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**Mixed Claims Commission (Germany-Venezuela)**

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# MIXED CLAIMS COMMISSION
# GERMANY-VENEZUELA
# CONSTITUTED UNDER THE PROTOCOLS
# OF 13 FEBRUARY AND 7 MAY 1903

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**REPORT: Jackson H. Ralston-W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903*, including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp. 511-641.**

# PROTOCOL OF FEBRUARY 13, 1903[1]

*Whereas certain differences have arisen between the United States of Venezuela and Germany in connection with the claims of German subjects against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized by the Government of Venezuela, and Baron Speck von Sternburg His Imperial German Majesty's Envoy Extraordinary and Minister Plenipotentiary, duly authorized by the Imperial German Government, have agreed as follows:*

## ARTICLE I

The Venezuelan Government recognize in principle the justice of the claims of German subjects presented by the Imperial German Government.

## ARTICLE II

The German claims originating from the Venezuelan civil wars of 1898 to 1900 amount to 1,718,815.67 bolivars. The Venezuelan Government undertake to pay of said amount immediately in cash the sum of £5,500=137,500 bolivars (five thousand five hundred pounds=one hundred thirty-seven thousand five hundred bolivars) and for the payment of the rest to redeem five bills of exchange for the corresponding installments payable on the 15th of March, the 15th of April, the 15th of May, the 15th of June and the 15th of July, 1903, to the Imperial German Diplomatic Agent in Caracas. These bills shall be drawn immediately by Mr. Bowen and handed over to Baron Sternburg. Should the Venezuelan Government fail to redeem one of these bills the payment shall be made from the customs receipts of La Guaira and Puerto Cabello and the administration of both ports shall be put in charge of Belgian Custom house officials until the complete extinction of the said debts.

## ARTICLE III

The German claims not mentioned in the Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the Engineer Carl Henckel in Hamburg and of the Beton and Monierban Company Limited in Berlin for the construction of a slaughter house at Caracas are to be submitted to a Mixed Commission.

Said Commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to or a wrongful seizure of property and consequently the Commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

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[1] For the German text see the Report mentioned on page 357.

ARTICLE IV

The Mixed Commission mentioned in Article III shall have its seat in Caracas. It shall consist of two members, one of which is to be appointed by the Government of Venezuela, the other by the Imperial German Government. The appointments are to be made before May 1st, 1903. In each case where the two members come to an agreement on the claims their decision shall be considered as final; in cases of disagreement the claims shall be submitted to an umpire to be nominated by the President of the United States of America.

ARTICLE V

For the purpose of paying the claims specified in Article III as well as similar claims preferred by other powers the Venezuelan Government shall remit to the representative of the Bank of England in Caracas in monthly installments, beginning from March 1st, 1903, 30 per cent. of the customs revenues of La Guaira and Puerto Cabello, which shall not be alienated to any other purpose. Should the Venezuelan Government fail to carry out this obligation, Belgian customs officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of the Venezuelan Government in respect of the above-mentioned claims shall have been discharged.

Any question as to the distribution of the custom revenues specified in the foregoing paragraph, as well as to the rights of Germany, Great Britain and Italy to a separate payment of their claims, shall be determined, in default of another agreement, by the permanent Tribunal of Arbitration at The Hague. All other powers interested may join as parties in the Arbitration proceedings against the above-mentioned three powers.

ARTICLE VI

The Venezuelan Government undertake to make a new satisfactory arrangement to settle simultaneously the 5% Venezuelan Loan of 1896 which is chiefly in German hands and the entire exterior debt. In this arrangement the state revenues to be employed for the service of the debt are to be determined without prejudice to the obligations already existing.

ARTICLE VII

The Venezuelan men-of-war and merchant vessels captured by the German naval forces shall be returned to the Venezuelan Government in their actual condition. No claims for indemnity can be based on the capture and on the holding of these vessels, neither will an indemnity be granted for injury to or destruction of the same.

ARTICLE VIII

Immediately upon the signature of this Protocol the blockade of the Venezuelan ports shall be raised by the Imperial German Government in concert with the Governments of Great Britain and Italy. Also the diplomatic relations between the Imperial German and Venezuelan Governments will be resumed.

