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Interest on Diplomatic debt Case (on merits)

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It must also be regarded as of importance that all of the other commissions sitting in Caracas at this time have failed to allow interest on awards — some, probably, because it was not asked for; in others, because it was directly denied as being beyond the power given by protocols. This not only adds the weight of the judgments of the many eminent men who have thus passed upon this question, but throws into the discussion of the question certain features of inequity in case it should be allowed to one only of the claimant Governments. Especially is there force to this thought in connection with Germany and Italy, who, with Great Britain, formed the blockading powers and claim preferential treatment out of the common source provided for the liquidation of all claims. They are to be paid in parts proportionate to the amount of their respective awards, and it is not equitable that Great Britain should have profit in a 5 per cent dividend on awards for six years' delay in payment while Germany and Italy are delayed equally, but without recompense, and the date of the final payment to them be deferred still further because of the increased burden placed upon the common fund by reason of such interest. If the protocol plainly required such an inequity to exist between these two parties the umpire would have no alternative but to make the allowance. These deductions bear largely upon the question of the probable intent when the result of a certain line of action is being considered, and it prevents a judgment, where in the discretion of the umpire it might be allowed if it would produce equity, when in fact it would produce inequity.

As the result of all this consideration the umpire is not satisfied that he has any warrant or authority under the protocol to favorably entertain the motion of the learned British agent in the matter of interest on awards until payment, and he therefore denies the motion.

INTEREST ON DIPLOMATIC DEBT CASE

Venezuela held liable for interest at legal rate on ascertained liquidated amounts acknowledged by her to be due.

PLUMLEY, *Umpire*:

The honorable Commissioners having failed to agree upon either class of claims presented by the memorial in this case, it comes to the umpire for his determination.

The memorial calls for simple interest at the rate of 6 per cent on two classes of claims.

Class 1 is claims agreed to by the Venezuelan minister for foreign affairs and Her Majesty's representative at Caracas, Mr. Edwards, in 1865.

Class 2 is awards made by the Mixed Commission constituted by the Anglo-Venezuelan claims convention of the 21st September, 1868.

I

The British Government has always claimed of the Venezuelan Government interest at the rate of 6 per cent as an integral part of the claims under class 1; but the umpire fails to find that the respondent Government ever formally consented to the payment of any interest until the decree of May 23, 1876, when, as the umpire understands it from the information in hand, 3 per cent bonds were proposed by Venezuela in payment of these agreed claims and also in payment of the awards made by said Mixed Commission. This proposition the

British Government declined to accept, but always insisted that interest at 6 per cent was their due on both classes of claims.

In the opinion of the umpire the claim for interest can not stand upon a contract either expressed or implied, because he fails to find such a contract, and, if allowed, it must be as damages for undue and unreasonable delay in payment, and for default of payment, in the manner and by the means proposed for liquidation when the claims of this class were merged into a stated sum by agreement between the two nations.

The umpire finds that there was an agreement to appropriate for the payment of this stated sum "the proportional sum appertaining to the British claims of the 10 per cent of import duties assigned for that purpose by the law of estimates of public expenditure." The sum thus stated and agreed upon between the two nations was \$ 247,935.60. In the year 1869, \$ 12,229.85 was paid presumably in accordance with this arrangement as to the share of Great Britain in the percentage of customs duties set apart for debts of this character.

By a decree of the 23rd of May, 1876, this stated sum of \$ 247,935.60 was approved by the Venezuelan Congress; but nothing more was paid until 1885, when \$ 2,784.75 was paid, and thereafter each year, by successive installments, the debt was gradually reduced, and in 1897 it was wholly extinguished.

