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**RECUEIL DES SENTENCES
ARBITRALES**

Henry Case

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thereon for the time he was without fault of his own kept out of the use of that sum. (Sedgwick on Damages, sec. 316.)

As indicated above, this claim originated in the years 1879 and 1880. Mr. de Garmendía, however, made no demand upon the Venezuelan Government for its adjustment until the month of December, 1889. Can Venezuela be justly charged with interest during this long interval? I think not. The delay in presenting the claim is not satisfactorily explained, and the Government was not in default until it at least had proper notice that Mr. de Garmendía was asserting his right to compensation.

The following payments have been made upon this claim: On February 6, 1891, the sum of \$ 10,000, as evidenced by Mr. de Garmendía's receipt of that date; on or about May 9, 1896, the sum of \$ 1,000; and on or about January 15, 1898, the sum of \$ 1,600 gold, the last two payments having been made to the claimant herein, as evidenced by her letter to Senator McComas.

In view of the foregoing, allowance will be made: (1) For the unpaid balance of subsidy, the sum of \$ 22,933.31 (Venezuelan).

(2) For the ice house at La Guaria the sum of \$ 10,000 (Venezuelan).

The principal sum of \$ 32,923.31 (Venezuelan) will bear interest at the rate of 3 per cent per annum from December 2, 1889, deducting the amounts paid. On this basis the balance due on December 31, 1903, the anticipated date of the final award by this Commission, is the sum of \$ 30,538.19 (Venezuelan), equivalent to the sum of \$ 29,363.64 in gold coin of the United States.

HENY CASE

(By the Umpire:)

The deficiency of an instrument for want of recording so as to make it invalid as against third parties cannot be invoked by a trespasser or tortfeasor to nullify it, and damages will be allowed a party whose interest is evidenced by such an instrument.

Damages will not be allowed for the interruption of the ordinary course of business in the territory where war exists, since it is an inevitable result of a state of war.¹

BAINBRIDGE, *Commissioner* (claim referred to umpire):

Emerich Heny, the claimant herein, was born in Germany in 1846 and emigrated to the United States in 1867, where he was naturalized as a citizen thereof in the superior court of the city of New York on October 15, 1872. Two years later he removed to Venezuela where he has since resided. In 1883 he was married to Bertha Benitz, of Caracas, one of the children and heirs of Carlos Benitz, deceased. The Benitz heirs were the owners of an estate situated at Las Tejerías, near Caracas, said estate being known as "La Fundación." Upon his marriage Heny undertook the management and cultivation of the estate, and he also rented an adjoining plantation known as "El Palmar," which he cultivated on his own account.

In the months of September and October, 1892, a revolution called the "Legalista" was in progress in Venezuela, which ultimately proved successful, resulting in the overthrow of the then existing government. During this revolution the contending forces passed over "La Fundación" and destroyed the crops, seized the horses, cattle, and other property, and exacting from the owners of the estate loans of money and supplies for the troops, inflicting a loss, as claimed, aggregating 143,098 bolivars, equivalent to \$ 27,617.91 in United States gold.

¹ See Dix Case, *supra*, p. 119.

On March 7, 1893, Gen. Antonio Fernandez, who was "chief of the army of the center during the 'Legalista' revolution," signed a document setting forth "the pro rata supplies furnished the army of the revolution by the plantation called 'La Fundación,' situated at Las Tejerías, the property of the heirs of Señor C. Benitz whose general agent and representative is Señor E. Heny," enumerating said supplies and giving the total value thereof as 143,098 bolivars.

On March 15, 1893, Mr. Heny addressed to the minister of the treasury and public credit the following communication:

E. Heny, a merchant and resident of this city as representative and authorized agent of the heirs of Señor C. Benitz respectfully represents to you:

The said heirs are creditors of the Government for the sum of 143,098 bolivars for supplies furnished to the revolution in the district of Ricaurte, State of Miranda, and as shown by the annexed proofs on stamped paper certified by Gen. Antonio Fernandez, which I present to you by virtue of the Executive resolution of November 25th, last.

Caracas, March 15, 1893.

E. HENY

An offer was made by the Government to pay 40 per cent of the amount of the claim in the form of a special revolutionary note issue which, it is alleged, was worth only 15 per cent of its par value; so that the offer was in effect to pay 6 per cent of the amount claimed: The offer was rejected and the claim was withdrawn from the ministry of the treasury and public credit.