DONE in duplicate in English and German texts, at Washington this thirteenth day of February one thousand nine hundred and three.

H. W. BOWEN [SEAL]
H. STERNBURG [SEAL]

## PROTOCOL, MAY 7, 1903 [1]

The Imperial German Minister Baron Speck von Sternburg as representative of the Imperial German Government, and Mr. Herbert W. Bowen as plenipotentiary of the Government of Venezuela, in order to carry out the provisions contained in articles III and IV of the German-Venezuelan protocol of February 13, 1903, have signed the following agreement with reference to the Mixed Commission which shall have to decide upon the German claims.

### ARTICLE I

The members of the Mixed Commission who are to be appointed by the Imperial German Government and Government of Venezuela shall meet at Caracas June 1, 1903. The umpire who is to be nominated by the President of the United States of America shall join the Commission as soon as possible, and not later than on the first of June, 1903.

The umpire is to be consulted in the proceedings and decisions whenever the German and the Venezuelan Commissioners fail to agree or otherwise deem it appropriate. Whenever the umpire is present at the meeting he shall preside.

If after the convening of the Commission the umpire or either of the commissioners should be unable to fulfill his duties, his successor shall be appointed forthwith in the same manner as his predecessor.

The German and Venezuelan Commissioners shall each appoint a secretary versed in the German and Spanish languages who is to assist them in the transaction of the business of the commission.

### ARTICLE II

Before assuming the functions of their office the umpire and both the commissioners shall make solemn oath or declaration carefully to examine and impartially decide according to the principles of justice and provisions of the protocol of the 13th of February, 1903, and of the present agreement, all claims submitted to them; the oath or declaration so made shall be embodied in the record of the proceedings.

The decisions of the Commission shall be based upon absolute equity, without regard to objections of a technical nature or of the provisions of local legislation. They shall be given in writing both in German and Spanish. The awarded amounts of indemnity shall be made payable in German gold or its equivalent in silver, at the rate of exchange at the time of the real payment at Caracas.

### ARTICLE III

The claims shall be presented to the commissioners by the Imperial German Minister at Caracas before the first day of July, 1893. A reasonable extension of this term may in proper cases be granted by the Commissioners. The Commissioners shall be bound to decide upon every claim within six months from the day of its presentation, and in case of the disagreement of the German and the Venezuelan Commissioners, the umpire shall give his decision within six months after having been called upon.

The commissioners shall be bound before reaching a decision, to receive and carefully examine all evidence presented to them by the Imperial German Minister at Caracas, and by the Government of Venezuela, as well as oral or

[1] For the German text see the Report mentioned *supra*, p. 357

written arguments submitted by the agent of the Minister or of the Government.

The secretaries mentioned in Article I Section 4 of this agreement shall keep an accurate record of the proceedings of the Commission; which have to be drawn up in duplicate copies signed by the secretaries and members of the commission that have taken part in the proceedings. When the work of the commission comes to an end, a certified copy of each of these records is to be delivered to the Imperial German Government and to the Government of Venezuela.

ARTICLE IV

Except as herein stipulated all questions of procedure shall be left to the determination of the commissioners; in particular they shall be authorized to receive the declarations of the claimants or their respective agents, and to collect the necessary evidence.

ARTICLE V

The umpire shall be entitled to a reasonable remuneration for his services and expenses, which is to be paid in equal moieties by the Imperial German Government and by the Government of Venezuela as well as any other expenses of the said Commission.

The remunerations to be granted to the two other members of the Commission and to the secretaries are to be paid by the Government by whom they have been appointed. In the same way each Government will have to pay any other expenses which it may incur.

DONE in duplicate in German and English texts at Washington, the seventh day of May, one thousand nine hundred and three.

STERNBURG [SEAL.]
H. W. BOWEN [SEAL.]

## PERSONNEL OF GERMAN-VENEZUELAN COMMISSION

*Umpire.* — Henry M. Duffield, of Detroit, Mich.
*German Commissioner.* — Hermann Paul Goetsch.
*Venezuelan Commissioner.* — Nicomedes Zuloaga.
*German Secretary.* — Paul Simmross.
*Venezuelan Secretary.* — Segundo Antonio Mendoza.
*Umpire's Secretary.* — Fernando G. Echeverría, of New York, N.Y.

