of the award no interest was accorded from the day of the presentation of the claim until the day of the final payment.

5. The views of the majority of the Commission in regard to uncorroborated affidavits of claimants are known from the decision in the claims of Messrs. Baker, Webb and Woodfin (Decision No. 12, section 5). Those views do not allow them to accept as sufficient evidence the statement of Mr. Tracy on his loss of property.

The affidavit of Señor Tarriba is accepted by the majority of the Commissioners, the Mexican Agent dissenting, as a corroboration of the statement of Mr. Tracy made on the 26th March, 1914. Señor Tarriba, as President of the *Compañía Minera Jesús María y Anexas*, was in a position to know exactly

what happened. He must have been in the closest touch with the events prior to the confiscation and with the confiscation itself. He swore his affidavit shortly afterwards, and there is no reason why his declaration should not be accepted as a sufficient proof of the seizure of the enterprise by public authorities.

This seizure in itself, however, does not make the Mexican Government liable according to the Convention. Property can be confiscated at all times, in all kinds of circumstances and on different grounds. To establish an obligation on the part of Mexico, it is necessary that it be proved that the act was committed by one of the forces enumerated in Article 3 of the Convention; in other words, the seizure must not have been an administrative act or an act ordered by purely civil authorities, but must have emanated from the elements which the article has in view, or, even if ordered by civil authorities, have been due to revolutionary events and disturbed conditions and committed by the forces already enumerated (last words of Article 3).

In examining whether in this case they had to deal with such circumstances, the Commissioners could not fail to remark a contradiction between the different statements.

On the 26th March, 1914, Mr. Tracy declared that the property had been confiscated by the Constitutionalist Government. On the 25th December of the same year Señor Tarriba said that the mine was seized by persons commissioned by the Governor of the State of Sinaloa and had been exploited since that date by order of and under officials appointed by that Governor, and afterwards by order of and under officials appointed by the Constitutionalist Government. On the 20th September, 1916, Mr. Tracy signed a statement, in which he declares that the mine was confiscated by the Government of Mexico.

In none of these documents the slightest indication is to be found that the confiscation was a military act or an act of violence or an act committed by forces. Only in his affidavit of the 30th September, 1927, drawn up after the terms of the Convention were known, Mr. Tracy amplifies his statements of 13 years ago and relates that the seizure and the administration of the Company's property were carried out with the aid and in the presence of military forces. He further mentions that a letter, sent by the Minister of Foreign Affairs of the Constitutionalist Government to the British Vice-Consul at El Paso (Texas), dated the 24th April, 1914, proved conclusively that the seizure and the administration of the properties of the Company was in accordance with the direct orders of the Chief of the Constitutionalist Arms.

Could this last document have been produced, it would probably have been of great assistance to the Commission, but it was not available, the archives of the Consulate of that period not having been preserved.

In these circumstances, the Commission must attach more value to the contemporary affidavits than to a document drawn up considerably later. In the former no mention is made of any forces, there is thrown no light on the nature of the confiscation, and there is nothing which prevents the Commission from regarding the measure as a civil act. Of the contrary, i.e., of the applicability of Article 3 of the Convention, which would be essential for the granting of an award, no convincing proof has been given.

6. The claim of the British Government on behalf of Mr. Norman Tucker Tracy is disallowed.

Separate opinion of Sir John Percival, British Commissioner

1. While I am prepared to concur in the opinion of my colleagues that this claim should be disallowed, I cannot entirely subscribe to the reasons set out in the opinion of the President.

2. With regard to the claim for \$510.00 for objects belonging to the claimant which are said to have been stolen, appropriated or taken from him, I do not agree with my colleagues that the fact that this claim is based on the affidavit of the claimant alone is a sufficient ground for rejecting it, and this for the reasons set out in my opinion in the case of Messrs. Baker, Webb and Woodfin (Mexico City Bombardment Claims), paragraph 3. I do, however, consider that it has not been adequately established that the Mexican Government is responsible under the Convention for these losses for the following reasons:

(a) As regards the carbine and pistol said to have been taken by Melendez: this person must be presumed to be a bandit referred to in Article 3, subsection 5, of the Convention, and there is no proof of negligence on the part of the Mexican authorities in respect of this robbery; moreover, it is admitted that Melendez was afterwards executed, presumably for one of his misdeeds among which this may be included.

(b) As regards the mule, bridles and household effects, there is no evidence as to who were the persons who stole these articles nor in what circumstances they were taken, and consequently no proof that the Mexican Government is responsible for the loss.