From the expressions used in the correspondence between the two Governments the umpire finds that it was understood by both of the high contracting parties that this debt was to be liquidated within five years from the date of said agreement; and he fails to find any agreement between the two Governments, or any consent on the part of the British Government, to any further extension of the time of payment. Whether the means proposed by which payment was to be made would have liquidated the entire sum in five years the umpire has no means of knowing, but that such was the expectation of the Venezuelan Government is clearly manifest from the language of its minister of foreign affairs when he urges for the consideration of the British minister at Caracas that interest ought not to be required on the sum then agreed upon because, among other reasons, France had accepted a settlement of her claims in which settlement there was an agreed delay of five years before final payment and no interest was exacted. There could be no significance to this argument on the part of the honorable minister for foreign affairs if it were not in the mind of both the representatives of their respective Governments that this particular debt was to be liquidated in less than five years. In the absence of any specific understanding a reasonable time for payment would be the implication of law; and whether default is found in failure to liquidate within the five years as the agreed time, or in the failure to pay any considerable part of said sum within twenty years from the settlement, it makes but little difference, for it is impossible not to find that this long delay has far exceeded the contemplation of either of the high contracting parties. Placing the ground for interest on the unreasonably long delay in payment, it becomes necessary to fix the time at which interest for that cause should begin. It is the belief of the umpire that the respondent Government will not regard it a harsh conclusion to set the time for payment on the same day when they first recognized their duty to pay and paid over their first installment on this account. This was in the year 1869.

As has already been said, allowance for interest on the claim must be for the default of the respondent Government and for the undue detention of the sum agreed to be paid to the claimant Government by the respondent Government. Under Venezuelan law, until 1873, contractual indebtedness bore interest at the rate of 6 per cent after default. Neither Government can complain if, until 1873, that rate is adopted here, the first charge for interest beginning at the close of 1869. The amount for the five years 1869 to 1873, both inclusive, is

\$ 70,711.70. Some time in the year 1873 the statutory rate under such circumstances became 3 per cent; and there is no hardship to the claimant Government that, in the matter of a pure money indebtedness, it should stand on a par with the claimants whom they then represented. If these claimants had recovered their indebtedness before Venezuelan tribunals they would have been limited to 3 per cent. Venezuelans are so limited.

(See 16 American and English Encyclopædia of Law, p. 1052, subhead 3. Rate as damages. *a.* General rule; legal rate: "When there is no contract for interest, and interest is given as damages strictly, the general rule is that the legal rate is recoverable." See note 3 and cases there assembled.)

The legal rate changing, the rate to be used must be changed to conform. (Ib. 1062. *c.* Interest recoverable as damages. See note 5 and cases there cited.)

The place where the contract is to be performed — i. e., the place where the money is to be paid — governs the interest to be allowed. (Ib. 1088, subdivision *b.* See note 5 and cases there cited.)

When interest is given as damages the law of the place of performance governs. (Ib. 1090, subhead 2. Interest as damages. See note 2 and cases there cited.)

Aliens should be content with the commercial laws of the country in which they are located by choice, for business or other reasons. If they should be content, so should the government of whom these aliens are subjects. Venezuela can not be asked to offer a prize or pay a premium for alien claimants through their governments.

It consorts with the umpire's idea of justice and equity to permit the legal rate in Venezuela to determine the rate recoverable before this tribunal in cases of this character. It follows, then, that beginning with 1874 and continuing until 1897, both inclusive, the allowance for interest is placed at the rate of 3 per cent, or one-half of the sum claimed. This amounts to \$ 120,850.77. Add to this the sum allowed from 1869 to 1873, inclusive, \$ 70,711.70, and the whole amount under this class is \$ 191,562.47.

Aside from the reasons which have thus far been stated there is the same or greater reason in justice and equity for allowing interest on this claim that there has been to allow it in the other cases before this tribunal. The allowance of interest for damages to property, or for contractual claims, considered by mixed commissions has been for a long time a well-settled practice with a large degree of uniformity. So far as the umpire is aware it has been the unquestioned action of all the mixed commissions sitting in Caracas in 1903. It has been the settled practice of this tribunal, where justice and equity seemed to require it. The claim now being considered is in effect an account stated between the two Governments and has a much stronger ground for allowance of interest after default than a claim not agreed to.

The one serious ground of weakness in this claim is that there has been an entire liquidation of the principal sum, or capital, and it is a rule of practically universal application in the courts that where interest is incidental only, as damages for a breach of the contract, payment of the principal *ipso facto* operates to defeat a demand for interest.

As this same question appears in the same way and must be given the same effect in the claim for interest on awards, discussion and determination thereof will be reserved until after consideration has been given to the other points in the second class of claims.