## RULES OF THE GERMAN-VENEZUELAN COMMISSION

I

The secretaries of the Commission shall keep a book in which they shall enter a list of all the claims as soon as they are formally presented. On each claim they shall make a note of the day on which it is presented to the Commission, and shall enter a minute of the claim in the register. The claims shall be numbered consecutively, beginning with No. 1, which shall be the number of the first claim presented.

II

The secretaries shall keep a book of awards which the Commissioners, or, in case of disagreement, the umpire and the Commissioners, shall sign.

The secretaries are the custodians of the papers, documents, and books of the Commission.

III

The Commission shall at its sessions enter upon the consideration of each claim as soon as the Commissioners shall have studied the respective proofs thereof and declare that they are in a position to do so. When the Commissioners shall have studied several claims and their respective proofs, they shall be considered in the same order in which they may have been presented to the Commission, unless the Commissioners for special reasons decide otherwise.

IV

Should the Venezuelan Commissioner ask, in the case of any claim, that a statement supplemental to the proofs be submitted, the German minister in Caracas shall be requested to supply it.

V

At any time before the decision of a case the Government of Venezuela shall have the right through its agent of opposing the claim and of presenting the proofs and allegations he may consider proper, or ask a time within which to do so. The provisions of this article shall in no wise alter the time set forth in the convention of May 7 for the decision of all the claims.

VI

With reference to the claims which in accordance with the protocol and the convention appear to be duly presented, the Commissioners have the right for the purpose of throwing more light on the matter to exact the presentation of documents or other supplemental proofs, provided that by so doing the period fixed by the convention on the 7th of May, 1903, for the settlement of the claims is not altered.

VII

The sessions of the Commission shall be private, except when the Commissioners shall in special cases direct otherwise, and the proceedings shall not be made public by the Commission or its members until the Commissioners shall have made their reports to their respective Governments.

This rule shall in no manner curtail the right of said Governments or of its agents, to proceed in the manner they may consider most favorable to their interests, nor the right of the members of the Commission to make private use of any information they may think will aid them, in the better fulfillment of their duties, in throwing light on some fact, or even settling some point of law.

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## OPINIONS IN THE GERMAN-VENEZUELAN COMMISSION

### CHRISTERN & CO., BECKER & CO., MAX FISCHBACH, RICHARD FRIEDERICY, OTTO KUMMEROW, AND A. DAUMEN CASES

No interest, *eo nomine*, will be allowed on claims based solely upon injuries to the person.

Claims based upon contracts in which a certain rate of interest is stipulated shall carry interest at that rate from the date of the breach. In all other contractual

claims interest will be computed at the rate of 3 per cent per annum from the date of the demand for payment of damages for the breach.[1]

Claims for wrongful seizures of or injuries to property shall bear interest only from the date of demand for payment of damages, and at the rate of 3 per cent per annum.[2]

Whenever interest is allowed it shall be computed to and including December 31, 1903.[3]

The Commission has no power under the protocols to provide for interest on awards.[4]

DUFFIELD, *Umpire:*

The Commissioners disagree as to the allowance of interest on the claims hereinafter mentioned, which have been referred to the umpire for decision.

The Commissioner for Germany is of the opinion that all claims should bear interest from their origin, while the Commissioner for Venezuela is of the opinion that no interest should be allowed except in cases arising upon contracts, and in such cases only from the date of the demand for payment of the claim, unless there is an express stipulation for interest in the contract. They also disagree as to the rate of interest, if any should be allowed.

Some phases only of the question are presented in the claims hereinafter mentioned, but as the question will necessarily come up for decision in all its phases during the progress of the Commission, it seems appropriate and convenient to determine the principles which shall govern.

The protocols provide:

Article III of the agreement of February 13, 1903:

That the Commission shall decide —

both whether the different claims are materially well founded and also upon their amount, [and in case of] injury to or a wrongful seizure of property * * * whether the injury to or the seizure of property were wrongful acts, and what amount of compensation is due.

