

WILLIAM E. BOWERMAN AND MESSRS. BURBERRY'S (LIMITED)
(GREAT BRITAIN) *v.* UNITED MEXICAN STATES

*(Decision No. 18, February 15, 1930, dissenting opinion by Mexican Commissioner,
February 12, 1930. Pages 141-146.)*

1. This case consists of two claims:

(1) A claim for £233 9s. 0d. put forward by Mr. Bowerman on behalf of Messrs. Burberry's (Limited) for the loss of a quantity of sample garments contained in a trunk which was despatched on the 6th December, 1919, by Mr. Bowerman from Tampico Station to Veracruz, and was destroyed *en route* by rebels who assaulted and burnt the train to Veracruz on the 10th December, 1919; and

(2) A claim by Mr. Bowerman himself for £16 11s. 0d., the value of personal effects of his own contained in the same trunk.

2. To these claims the Mexican Agency, apart from a formal denial of the facts, opposed two principal defences:

(1) That Mr. Bowerman was not the Agent of Messrs. Burberry's (Limited), and was not authorized to put forward the claim on their behalf, as provided by article 10 of the Rules of Procedure; and

(2) That even assuming that the trunk was destroyed by rebels, they were not forces within the meaning of subdivisions 1-4 of Article 3 of the Convention, and if they were to be included in subsection 5 of this Article, the Mexican authorities were not to blame either in the matter of repressing the act or of punishing the parties responsible therefore.

3. To these defences the British Agency replied that they were prepared to furnish proof that Mr. Bowerman was the authorized Agent of Messrs. Burberry's (Limited), and that the persons responsible for the loss were forces included in one of the first four paragraphs of Article 3. At the hearing, however, the British Agent admitted that he was not able to establish the latter contention, and that therefore the forces referred to must be included in subsection 5 of Article 3, but he contended that the Mexican Government was liable for the losses as the competent authorities, with full knowledge of the facts, had taken no measures whatever to suppress the acts complained of or to punish those responsible for the same.

4. In his rejoinder the Mexican Agent contended that it lay with the British Government to establish the omissions or faults on the part of the Mexican authorities, and that of this no evidence had been given, and at the hearing he raised an additional defence, namely, that the loss claimed had been incurred by the partnership of Burberry's, and that the claimants, Messrs. Burberry's (Ltd.), who had purchased the business of the firm of Burberry's on the 12th January, 1920, i.e., after the events forming the subject of the claim, had suffered no loss and no *locus standi* to make the claim.

5. With regard to the first defence of the Mexican Government, which was really in the nature of a motion to dismiss, the British Agent put in a copy of the agreement dated the 12th January, 1920, between the firm of Burberry's and the Company of Messrs. Burberry's (Limited) whereby the latter purchased the business of the former.

From this document it appears that, although the agreement was made on the 12th January, 1920, it was provided by article 2 that the purchase and sale should take effect as on and from the 3rd April, 1919, and by article 9 it was provided that the vendors (i.e., the firm of Burberry's) should be deemed as from the same date to have been carrying on the business of Agents for the Company (i.e., the present claimants), and that the Company should assume all the transactions and acts done by the vendors as from the same date of the 3rd April, 1919.

Documentary evidence was also provided that Mr. Bowerman was, in December 1919, the travelling representative of the firm of Burberry's, who, as shown above, were acting as Agents at that time for Messrs. Burberry's (Ltd.), and that he is now the representative of Messrs. Burberry's (Limited) and authorized to make the claim on their behalf.

The majority of the Commission is therefore of opinion that the conditions of article 10 of the Rules of Procedure have been complied with, and that the objection of the Mexican Government must be overruled.

6. The Commission is of opinion that it has been sufficiently proved by the affidavit of Mr. Bowerman, dated the 6th May, 1921, and by the telegram dated the 18th December, 1919, from Mr. S. A. Orozco, Superintendent of

Express, Puebla, to Francisco R. Nino, Agent at Veracruz for the Constitutionalist Express, that the trunk containing the articles which are the subject of this claim, was destroyed in an assault on the south mixed train at Kilo 278 on the 10th December, 1919, and that this assault was committed by insurrectionary forces or brigands referred to in Article 3, sub-section 5 of the Convention.

7. With regard to the responsibility of the Mexican Government for the acts of these forces or brigands, the majority of the Commission would refer to the principles laid down in the opinion of the President in the decisions of the claims of Messrs. Baker, Woodfin and Webb (Mexico City Bombardment claims) Paragraph 6. Reference is there made to the difficulty of imposing on the British Government the duty of proving a negative fact such as an omission on the part of the Mexican Government to take reasonable measures, and it is stated that whenever an event causing loss or damage is proved to have been brought to the knowledge of the Mexican authorities or is of such public notoriety that it must be assumed that they had knowledge of it, and it is not shown by the Mexican Agency that the authorities took any steps to suppress the acts or to punish those responsible for the same, the Commission is at liberty to assume that strong *prima facie* evidence exists of a fault on the part of the authorities.

In this case Mr. Bowerman, who left Mexico almost immediately after the loss, did not call the attention of the authorities to the matter at the time, but an assault on, and the burning of, a train on the line from Mexico City to Veracruz was an occurrence of such importance that it cannot be supposed that the authorities were unaware of it, and the Mexican Agent has not shown that they took any action whatever in the matter.

For these reasons the majority of the Commission considers that the authorities were blamable in the matter, and that the Mexican Government is responsible in virtue of Article 3, subsection 5 of the Convention.