During the months of November and December, 1899, another revolution was going on in Venezuela, in which the military forces, both of the Government and the revolutionists, passed over "La Fundación," and cut down and seized for forage a large quantity of growing sugar cane. A battle occurred in the vicinity on November 29, 1899, and the sugar cane was in part destroyed by the passage and repassage of the troops. The total value of the sugar cane taken or destroyed in this manner and at this time was the sum of 12,000 bolivars.

The United States of America on behalf of Emeric Heny now presents to this Commission a claim, inclusive of the two claims designated above, amounting in the aggregate with interest to \$ 38,714.30.

Article 1 of the protocol constituting the Commission confers jurisdiction over —

"all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas."

It is evident from the record that Heny never became the real owner of "La Fundación." Subsequent to his marriage he assumed the management of the estate and became in all matters pertaining to it the general agent and representative of the Benitz heirs. It seems at that time the plantation was run down and out of repair. Heny says:

Upon my marriage I entered into a contract with the said heirs by which I undertook the management and cultivation of the said plantation on my own account and with my individual capital. From that time until 1892, when the events hereinafter related occurred, I invested, in addition to my labor and services, the sum of \$ 12,606.80 of my own money in improving and developing said plantation.

An instrument is put in evidence bearing date May 1, 1892, which reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolf Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than 21 years of age, and

sole heirs — conjointly with Bertha Benitz de Heny, wife of E. Heny — of Mr. Carlos Benitz, declare that, owing as we do Mr. E. Heny the sum of 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate “La Fundación,” to the amount of 26,833 pesos and 33 centesimals, for money supplied by said Heny for the improvement, maintenance, and cultivation of our sugar-cane estate called “La Fundación,” situate at Las Tejerías jurisdiction, of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs to our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41 of the first and second protocols, of the first quarter, under date of March 11, 1878, we hereby assign, cede, and transfer, in favor of the said Mr. E. Heny, all of the rights and actions that correspond to us or may to us correspond in future in said property “La Fundación,” as a guarantee to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we now make, formal cession in his favor of our credits in said estate. To the accomplishment of what is herein agreed to we bind our present and future property, in accordance with the law.

I, E. Heny, of over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of this agreement.

Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
Adolf BENITZ
Emilia BENITZ
Gustavo BENITZ
E. HENY

This contract between the Benitz heirs and Heny is neither a mortgage nor a sale of the estate. Somewhat deficient in form, the contract is in substance that known to the civil law as an antichresis, whereby a creditor acquires the possession and right of reaping the fruits and other revenues of real property given him in pledge as security for a debt. The creditor does not become the proprietor of the immovables pledged, but he may take the profits of the estate, crediting annually the same to the interest and the surplus to the principal of the debt, and being bound to keep the estate in repair and pay the taxes. It is analogous to the *vadium vivum* of the early English law and the Welsh mortgage, which has now gone entirely out of use in common-law countries. Under the civil law the antichresis gives the creditor, not the title to but a possessory interest in, the real property pledged. (4 Kent's Com., 138n; Livingston v. Story, 11 Pet., 351; Walton's Civil Law in Spanish-America, art. 1881.)

A pledge or pawn (*Pfandrecht*) in the modern Roman law, according to Bar's definition, is a real, or possessory, right to follow a thing in the hands of third parties for the satisfaction of a personal claim. * * *

A whole estate may be thus pledged and in such cases the pledge covers not only what is on the estate at the time, but what may afterwards be added to it, even though the parties at the time have no knowledge of such addition. (Wharton, Conflict of Laws, sec. 314, citing Savigny, VIII, sec. 366.)

By the common Roman law a person can hypothecate his entire estate as an aggregate — i. e., all things which he has in bonis at the particular time and those he will possess in future. (*Ibid.*, sec. 320.)

We have here the measure and extent of Heny's individual interest. Up to May 1, 1892, he had advanced the Benitz heirs out of his own capital the sum of 12,606.80 pesos. Clearly the purpose and intent of this contract was to secure Heny for the advances made and to be made by him on account of the estate. To provide this security, the heirs of Carlos Benitz pledged to Heny the estate

of "La Fundación" and its appurtenances. Thereafter Mr. Heny, though not the holder of the legal title to the estate, did have a real or possessory right therein, which entitled him to compensation against third parties who, by their wrongful acts, might impair his security, to the extent at least of his actual interest in the property.

