

## LA GUAIRA ELECTRIC LIGHT AND POWER CO. CASE

BAINBRIDGE, *Commissioner* (for the Commission):

It appears from the evidence that on October 19, 1893, the municipal council of La Guaira, in ordinary session, approved a contract granting to one Luis J. García the privilege of establishing an electric-light plant in that city. The contract was executed on behalf of the city by "Rafael Ravard, chairman of the municipal council of the district of Vargas, sufficiently empowered by this corporation," and by Luis J. García, "a resident of this city," on the other part.

On October 11, 1895, Luis J. García transferred to his brothers, Juan B. and Antonio García, all the rights and privileges possessed by the former under the contract. Juan B. García and others incorporated the claimant company under the laws of the State of West Virginia on October 17, 1895.

By the fourth article of the contract of 1893, it was provided that the work to establish the plant was to begin within six months and to be finished within ten months. The twelfth article provided that the contract was to run twenty-five years and the municipality bound itself not to grant to anyone for the district of Vargas equal or better rights for the public lighting or to make any contract relating to any illumination.

In April, 1894, Luis J. García was granted an extension of six months to begin the work of installing the plant; again, in March, 1895, another extension of four months was granted him by the municipal council, and still another extension of six months on June 8, 1895.

The minutes of the municipal council of La Guaira, under date of December 27, 1897, show an entry to the effect that all efforts of that body and of the mayor have been useless to obtain the fulfillment of the contract made with

Luis J. García. On December 31, 1897, the municipal council approved a contract with F. Martínez Espino & Co., of Caracas, for the establishment of electric lighting.

On January 23, 1900, in the court of first instance at Petare, in a certain action entered by the La Guaira Electric Light and Power Company against the municipal council of the Vargas district, a settlement of said litigation was effected and made of record whereby F. Martínez Espino & Co. transferred to the La Guaira Electric Light and Power Company all the rights and privileges of the contract executed December 31, 1897, with the council of the Vargas district, and as a compensation for this transfer the La Guaira Electric Light and Power Company recognized the right of Espino & Co. to receive 5 per cent of the shares issued by the cessionary company; and by the fourth article of the settlement the municipal council of the Vargas district and J. B. García, as attorney for the La Guaira Electric Light and Power Company, "agreed to rescind the contract which with the same purpose was executed under date of October 19, 1893, between the said municipal council and Luis J. García, remaining only in force the one caused by this cession." In November, 1897, the municipality had brought suit in the court at Petare for the cancellation of the contract of October 19, 1893. And as indicating the scope of the settlement effected on January 23, 1900, the following is quoted from the judicial record:

This tribunal gives its approval to this transaction (i. e., the settlement), interposing for its greatest force its authority and judicial decree; and resolves, according to the request, to make appear in the file that the action entered by the municipal council of the Vargas district against the La Guaira Electric Light and Power Company for the abrogation of a contract about electric light, that this settlement has been entered into.

The fifth article of the contract with Espino & Co., referred to in the settlement as being the only one thereafter remaining in force, reads as follows:

The work for installation of the company must be started six months from date of this contract (i. e., December 31, 1897) and ended six months after started. This time could be extended for cause of superior force. The failure to comply within the time stipulated will make this contract abrogated.

However, it was agreed in the settlement effected in court on January 23, 1900, that —

as a natural result of this transaction the parties hereto have agreed that the time stipulated in the contract transferred will begin to count from this date.

At an extra session of the municipal council of the department of Vargas, held on January 24, 1901, a resolution was passed that the contract with the La Guaira Electric Light and Power Company had ceased de facto, according to the fifth article thereof.

On February 25, 1901, the municipal council of La Guaira ratified a contract for electric lighting, executed on December 12, 1899, with Messrs. Perez and Morales.

On March 6, 1901, J. B. García, as attorney for the La Guaira Electric Light and Power Company, protested against the action of the municipal council in canceling the contract of which said company was cessionary, as per the judicial settlement of January 23, 1900, and against the refusal of the council to grant the extensions requested for beginning the work, and claiming that the state of civil war and latterly the earthquake of October 29, 1900, had prevented compliance with the contract and rendered necessary the extensions of time asked. He insisted in the protest that, supposing the company were in

fault, the council "could only have an action to ask for the abrogation of the contract before the courts of justice, as the contract is mutual."

Substantially upon the foregoing facts a claim is presented here on behalf of the La Guaira Electric Light and Power Company against the Republic of Venezuela for the sum of \$ 1,500,000. But the memorialist states:

The company is willing, however, on condition that the Republic of Venezuela and the municipalities concerned act in a friendly spirit, paying damages sustained through actual destruction of property, and regrating its charter so that its rights may be extended for a period to compensate for the interruption and destruction of its business, that then the loss of profits specified shall be waived and the sum of \$ 150,000 for actual loss of property in that event received.