8. The final defence of the Mexican Government consists in the argument that the loss was suffered by the firm of Burberry's and could not have been taken over by Messrs. Burberry's (Limited) under the agreement of the 12th January, 1920, as one of the assets of the firm, as the right to claim for the loss did not exist at that time, but only came into existence on the signing of the Convention on the 19th November, 1926.

The majority of the Commission is, however, of opinion that the right to claim was not created by the signing of the Convention, but existed as a marketable asset from the time when the loss occurred, even although it might subsequently turn out to be worthless. This is shown by the fact that such rights may be assigned or inherited as appears from the decisions of numerous International Commissions, and the same principle is implicit in article 10 (paragraphs (f) and (g)) of the Rules of Procedure, which show that the eventuality of an assignment of the right to claim after the time when it had its origin, i.e., the date of the loss, has been taken into consideration.

The majority of the Commission is therefore of opinion that the right to make this claim existed in the firm of Burberry's at the date of the loss and was included in the assets sold by them to Messrs. Burberry's (Limited) on the 12th January, 1920, and that the latter are now entitled to make the claim on their behalf.

9. During the discussions of the Commission, it has been pointed out that there is no clear evidence that the firm of Burberry's, who suffered the original loss, was a British partnership. The probability of this being the case seems so high that the Commission does not consider it necessary to delay its decision,

but holds that before its execution evidence satisfactory to the Commission must be furnished upon this point.

10. The only remaining question is that of damages. No evidence is forthcoming except the affidavit of Mr. Bowerman as to the contents of the trunk, and no other evidence could possibly now be produced, but he insured the trunk for \$2,000, which may be taken as some proof of its value.

The articles claimed by Mr. Bowerman as his own property appear to the Commission to be reasonable and the prices put upon them moderate, and they are prepared to accept this value of £16 11s. 0d.

With regard to the claim of Messrs. Burberry's (Limited) it must be remembered that these were sample garments and not really intended for sale, and, moreover, there is an item of £64 8s. 0d. for duty and agency fees, of which no proof has been given. The Commission is of opinion that £180 would be a fair sum to allow them for the loss sustained.

Decision

11. The United Mexican States shall, subject to the conditions set out in section 9, pay to the British Government on behalf of Messrs. Burberry's (Ltd.), the sum of £180, and on behalf of Mr. Bowerman, the sum of £16 11s. 0d.

Dissenting opinion of the Mexican Commissioner, in Claim No. 4, presented by His Britannic Majesty's Government on behalf of William Edgar Bowerman and Messrs. Burberry's (Limited)

1. The Mexican Commissioner does not agree with the opinion of his learned colleagues when deciding this case, upon the following points:

In considering Mr. Bowerman as *Attorney-in-fact* for Messrs. Burberry's (Limited), because only a commercial letter, signed by Murray Burberry, on behalf of Messrs. Burberry's (Limited), has been produced to prove it.

From said document it does not appear that the person signing it is authorized to execute said act on behalf of the company. It has not been shown either that the signer is actually the person whose name appears in the signature itself; that is, the letter in question is not authenticated. It is a private document that may or may not be authentic, but to which, at all events, objection was made by the opposing party.

The Mexican Commissioner has upheld this same principle respecting the probative value of private documents not acknowledged and presented before this Commission, to which objection was raised by the Mexican Commissioner in the case of Robert John Lynch, and, in order not to repeat the arguments therein invoked, he refers to them throughout: "Claim No. 32". Demurrer entered by the Mexican Agent.

2. The Mexican Commissioner does not agree either that any negligence on the part of the Mexican authorities in taking measures tending to suppress the act, or to punish those responsible for the same, have been proven, nor that the authorities were blamable in any other way.

The Mexican Commissioner has also upheld this principle in connexion with claims 2, 28, 40, 50, 55 and 58, referring to the bombardment of Mexico City, and it will therein be seen that the burden of proof, in the case specified in subdivision 5 of Article III of the Claims Convention, Mexico and the United States, always devolves on the claimant, and, therefore, the Mexican Government is not bound to prove its diligence, as maintained by his Honourable Colleagues.

3. The Mexican Commissioner is also of the opinion that this claim should be dismissed, because:

(a) The claimant company could not have obtained the right to claim, which is granted by the Convention only to those sustaining the damage or to their successors in interest by universal succession, but never to a third party through contract, if, when same was entered into, the predecessor in interest had not acquired the right to claim; and, in the present case it so happens that Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, who were originally the injured parties, transferred all their rights to Burberry's (Limited) in 1920, that is, prior to the date of the Convention between Mexico and Great Britain, which is the only title conferring the right to claim for the acts in question, when heirs are not concerned, i.e., the *partnership* signed by those gentlemen could not transfer to Burberry's (Limited), in 1920, what it only acquired in 1926, when the Convention between Mexico and Great Britain was signed.

(b) The Mexican Commissioner is also of opinion that, even supposing it were declared that the claimant company is the one entitled to claim, and not Messrs. Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, as maintained by the Mexican Commissioner, as it has not been shown that these last-mentioned gentlemen were British subjects, the claim would not be sustainable without proof of this last requirement, both because the Rules of Procedure (article X, Frac. (a)) so provide, and because this Commission has so laid it down in conformity with the jurisprudence generally established by the International Claims Commission in compliance with the principle that the claim must have the nationality of the claimant Government, from the beginning and until decided by the Commission.

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