Anyone having an interest in land is liable to suffer injury with respect to this right; and accordingly, if his right, however limited it be, is injured, he may recover compensation equal to his individual loss. The general rule may be said to be that the extent of the injury to the plaintiff's proprietary right, whatever it may be, furnishes the measure of damages. (Sedgwick on Damages, sec. 69.)

In the contract with the heirs, Mr. Heny agreed to pay the other debts of the estate; but there is in the record no allegation or proof that he did so. They can not be considered, therefore, as included in the advances made by Heny to the estate.

General Fernandez certifies that the pro rata supplies furnished to his army by the plantation called "La Fundación," amounted to 143,098 bolivars. These supplies consisted of crops, horses, cattle, lumber, merchandise, tools, and money. All of this property as appurtenances of the estate was in Heny's possession under the contract with the Benitz heirs, constituting part of his security for the 12,606.80 pesos invested by him in the property. It represented the "fruits and other revenues" of the estate which he had the right to apply to the satisfaction of his claim. The property taken or destroyed exceeded in value the amount of his lien. If the Government of Venezuela is liable for the taking and destruction of this property, Mr. Heny is entitled to an award for an amount equal to his individual loss. To this should be added, as involved in the claim, compensation for the proportionate loss sustained by his wife, Bertha Benitz Heny, one of the Benitz heirs, who is by virtue of her marriage a citizen of the United States.

The "Legalista" revolution of September, 1892, ultimately proved successful in establishing itself as the de facto Government of Venezuela. The same liability attaches for encroachment upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government.

The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. (*Williams v. Bruffy*, 96 U. S., 176.)

The liability of a government for encroachment upon neutral property has been clearly stated in *Shrigley v. Chile* decided by the United States and Chilean Commission of 1892, as follows:

Neutral property taken for the use or services of armies or functionaries thereunto authorized gives a right to the owner to demand compensation from the government exercising such authority.¹

This rule has been followed in the case of *Ford Dix* decided by this Commission².

The certificate of General Fernandez is sufficient evidence that the property taken from "La Fundación" was under the authorization of the military authorities for the use and services of the revolutionary army.

¹ Moore's Arbitrations, 3712.

² *Supra*, p. 119.

The learned counsel for Venezuela urges that the contract between Heny and the Benitz heirs is void because it consisted in the transfer of rights to real property for which record in the registry is an indispensable requisite in Venezuela. (Civil Code, art. 1888.) But this position is believed to be untenable. Certainly the contract was valid as between the parties, whether recorded or not. And whatever may be the requirement and effect of a registration law as affecting the rights of innocent third parties, it can have no possible bearing to excuse the acts of a mere trespasser or tortfeasor.

The foregoing renders unnecessary any discussion of the second claim. But it may be remarked that the evidence shows that at the time of its destruction the property lay in the track of actual war.

An award should be made in this case for the sum of \$ 10,085.40 (being the equivalent of 12,606.80 pesos) and the further sum of \$ 1,753.25 (the proportionate loss sustained by Bertha Benitz Heny) in all the sum of \$ 11,838.65 in United States gold, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government to December 31, 1903, the anticipated date of the final award by this Commission.

In so far as any claim or claims of the heirs of Carlos Benitz other than Bertha Benitz Heny are involved herein, they should be dismissed for want of jurisdiction, without prejudice to their prosecution in a proper forum.

PAÚL, *Commissioner* (claim referred to umpire):

The United States of America, on behalf of Emerich Heny, presents to this Commission a claim for the sum of \$ 38,714.30, interest inclusive.

E. Heny, claimant, was born in Germany in 1846, emigrated to the United States in 1867, was naturalized as an American citizen in 1872, and two years later moved to Venezuela, where he has since resided. In 1883 he married in Caracas Miss Bertha Benitz, daughter and heir of Carlos Benitz, then deceased. The heirs of the latter acquired by inheritance from their father a rural property situated in "Las Tejerías", and called "La Fundación." After his marriage Heny became the manager of this estate.