II

It was especially provided in the protocol constituting the Mixed Commission of 1868-69 that the awards were made to receive "full effect without objection or delay." But there was also a stipulation in the protocol that the awards of

the said Commission, together with the convention itself, should be submitted for approval to the Venezuelan legislature. Because of the revolutionary condition of Venezuela for the next three years this provision could not be carried out until 1873, when a decree of date the 14th of June approved both the convention and the awards.

It is certainly a matter of serious doubt whether, until such decree, the awards made by the Mixed Commission could be regarded as settled and fixed beyond all question. As has been stated, this action was taken by the Venezuelan Congress as soon as it could be done, in consideration of the unfortunate condition of the country during the period intervening. It is the opinion of the umpire that in all these matters up to and including the ratification of the convention and its awards the Venezuelan Government acted in the utmost good faith, without purposed or willfull delay and without actual default. Had the Venezuelan Government then provided for an early payment of the principal sum, in the opinion of the umpire, there could be nothing claimed of Venezuela by the British Government under this part of the memorial; but this was not done.

The conditions here are decidedly different from those attending the protocol of February 13, 1903, and the awards made thereunder. In the latter case the signatory parties agreed in the protocol (*a*) to constitute a mixed commission and settle the several amounts due; (*b*) to provide a specific way for payment out of a certain definite class of Venezuelan income necessarily entailing by its terms a delay of some years before final liquidation. All this is a part of the protocol creating our Mixed Commission.

In the present case now under consideration the protocol creating the Mixed Commission required the ratification above referred to, but provided in effect that when the awards were made and the ratification had there should be given full effect to said awards "without objection or delay." No objections were made. In fact, in everything, the conduct of the Venezuelan Government was so scrupulously regardful of the terms of the convention that it is forced upon the umpire, and must be apparent to all who carefully consider the question, that failure to meet the award with ready payment was solely because of their straitened financial condition resulting from the drain upon their finances through the revolutions which had directly preceded. The umpire understands it to be an admitted fact that Great Britain never acceded to any delay and never consented to any installment method of payment except through allowance of interest to compensate therefor. On September 4, 1873, the Venezuelan Government was informed by the British representative at Caracas that the sums awarded the British claimants under the convention of 1868 had been apportioned among them with interest from the date of the awards at the rate of 6 per cent per annum. To this the Venezuelan Government demurred; but it has always been insisted upon on the part of Great Britain, and the Venezuelan Government is presented with no new claim in the memorial now before this tribunal. The whole amount awarded was \$ 312,586.95. The first payment was made in 1873 and there were annual installments thereafter, omitting the year 1879, until 1885, when the last installment was paid and the principal or capital sum was extinguished.

It is the belief of the umpire that this delay constituted a default on the part of the Venezuelan Government; that it was not in accordance with the spirit and purview of the protocol to thus defer the final liquidation of the awards.

This default was not from choice or purpose from necessity. Nevertheless among individuals similarly situated if one should from necessity withhold the money of another he is on all fours with the one who withholds from preference. In either case he is held to pay the creditor a reasonable sum for the damages done him through such detention.

As stated under Claim I, there is projected here, as there, the fact that the claimant Government has received in full the principal sum.

The law as laid down in England and the United States in the courts of both countries is well settled in cases of this character. Where interest is not a matter of contract it is not regarded as an integral part of the debt but as a mere incident thereof. In consequence, if the original debt is paid the incident thereof ceases. There is no authority of repute known to the umpire which sustains a contrary contention. The maxim, "Equity follows the law" is also in the mind of the umpire. This maxim would be controlling if in international matters it should apply under a protocol containing such provisions as are found in the one by which this tribunal exists. If it is to control, then the claims under this memorial must be disallowed.

That when the principal thing ceases to exist, things merely incidental thereto, or incidents thereof, cease also, is a logical deduction and may well control in the courts and yet not be controlling between Governments before an international tribunal.

It seems to the umpire that the claimant Government acted with wisdom and with proper regard for the dignity and quality of the respondent Government when it received the payments made as payments on the principal in accordance with the wishes of the respondent Government; and, while presently pressing the claim for interest upon Venezuela, awaited the action of that country in response to the demand instead of applying the payments, as made, first to interest and the remainder, if any, to the principal, as would have been the due course between individuals. The umpire is aware that it has been held by the courts that to accept the principal and yet claim the interest as still due does not affect the rule first stated because the act of receiving is not compulsory but voluntary on the part of the payee.