Article V:

For the purpose of paying the claims * * * the Venezuelan Government shall remit to the representative of the Bank of England in Caracas, in monthly installments, beginning from March 1, 1903, 30 per cent of the customs revenues of La Guaira and Puerto Cabello. * * *

Article II of the agreement of May 7, 1903:

The decisions of the Commission shall be based upon absolute equity without regard to objections of a technical nature or of the provisions of local legislation.

These words of the protocols must be interpreted according to the law of nations, and not according to any municipal code. Mr. Webster said in a similar case: " When two nations speak to each other they use the language of nations."

The importance of a correct decision has induced a careful examination of the subject, both in principle and upon precedents, which is the reason for the length of time that has been taken in the preparation of the opinion.

Primarily, interest was the sum due from a borrower to the lender for the use of a sum of money. In ancient times the strongest prejudice existed

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[1] Vol. IX of these Reports, p. 122.
[2] *Ibid.*, p. 481.
[3] Infra, p. 499.
[4] Vol. IX of this Report, p. 470; *infra*, p. 492.

against its exaction, and as late as the reign of Edward VI an act of Parliament of Great Britain declared the " charging of interest a vice most odious and detestable, and contrary to the Word of God." This prejudice, however, has long since given way to the enlightened view that reasonable compensation for the use of money, like any other property, may justly be demanded.

Domat defines interest to be " the reparation or satisfaction which he who owes a sum of money is bound to make to his creditor for the damage which he does by not paying him the money that he owes him."

Pothier defines interest as including the loss which one has suffered and the gain that one has failed to make. The Roman law calls its two elements the "*lucrum cessans et damnum emergens.*" The pay of both is necessary to a complete indemnity.

The rule is thus stated in Rutherford's Institutes (Book 1, ch. 17, sec. 5):

> In estimating the damages which any one has sustained where such things as he has a perfect right to are unjustly taken from him or withholden or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. * * * So that it is properly a damage to be deprived of them as it is to be deprived of the thing itself.

The jurisprudence of all civilized nations now recognizes this principle as between individuals in case of contract, and has extended it to compensation for the taking of or injury to property. The general language of the civil law accords with the Anglo-Saxon common law in this respect, and the French civil code enacts the principle. (Sedgwick on Damages, 8th ed., sec. 697.) It is certainly a reasonable presumption from this uniform international recognition of this right as between individuals, that the nations would recognize its justice between themselves.

As applied to the case of reprisals, in which great caution is enjoined to keep within the strictest principles of justice, Mr. Wheaton says, in his work on International Law (Lawrence's ed.), page 363:

> If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury or to give adequate satisfaction for it, the latter may seize something belonging to the former and apply it to its own advantage till it obtains payment of what is due, *together with interest and damages.*

A report to the House of Representatives of the Forty-third Congress of the United States of America, second session (No. 134), published by authority of Congress in 1875, called " The Law of Claims Against Governments," contains an exhaustive discussion and examination of authorities on the question of interest on claims against governments. (See pp. 219 to 232.) Among other precedents there cited is the report of the Committee on Appropriations of the House of Representatives upon the question whether the United States of America should pay the sum due from it to the Choctaw Indians for lands ceded by them to the United States. The committee decided the question in the affirmative. In support of its decision it cites as precedents the allowance of interest upon claims under the treaty of 1794 between the United States and Great Britain; the treaty of 1795 between the United States and Spain; the convention with Mexico of 1839; the same of 1848; the convention with Colombia of 1864; the convention with Venezuela of 1866; by the Mixed American and Mexican Commission; by the United States to the State of Massachusetts; the American-British Mixed Commission under the treaty of 1871; the United States in dealing with the Indians; the United States in 53 cases of private claimants cited.

The principle of this report was approved by the Senate of the United States in the adoption of the report of its committee containing the following language:

Your committee have discussed this question with an anxious desire to come to such a conclusion in regard to it as would do no injustice to that Indian nation whose rights are involved here, nor to establish such a precedent as would be inconsistent with the practice or duty of the United States in such cases. Therefore your committee have considered it not only by the light of those principles of the public law — always in harmony with the highest demands of the most perfect justice — but also in the light of those numerous precedents which this Government, in its action in like cases, has furnished for our guidance. * * * Your committee can not believe that the United States are prepared to repudiate these principles, or to admit that, because their obligation is held by a weak and powerless Indian nation, it is any the less sacred or binding than if held by a nation able to enforce its payment and secure complete indemnity under it. (H. R. Report No. 134, 43d Cong., 2d sess., p. 230; Lawrence, Law of Claims.)