The claim is based upon the following grounds:

First. During the months of September and October 1892, the so-called "Legalista" revolution, which afterwards became the regular government, destroyed the plantations of the estate of "La Fundación," confiscated horses, cattle, and other valuable property, and obtained sums of money as loans, the total of these items amounting, as it is affirmed, to the sum of 143,098 bolivars. General Antonio Fernandez, on March 7, 1893, signed a document, in his character of "chief of the army of the center during the 'Legalista' revolution," declaring that "the total sum of the advances made to the revolutionary army by the estate called 'La Fundación,' property of Mr. Benitz's heirs and managed by Mr. E. Heny, amounted to the sum of 143,098 bolivars." This document appears to be legally executed by its signer.

Second. During the months of November and December 1899, forces of the "Revolución Restauradora," then already constituted as government, passed and repassed over the estate "La Fundación," cutting large quantities of sugar cane under cultivation for forage, a battle actually taking place upon the property causing damages to the said plantation. The amount claimed on this account is 12,000 bolivars.

Third. The honorable agent for the United States presents as proof that his claim belongs to the American citizen, Mr. E. Heny, a private document executed by the widow and children of Carlos Benitz, his heirs, dated in Caracas on May 1, 1892, in which it appears that there being due to Mr.

E. Heny the sum of 12,606.80 pesos venezolanos, and to other creditors of the same estate "La Fundación," the sum of \$ 26,833, for advances made by said Heny for the improvement, maintenance, and cultivation of the said plantation, they assigned and transferred to E. Heny all rights and interests that correspond or might thereafter correspond to them in the said estate "La Fundación" as a guaranty against any loss that Heny might sustain of the capital invested by him in the estate; Heny being also bound to respond for all other claims against the estate, which he undertook to pay in consideration of the transfer made to him of all the rights and interests in the said property.

Fourth. E. Heny addressed on March 15, 1893, the minister of finance and public credit, as follows:

E. Heny, merchant and resident of this city, on behalf and as representative of the heirs of Mr. C. Benitz, beg to state respectfully that said heirs are creditors of the Government for the sum of 143,098 bolivars for advances made to the revolution in the district Ricaurte, State of Miranda, as is proven by the annexed voucher consisting of 1 folio, signed by Gen. Antonio Fernandez, which I present to you in accordance with the Executive resolution of 28th of November last.

When this claim was presented to the board of public credit it was admitted in favor of Benitz heirs for one-half of the total amount claimed, and the Government offered in payment bonds of "Deuda de la Revolución," which the claimants declined to accept for reason of its depreciated price in the market. Subsequently E. Heny addressed the Department of State at Washington on May 9, 1901, presenting in his own name and for his account two claims which had arisen as the results of the acts committed by the revolutionary forces in the estate "La Fundación" in 1892 and 1899, and other damages suffered.

The petitioner in that document styles himself owner of the plantation "La Fundación."

The honorable Acting Secretary of State, David J. Hill, in his note of April 29, 1901, addressed to Mr. Heny's attorney, Charles A. Hansmann, in answer to the claim presented by said attorney against the Government of Venezuela for damages caused by the destruction, occupation, and confiscation of Heny's property by military forces of the Venezuelan Government and by revolutionary troops, determined and specified that Mr. Heny should produce the contract made with Benitz heirs by virtue of which he was managing the plantation, or any other proof that the property taken and destroyed belonged to him. To comply with this requirement the claimant has presented to the Commission the private agreement executed on May 1, 1892, by the widow and children of Mr. Benitz, deceased.

The honorable agent for the Venezuelan Government objects to the efficacy of this contract or private document as establishing the proof of ownership in favor of Heny, of property rights in the estate "La Fundación" as to third parties, inasmuch as said document lacks official certification as to the exactness of the date and has not been authenticated and recorded in the public register's office of the district where the estate is situated, in conformity with the law. In proof of his assertion the honorable agent has produced two deeds marked "A" and "B;" the first of which, dated March 8, 1878, refers to the purchase of the estate "La Fundación" by Mr. Carlos Benitz, and the second, dated November 28, 1898, in which it appears that Mr. E. Heny, acting as attorney for Juan Remsted, on July 2, 1896, by deed duly recorded in the city of La Victoria in the public register's office, bought, for said Remsted, from the widow and children of Mr. Benitz, the plantation called "La Fundación" for the sum of 80,000 bolivars, with an agreement of resale for the same amount to Messrs. Benitz within a stipulated term. It also appears from the last-