To the mind of the umpire, however, these rules of the courts concerning litigants and litigation before them are not necessarily correct or safe guides for international tribunals, or for the conduct of nations in their intercourse with one another. The rule which suggests that nations do not ordinarily pay interest to a claimant is based upon the ground that it can not be assumed that a nation is not ready to pay as soon as the debt is determined and the responsibility fixed. Here it is evident that Venezuela was financially unable to make immediate response to acknowledged obligations. It appears to the umpire that the conduct of the claimant Government in continuing to press its demands for interest, but at the same time consenting to receive payment of the principal sum, is to be approved as properly regardful of the dignity of the debtor nation; and that in relying upon presenting her claim for interest as an independent claim she was, in effect, placing both Governments on a level, which was wise and discreet. The umpire, looking to the protocol for guidance, finds ample warrant for an award which produces justice and equity, clearly and indisputably, although it may be at variance with the strict provisions and holdings of the courts. This tribunal is to decide "all claims upon a basis of absolute equity without regard to objections of a technical nature * * * ." In the opinion of the umpire, which he rendered in the Aroa mines supplementary claims on page 67¹ of said opinion, he expresses his interpretation of absolute equity to be "equity unrestrained by any artificial rules in its application to the given case." On page 5² of this same opinion there are quoted his accepted definitions of "technical" as used in the protocol.

¹ *Supra*, p. 444.

² *Supra*, p. 410.

With this mandatory order from both Governments to do justice and equity regardless of objections of a technical nature, the duty of the umpire in this case is made plain. He must ascertain "that which is equally right or just to all concerned" — that which is "equal or impartial justice" (Century Dictionary; title, Equity.) — and make an award which is "fairness in the adjustment of conflicting interests — the application of the dictates of good conscience to the settlement of this controversy." (Ibid.)

There remains to consider the objection raised by the honorable Commissioner for Venezuela that the award must exclude from the benefit of interest allowance if made, all Venezuelans who have replaced the old claimants as their sole heirs. The reason urged to sustain this position is that this Mixed Commission was "constituted to decide the claims of *British subjects* against Venezuela and that Venezuelans can not legally apply thereto for maintaining their rights." This is a point the force of which, when properly applied, has been acknowledged by the umpire and has met his approval in the claim of Mathison¹ and in the claim of the heirs of Stevenson,² but in the case now being considered all rights passed upon by the umpire were vested, respectively, in 1865 and in 1869, when the stated account was agreed to and when the awards were made. This vested right may pass, like other vested rights, to those who in themselves would have no place before this tribunal, but who as the representatives of those having such vested rights may have such place. To hold otherwise would permit Venezuela by delaying payment of these vested rights to avoid payment at all which would not partake of justice or equity. In the Chopin case, quoted in the umpire's opinion in the heirs of Stevenson³ and found in Moore, volume 3, 2506-2507, it was held that a claim duly presented before a commission became such a vested right that an award could be made for the benefit of unquestioned citizens of the respondent government to take as representatives of one deceased whose right had thus vested.

There are many other cases to be found in Moore where the claims were held within the terms of the convention if vested in a deceased claimant, although the immediate representative would not, on his own part, receive an award.

In the opinion of the umpire this case takes its true status back when the indebtedness was agreed upon between the Governments and the awards were made, and therefore these claims rest upon rights which have vested for more than thirty years.

Interest is but an incident of the original award and takes the right then established in the principal sum. This would have been the case had the interest been discharged from time to time, and it is not equity to give Venezuela any advantage to be derived from its own delay. Such appears to the umpire to be a just, equitable, wise, and salutary rule to apply in this case.

Interest is therefore allowed in this second branch of the memorial at 3 per cent, beginning with 1874 and ending with 1884, both inclusive, amounting in all to \$ 39,797.32. The umpire therefore holds that judgment should be entered in both classes of claims in the round sum of £ 46,279, and award will be made accordingly.

¹ *Infra*, p. 489.

² *Infra*, p. 497.

³ *Infra*, p. 503.