

EVERTSZ CASE

PLUMLEY, *Umpire*:

This case came to the umpire for his consideration and decision upon the disagreement of the honorable commissioners.

Before entering upon the consideration of the case proper, it seems wise to look first at the contention of the learned agent for Venezuela, who objects that the testimony presented on the part of the claimant Government can not be accepted as proof of any fact because taken in foreign parts and *ex parte*. While testimony prepared in the absence of the other party, without giving them an opportunity to elucidate the facts by cross-examination, would not have the evidential force which it otherwise would have, and while testimony so taken without due and reasonable notice to the opposing party of the time and place of such taking might be refused admission into courts controlled by definitive or restrictive rules and statutes covering such matters, yet here it must be both received and considered, however adduced or obtained, in virtue of the specific provision in that regard found in article II of the Netherlands-Venezuelan protocol of February 28, 1903, which protocol is the perfect law of this tribunal. It is there stated:

* * * They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to any claim. * * *

The probative force of the testimony presented is for the tribunal to determine, but that it must be received and considered is settled in advance.

Having determined that the evidence must be considered and weighed, it is next to determine what facts are to be found therefrom. If the testimony introduced on behalf of the claimant were in any material part untrue, it concerns facts so lately within the knowledge of the respondent Government, and its opportunity for countervailing proof is apparently so perfect and immediate

¹ *Supra*, p. 713 and cases therein referred to.

² See Faber case, *supra*, p. 438 and note.

that the absence thereof is tantamount to the admission of the truth of the claimant's proof, and the umpire will deal with the case upon the assumption that the facts are as alleged.

It appears that the island of Orchila is a part of the territory of Colón, of the Republic of Venezuela; that in 1885 one Manuel Roblín assigned and transferred to Gen. Joaquín Crespo and Marco Julio Rivera the rights which he had previously acquired through a contract with the Venezuelan minister of fomento to burn lime and to raise cattle upon said island; that in August, 1890, Rivera ceded all his rights in the same to General Crespo, and, that on February 3, 1897, General Crespo sold outright to the claimant the cattle and dwelling house on said island and transferred to the claimant his usufructuary interest in said island for the term of fifteen years. These facts being admitted, it is not important to the determination of the questions here involved to study the especial terms of the original contract. It is enough for the umpire to know, what he finds to be true, that at the time of the happening of the events complained of the claimant was the lawful owner of the cattle and the boat in question and was in rightful and actual possession of the island.

Through the fortunes of war the respondent Government in January, 1902, found itself with certain military prisoners under its charge and within its control; through the fears or necessity of the respondent Government it had also in its control the persons of several of its citizens whom it deemed necessary to hold to insure its safety or welfare.

In accordance with what the umpire must assume was the wisdom of the respondent Government, it entered upon the deportation of these persons to the island of Orchila. As these persons were left on this island without any means of maintenance provided by the Government, it can not for a moment be assumed that the respondent Government was unaware of the fact that out of the cattle of the claimant they could obtain sustenance. Any other assumption is too contrary to the claims of humanity under the sway of christian civilization to be entertained. That their presence might be injurious otherwise to the rights of the claimant must have been in the mind of the respondent Government. There is no other rightful view of this act apparent to the umpire than that under the stress of its peculiar circumstances it decided to do as it did in full view of all the facts known and in full expectation of meeting and canceling all the obligations and consequences which might naturally flow from its acts.

As the case stands, the respondent Government must be held liable for the loss occasioned the claimant through the coast guard of the island of Orchila by the seizure and confiscation of the sloop of the claimant.

There is no suggestion by the learned agent for the respondent Government that the indemnity claimed is excessive, and since the claimant had no voice concerning the coming of these persons on to his estate and had no alternative in permitting his property to be taken for their maintenance, and since he was given no chance to decide concerning the taking and the selling of his boat, it is eminently just that he should name any price not extortionate for the losses incurred by him through the acts of the authorities of the respondent Government.

The umpire therefore finds for the claimant in the sum of \$1,200 in the gold coin of the United States of America, or its equivalent in silver at the rate of exchange at the time of payment, and judgment may be entered accordingly.