mentioned deed that the Benitz heirs, after having availed themselves of the privilege of repurchasing the estate "La Fundación" by paying to Remsted the sum of 80,000 bolivars, and thus having reacquired the ownership of said estate, the same heirs of Benitz, and among them Bertha Benitz, acting under the authorization of her husband, E. Heny, made a new sale to Mrs. Altagracia H. de Ortega Martinez, of the same plantation, free of all incumbrances for the sum of 36,000 bolivars, reserving to them the privilege of repurchasing within the term of one year, and Messrs. Benitz remaining as tenants of the plantation. This deed, signed by E. Heny, as attorney for J. Remsted, is authenticated before the mercantile court of first instance of the Federal district on the 28th of November, 1898, and was recorded in the public register's office of the district Ricaurte, on December 2 of the same year.

It appears from the foregoing that the question of the rights that Mr. Heny alleges to have acquired in the real property, "La Fundación," prior to the dates on which the acts committed by the Government and revolutionary forces took place, and which rights he claims as arising from the private contract between himself and Benitz heirs, is in itself a question which treats of the rights acquired in a real property situated within the territory of the Republic. All questions relating to real property are necessarily governed by the local law of the place where the property is situated, *lex loci rei sitæ*:

As everything relating to the tenure, title, and transfer of real property (immobilia) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription the forms of action and pleadings, must necessarily be governed by the same law.

Thus real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State or the private dispositions of its citizens may provide to the contrary. That State where this real property is situated can not suffer its own laws in this respect to be changed by these dispositions without great confusion and prejudice to its own interest. Hence it follows as a general rule that the law of the place where real property is situated governs as the tenure, title, and descent of such property. (Lawrence's *Wheaton's Elements of International Law*, pp. 196, 116, Part II, Chap. II.)

The contract made between the heirs of Benitz and Heny, in May 1892, is not a contract of sale by which the dominion of the real estate is transferred in conformity with the laws that govern such contracts, because in order to be so considered required the explicit statement that the real estate was given in sale for a stated price; and furthermore, the local law required that in order to be valid as to third parties the document must be recorded at the register's office of the district where the said real estate is situated. Neither is it a mortgage contract, because, although the word guarantee is employed, it lacked one of the two essential legal conditions that characterize the mortgage, and that is the publicity which is obtained according to the law by employing the essential formality of registering in the proper office of the place where the real estate is situated. From the terms of the said contract the only inference which might be drawn is that it was the intention of the parties to celebrate an antichresis, giving to the creditor the right of reaping the fruits of the estate delivered to him, with the obligation of annually crediting the value thereof against the interest, if any was due to him, and any remaining balance against the principal standing to his credit; but besides the terms, which characterize a contract of antichresis, being imperfectly defined in the said contract, because there is no stipulation that the creditor acquired the right to reap the fruits, with the obligation of crediting the value thereof against the interest and prin-

cipal due him, in order that this contract of antichresis might be valid against third parties, it was necessary that the formality of registry should likewise be complied with as being essential for its effectiveness.

The said document, such as it is, only established a subsidiary guaranty between the debtor and the creditor, which did not cancel Heny's credit against the Benitz heirs, neither transferred to Heny any actual right in the real estate belonging to said Benitz heirs, because that transfer to make it effective against third parties would have had to be made public and made in accordance with the law governing the tenure, the title, and the transfer of the real property in the place of its situation. The law in such cases, demands as an essential requisite for the transfer of rights in real estate, to produce effect against third parties, the recording thereof in the office of the public register in the respective district.

The Benitz heirs, owners of the estate "La Fundación," in 1892, became direct creditors of the Government of Venezuela, by reason of the acts damaging said estate and committed by the forces of the "Revolución Legalista," and the said heirs, as regards their relations to the Venezuelan Government, being as they were, the only owners of the estate called "La Fundación" as per public title, duly recorded, and it was in virtue of this ownership only that General Fernandez executed to the Benitz heirs an acknowledgment of their credit against the Government of Venezuela, and it was for the same reason that E. Heny, presented to the minister of finances and public credit, as attorney of the Benitz heirs, and on behalf of said heirs, owners of the estate "La Fundación" against the said Government, the claim for the amount of this credit.