(c) As to the three horses, it is stated in Mr. Tracy's affidavit that they were taken by Federal guerrillas, in which case the Mexican Government would be liable for the loss, but Mr. Tracy admits that he did not possess sufficient evidence to prove that they were his property.

For these reasons I do not consider that he has established this part of his claim to the satisfaction of the Commission.

3. Coming to the question of the claim for loss of salary, I agree with the President that it has been sufficiently proved that the mine was confiscated by certain Mexican authorities, which was the cause that Mr. Tracy lost his employment, and, furthermore, I also agree that there is not adequate proof to make the Mexican Government responsible for the losses caused by this confiscation under the last paragraph of Article 3 of the Convention.

But I arrive at this conclusion in view of the special circumstances of the evidence offered in this case and consider that it would be dangerous to treat the decision as a precedent for other cases. When property has been confiscated by civil authorities, the Mexican Government is only responsible for loss or damage caused by such action if two conditions exist:

1. That the acts were due to revolutionary events and disturbances, and
2. That the acts were committed—or, as it should better be translated, executed—by one of the forces specified in Article 3, subdivisions 1, 2 or 3 of the Convention.

Now the first of these conditions was undoubtedly, in my opinion, fulfilled in this case, and when this is so I do not consider that it is necessary for the British Government to establish that physical force was exercised by the agents referred to in the Article. It should be sufficient that the order emanated from a military chief or that the civil authorities were supported by a military force sufficient to overcome any justified resistance. In this case, for the reasons set out in the President's opinion, and more particularly as Mr. Tracy, who

alone alleges the presence of military forces at the time of the confiscation, was not himself on the spot at the time, I concur in the view of my colleagues that the existence of the second condition referred to above has not been established, and that, therefore, the claim must be disallowed.

FREDERICK W. STACPOOLE (GREAT BRITAIN)
v. UNITED MEXICAN STATES.

(*Decision No. 14. February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner. January 29, 1930. Pages 124-130.*)

AFFIDAVITS AS EVIDENCE.—DAMAGES. PROOF OF. An affidavit of claimant, made shortly after the loss, supported by an affidavit of a companion, made seven years after the loss, *held* sufficient evidence of circumstances of loss. Such affidavits *held* sufficient evidence of items of property lost, even though supporting affidavit was not fully corroborative, when such items could reasonably in the circumstances have been possessed by claimant. Affidavit of claimant as to value of item lost *held* not sufficient evidence and excessive. Tribunal instead estimates damages to be awarded.

1. The Memorial, filed by the British Agent, sets out that on the 4th May, 1920, Mr. Stacpoole left the Hacienda de Guadalupe, near Sultepec, with Mr. R. J. H. Danley for Mexico City owing to the danger to person and property from the numerous soldiers in that neighbourhood. About 2.30 on the same day they were stopped near Sultepec by a number of Obregonistas. They were threatened and insulted by these men and ordered to proceed with them to headquarters. On the way there, Mr. Stacpoole's pack mule, together with all their baggage, was taken away. At the headquarters an officer demanded that they should hand over their animals, saddles and their belongings. They requested permission to retain them for riding to Sultepec, where they promised to arrange matters with the Obregonistas. This request was refused and they returned to Sultepec on foot. Every effort was made to obtain the return of this property, but the next day, the 5th May, Mr. Stacpoole recovered his mule and raincoat only. On the following days he made attempts to recover his property in Toluca, but without success. At the time of the robbery Mr. Stacpoole produced a safe-conduct signed by General Pablo Gonzalez, and a card from the Ministry of War authorizing him to carry arms. These documents were not respected.

The amount of the claim is for \$475.50 (four hundred and seventy-five pesos, fifty centavos).

2. The British Agent produced an affidavit of Mr. Stacpoole before the acting British Consul-General in Mexico City, dated the 5th June, 1920, and an affidavit of the afore-mentioned Mr. Danley before the acting British Vice-Consul in Mexico City, dated the 14th July, 1927. Mr. Danley was at the time of the hold-up and at the time he signed his affidavit Vice-President and General Manager of the Sultepec Electric Light and Power Company, and lived at Toluca. He confirms the facts set out in the affidavit of Mr. Stacpoole.

3. The Mexican Agent contended that as Mr. Danley, being an American citizen, had sworn his affidavit before a British Vice-Consul in Mexico, and could accordingly not be prosecuted either in Mexico or in the United States