The memorial is couched in somewhat vague and indefinite terms. Various interruptions of the company's service are alleged and certain unpaid indebtedness from the municipality to the company is set forth. An alleged arrest of all the employees of the company on one occasion and their detention "in the calaboose" over night is charged, and it appears that J. B. Garcia was arrested on April 4, 1898, and confined for a period of twenty-four days, the only excuse for his confinement being that he was a political suspect. Since February 23, 1899, said Garcia has been a citizen of the United States. As nearly as can be ascertained from all the evidence presented the injuries to property complained of occurred during the years 1897, 1898 and 1899, prior, it is to be observed, to the settlement of differences between the company and the municipality effected and made of record in the court of first instance at Petare on the 23d of January, 1900.

The contract of the claimant company then in force was declared null and void de facto "according to the fifth article thereof" by the municipal council on January 24, 1901.

The protest of the company made on March 6, 1901, was against the refusal of the council to grant extensions requested for beginning and executing the work as provided by that article. It is not claimed that the contract had been complied with, but that the state of civil war and the earthquake of October 29, 1900, had prevented compliance and rendered necessary the extensions asked. The protest seeks to "reserve all the rights of the company about the matter, to make them valuable before the tribunals of the Republic against the said municipal council."

Except as hereinafter stated, the Government of Venezuela does not appear in any contract or proceeding relating to this company. The parties to the various contracts and judicial proceedings were the municipal council of the district of Vargas and the claimant. But it is sought here to hold the National Government liable for the acts of the municipality as one of the political subdivisions of the State. No evidence is introduced to fix such liability by reason of special legislative or administrative control exercised by the National Government over the municipality. The learned counsel for the United States argues that by the protocol constituting this Commission all citizens of the United States who possessed claims were given the right of recourse against the entity which entered into this international agreement, and that under this agreement the various political subdivisions of the Government of Venezuela were included; and further, that there is in this case no remedy but against the Federal Government, which by signing the protocol has obligated itself to redress the wrongful acts of municipalities as well as other constituted parts of its power.

The argument, however, overlooks the dual character of municipal corporations; the one governmental, legislative, or public; the other proprietary or private.

In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the State is supreme.

But in their proprietary or private character their powers are supposed to be conferred, not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality. (Bouvier Law Dict., Rawle's ed., Vol. II, 453.)

Those matters which are of concern to the State at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control, while the enforcement of municipal by-laws proper, the establishment of gas works, waterworks, construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the State at large. (*Ibid.*)

The contract between the municipal council and the claimant company for the establishment of the electric-light plant was entered into by the former solely in the exercise of its proprietary functions as a distinct legal personality. Its act was in nowise connected with its governmental or public functions as a political subdivision of the State. So far as the contract is concerned, the municipality is to be regarded as neither more nor less than a private corporation and as such could sue or be sued in respect thereof. (Dillon's Mun. Corp., sec. 66.)

It is fundamental that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations imposed by the contract are to be fulfilled, and are ordinarily remitted to the remedies afforded by those laws for the redress of grievances resulting from breaches or nonfulfillment of such contracts.

It is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such as might happen in very exceptional cases as to constitute grievous oppression in themselves, that the State to which the individual belongs has the right to interfere in his behalf. (Hall, Int. Law, p. 291, sec. 87.)

In order to bring this claim within the jurisdiction of the Commission, it was, in our judgment, incumbent upon the claimant to show a sufficient excuse for not having made an appeal to the courts of Venezuela open to it, or a discrimination or denial of justice after such appeal had been made. As the claim stands it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract. It has not the necessary basis for an international reclamation. The case is very different from one in which the Government itself has violated a contract to which it is a party. In such a case the jurisdiction of the Commission under the terms of the protocol is beyond question. All that is decided here is that the Commission has no jurisdiction of the claim of the La Guaira Electric Light and Power Company in its present status, and the said claim, except as hereinafter stated, is hereby dismissed on that ground without prejudice to the rights of either the claimant company or the municipality concerned.

But it appears in evidence that on July 7, 1894, the National Government made a contract with Luis J. García "for himself and for the company which he may organize" by which the said García or his company agreed to provide electric light for the custom-house and other public buildings at La Guaira, the Government agreeing to pay to García or to the company for such service the sum of 2,000 bolivars monthly. The claimant herein alleges that there is

due from the National Government according to this contract for services rendered from July 1 to December 1, 1897, the sum of \$ 2,307.69. This indebtedness is not denied by the Government of Venezuela, and an award is there-fore made for said sum with interest thereon at 3 per cent per annum from December 1, 1897, to December 31, 1903, the anticipated date of the final award by this Commission.

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