This opinion is confirmed by the remarkable circumstance that four years after the celebration of the private agreement between the Benitz heirs and Heny, the Benitz heirs appear on record as signing a deed of sale of the estate "La Fundación" in favor of Mr. Juan Remsted, and the same Mr. Heny accepted the said sale as attorney for Remsted without making any reservation as to the rights which he had acquired in the income and value of the estate, as security for the payment of his personal credit against the Benitz heirs. This acceptance of the transfer of the real estate to a third party given by Heny implies one of two conclusions: Either Mr. Heny had been paid by the Benitz heirs on or before that date the amount personally due to him or by such act he released his rights against the estate "La Fundación" which the Benitz heirs had accorded him as a guaranty for any loss that he might incur because of his prior investments in the said estate. In either case all legal rights or privileges established by the private contract of 1892, in reference to the estate "La Fundación," even considering said contract as antichresis, became null and void, and without effect whatsoever.

It appearing proven by the public deed presented by the honorable agent of Venezuela, dated November 28, 1898, that the estate "La Fundación" was again sold to Mrs. A. H. de Ortega Martinez, by the same heirs of Benitz as owners, this evidence destroys Heny's pretension to the payment of the damages caused to the real estate "La Fundación" in 1899, which constituted the second part of his claim, because on that date the said estate did not belong to him.

The circumstance which is argued that the estate "La Fundación" was cultivated and developed with Mr. Heny's money does not establish any juridical bonds between him and the Venezuelan Government, as relating to the damages caused to the property by Government or revolutionary troops, as such damages can only be claimed of the Venezuelan Government by such parties who by duly registered and authenticated titles appear as the legitimate owners of the damaged property. To admit as competent for recognition as a claimant before this Commission, anyone who may advance money for the

cultivation and development of estates or property belonging to Venezuelan citizens, would be equivalent to bringing before this Commission all foreigners who make a business of advancing money to the owners of real property either by private contracts or by virtue of contracts in which a mortgage on the property so benefited is given, a common practice between the foreign merchants established in this country and Venezuelan proprietors and agriculturists.

In consequence, my opinion is that this claim should be disallowed.

BARGE, *Umpire* :

A difference of opinion arising between the Commissioners for the United States of America and the United States of Venezuela this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol, documents, evidence, and arguments, and likewise all other communications made by the two parties, and having carefully and impartially examined the same, has arrived at the decision embodied in the present award.

As to the first claim of the claimant:

Whereas it is clearly proven that in the months of September and October 1892, during the so-called "Legalista" revolution, at the hacienda "La Fundación," the plantations of that estate were partially destroyed; horses, cattle, and other valuable property confiscated, and sums of money obtained as loans by the troops of the revolutionary party for the use and service of the revolutionary army under the authorization of the military chiefs;

And whereas the revolution proved ultimately successful in establishing itself as the de facto Government so that the liability of the Venezuelan Government for these acts can not be denied;

And whereas Emerich Heny, who has proved himself a citizen of the United States of America, claims that the sum owed by the Venezuelan Government as restitution for the above-mentioned acts is due to him, and as proof of his rights in the above-mentioned damages, confiscated properties and loaned moneys produces an instrument bearing date of May 1, 1892, and containing a contract between himself and the heirs of Carlos Benitz, who, according to the evidence produced before the Commission, were on the date of the above-stated facts the owners of the said estate "La Fundación."

Whereas, therefore, it has to be considered to what extent this contract gives the claimant any right to the claim in question.

Whereas this contract reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolfe Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than twenty-one years of age, and sole heirs, conjointly with Bertha Benitz de Heny, wife of E. Heny, of Mr. Carlos Benitz; declare that owing as we do to Mr. E. Heny, the sum of \$ 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate "La Fundación," to the amount of 26,833 pesos and 33 centesimals, for money supplied by E. Heny, for the improvement, maintenance, and cultivation of our sugar-cane estate called "La Fundación," situated at Las Tajerías, jurisdiction of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs of our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41, of the first and second protocols, of the first quarter, under date of March 11, 1878 (1878), we hereby assign, cede, and transfer in favor of the said Mr. E. Heny, all the rights and actions that correspond to us or may to us correspond in future in said property, "La Fundación," as a guaranty to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we do now make, formal cession in his favor of our credits in said estate; to the accomplish-

ment of what is herein agreed to, we bind our present and future property, in accordance with the law.

E. Heny, over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of the agreement.
Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
(And others in interest)

And whereas it is clear that in this contract, stating that they owe the claimant Heny the sum of 12,606 pesos sencillos and 80 centesimals, as invested by him in the estate "La Fundación," and that they owe besides 26,833 pesos and 33 centesimals to sundry others whom they call "creditors of our estate La Fundación," thereby indicating that this sum as well was invested in said estate, the heirs of Carlos Benitz wanted to give a guaranty to Heny for any capital invested by him in that estate and at the same time wished to be freed from the other debts incurred by said estate, and therefore transferred to him, Heny, their credits in that estate, whilst he agreed to answer for all the debts;

Whereas, certainly this contract is neither a mortgage nor a sale of the estate and, lacking the characteristic stipulations of an antichresis, can not properly be counted to that species of contracts, to which, in substance, it seems to bear most resemblance;

Whereas, however — whatever may be the technical deficiencies of the instrument — whilst interpreting contracts upon a basis of absolute equity, what the parties clearly intended to do must primarily be considered;

And whereas, it was clearly the intention of parties that no one but the claimant should have a right to expropriate anything belonging to this estate, nor to profit by the revenues, at all events so long as his interest in the estate should last, which interest the heirs wished to guarantee; and whereas this interest existed as well in the sum invested by him in the estate as in the debts he assumed and which he might pay out of the estate, the credits and debits of which were equally transferred to him by the owners; whereas, therefore, according to this contract at the moment the facts which obliged the Venezuelan Government to restitution took place, the only person who directly suffered the "detrimentum" that had to be repaired was the claimant E. Heny;

Whereas, it being true that according to the principles of law generally adopted by all nations and also by the civil law of Venezuela; contracts of this kind only obtain their value against third parties by being made public in accordance with the local law — in this claim before the Commission, bound by the Protocol, to decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation, this principle can not be an objection, and even when made this objection may be disregarded without impairing the great legal maxim, locus regit actum, as equity demands, that he should be indemnified who directly suffered the losses, and it not being the question here who owned the estate "La Fundación," but who had the free disposition over and the benefit and loss of the values for which restitution must be made, and who, therefore, in equity, owns the claim for that restitution against the Venezuelan Government.

Whereas then, it being stated that the American citizen E. Heny owns a claim against the Government of the United States of Venezuela for the partial destruction of the plantations, the confiscation of horses, cattle, and other valuables, and the imposing of loans upon the estate "La Fundación" during the "Legalista" revolution in 1892, it now remains to state, what sum may in equity be claimed on this ground;

And whereas the claimant, to prove the correctness of the sum, produces an official certificate of Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the "Legalista" revolution, which certificate was thereafter recognized by said General Fernandez, and the correctness of its contents affirmed before the court of the first instance in civil and commercial matters of the Federal district, by him as well as by two other sworn witnesses; and whereas this certificate reads as follows:

CIVIL AND MILITARY HEADQUARTERS OF THE STATE OF ZULIA,
Maracaibo, March 7, 1893.

Citizen Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the Legalista revolution certifies: That the statement at the foot of this document sets forth the pro rata supplies furnished the army of the revolution by the plantation called "La Fundación," situated at Las Tejerías, the property of the heirs of Señor Carlos Benitz, whose general agent and representative is Señor E. Heny.

Twenty-four tablons¹ of sugar cane, at 2,000 bolivars each, 48,000 bolivars; 12 tablons malojo, at 800 bolivars, 9,600 bolivars; 4 saddle horses, at 800 bolivars each, 3,200 bolivars; 1 tablon maize, at 600 bolivars; 2 cart horses, at 800 bolivars each, 1,600 bolivars; 1 breeding mare, 400 bolivars; 1 mare with her colt, 480 bolivars; 11 yoke of oxen, 8,800 bolivars; 1 single ox, 400 bolivars; lumber prepared for building and other uses, 1,200 bolivars; 3 kilometers of fences with their posts destroyed, 1,600 bolivars; in money, forced loans of 1,458 bolivars; and from the business house at "Las Tejerías," 33 cattle, each 120 bolivars, 3,960 bolivars; merchandise and tools from same store, 8,000 bolivars; for loss of time in consequence of the war, 48,000 bolivars; chief steward paid for Antonio Fernandez at the rate of 600 bolivars for eight months, 4,800 bolivars; sum total, 92,498 bolivars.

And whereas by this certificate evidence is given of the facts therein mentioned;

And whereas the estimation of the therein-mentioned values has to be recognized as just, being the authentic estimate of the authority that expropriated said values for the benefit of the army;

And whereas it is thus stated that claimant furnished to the army:

	<i>Bolivars</i>
24 tablons of sugar cane, at 2,000 bolivars each	48,000
12 tablons malojo, at 800 bolivars each	9,600
1 tablon maize	600
4 saddle horses, at 800 bolivars each	3,200
2 cart horses, at 800 bolivars each	1,600
1 breeding mare	400
1 mare with her colt	480
11 yoke of oxen	8,800
1 single ox	400
Lumber prepared for building and other uses	1,200
In money, forced loan	1,458
And from the business house in Las Tejerías on the estate "La Fundación":	
33 cattle, each 120 bolivars	3,960
Merchandise and tools from same store	8,000
Chief steward paid for Antonio Fernandez, at the rate of 600 bolivars per month for eight months	4,800
Total	92,498

This sum has to be paid as a restitution to the claimant by the Venezuelan Government, and to it should be added the value of 3 kilometers of fences and posts destroyed by the military authority and estimated by that authority at 1,600 bolivars, making altogether 94,098 bolivars;

¹ One tablon = about 10,000 square varas.

Whereas the claimant further claims 48,000 bolivars for loss of time in consequence of the war, which sum is also mentioned in the above-cited certificate;

And whereas this certificate, although being evidence of the facts therein stated, which were the cause of the debits incurred by the Government, and containing the estimate by the proper authorities of the values claimant was deprived of, it is, however, not in itself a *causa*, and does not create a debit where the *causa* is wanting;

And whereas the interruption of the ordinary course of business is an invariable and inevitable result of a state of war under which all inhabitants, whether citizens or aliens, have to suffer; and whereas losses incurred by reason of such interruption are not subject to compensation by the Government within whose territory the war exists;

Whereas, therefore, loss of time in consequence of the war, is not a loss whereupon compensation can be equitably demanded; this part of the claim has to be disallowed.

In view of the foregoing an allowance is made in this claim for the sum of 94,098 bolivars, or, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government, to December 31, 1903, the anticipated date of the final award by this Commission.

And as to the second claim:

Whereas claimant claims 12,000 bolivars for 4½ tablons of growing sugar cane, confiscated and set aside for the food of the soldiers and taken and destroyed on the estate "La Fundación" during the months of November and December 1899; and whereas the Venezuelan Government produced a deed authenticated before the mercantile court of first instance of the Federal district, on the 28th of November, 1898, and recorded in the public register's office of the district of Ricaurte, on December 2 of the same year; and whereas in this instrument it is stated that on the 25th of November, 1898, the heirs of Carlos Benitz and among them Bertha Benitz, acting under the authorization of her husband E. Heny, made a sale to Mrs. Altagracia H. de Ortega Martinez, of the same estate, "La Fundación," free of all incumbrances, for the sum of 36,000 bolivars, with an agreement of resale within the term of one year.

And whereas it is proven thereby that on the 28th of November, 1898, the claimant Heny, without reserve as to any of his own rights authorized his wife, Bertha Benitz, to partake in a sale of the said estate free of all incumbrances and that this sale was effected; whereas, therefore, on that date Heny lost or abandoned whatever rights he might have had in this estate or its appurtenances and revenues;

And whereas no proof is given that the claimant acquired or recovered any right in the estate or its appurtenances and revenues later than this 28th of November, 1898; whereas, therefore, it is not proven that the claims against the Government of Venezuela for restitution for losses suffered on the estate "La Fundación" during the months of November and December 1899, is owned by the claimant, this claim ought to be disregarded.

BOULTON, BLISS & DALLETT CASE

Equitable demands may be received under the protocol as "claims."

An award will be made in favor of parties who under an implied contract have rendered services to the Government.

PAÚL, *Commissioner* (for the Commission):

The United States presents the claim of Boulton, Bliss & Dallett, against the Government of Venezuela, for the sum of 257,027.02 bolivars, for services rendered.