Other instances are:

Two Cargoes of Flour — interest allowed against the Republic of Venezuela (Moore's History and Digest, p. 3545); Ward's case (id., 3734); Rochereau's case (id. 3742); finally, the Geneva arbitration (Alabama Claims Commission), which, because of the gravity of the questions at issue, and the character, ability, and learning of its members, representing the United States, Great Britain, Italy, Switzerland, and Brazil, was justly regarded as the greatest the world has ever seen. In the great case before it, as in this case, the treaty was silent as to interest. The Commission, on account of the importance and gravity of the question, called for a special argument thereon, and by a decision of four to five allowed interest on the claims.

The umpire is therefore of the opinion that interest is allowable upon all claims arising upon contracts, and on all claims for wrongful seizure of or injury to property.

Claims for injuries to the person, however, stand upon a different footing. Damages in such cases are necessarily unliquidated and their exact amount can not be precisely ascertained. In such cases as between individuals interest is not usually allowed. (Sedgwick on Damages, 8th ed., sec. 320.) In the case of Lincoln *v.* Claflin, 7 Wall., 132, 139, the Supreme Court of the United States speaking through Mr. Justice Field, said:

> Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury.

Under nearly all systems of jurisprudence the damages in claims of this nature are left to a jury to assess, instead of to a single judge, upon the accepted theory that because of their peculiar character the united judgment of a number of men will more nearly approximate the exact compensatory amount than the judgment of a single mind. In many courts, and in all the courts with the practice of which the umpire is familiar, it is not the practice for the plaintiff to ask or the jury to assess interest per se. Doubtless the latter may and often do consider the lapse of time between the injury and the recovery of damages therefor in arriving at the amount of their verdict, but they do not specially compute or allow it eo nomine. The same course is open to the Commissioners and to umpire, and in their wise exercise of their discretion, in cases of this character, no practical injustice need be done in any case.

In the opinion of the umpire, therefore, *no interest should be allowed, as such, upon claims for purely personal injuries,* not involving the seizure of or injury to property.

The Commissioners further disagree upon the questions from what time interest shall accrue and the rate to be allowed. It is the opinion of the Commissioner for Germany that interest should begin to run from the date of breach

of contract, or date of wrongful seizure of or injury to property, but the Commissioner for Venezuela is of the contrary opinion except in cases of claims based upon contracts expressly stipulating for interest. In all cases he maintains that no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela.

There is much force in the argument of the Commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the acts of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*. It is generally presumed that governments are ready and willing to pay all just claims against them. This is a corollary to that other presumption of law which is of universal application — omnia rite acta præsumuntur. If such is the case in respect of individuals it must certainly be true in respect of governments. The umpire is not prepared to go the full length of the argument of the Commissioner for Venezuela as to the formality necessary to constitute a sufficient demand in all cases, but he is of the opinion that some evidence of a demand upon the government for payment of a claim is necessary to start the running of interest in all cases which the Government of Venezuela has not either stipulated for interest or given an obligation from which an agreement to pay interest can fairly be implied. The sufficiency of the demand is to be decided according to the particular facts in each case.

The umpire is of the opinion that where no rate of interest is fixed by the terms of the contract interest should be computed at 3 per cent per annum in all cases, that being the rate fixed by the statute of Venezuela in like cases. It is not inconsistent with the language of the protocol to refer to the law of Venezuela fixing that rate. All foreigners residing in or doing business with a country are equally bound with its citizens to know the laws of the country. When they determine to reside in or do business in that country they should be and are prepared to accept the commercial laws of the country. Such general laws are not, in the opinion of the umpire, local legislation, within the meaning of the protocols. Certainly in a suit between a foreigner and a Venezuelan citizen arising upon a contract which is silent as to the rate of interest, the former could only recover against the latter the rate of interest prescribed by the law of Venezuela. There is no good reason for any different rule when the claim of the foreigner is against the Government.

The umpire agrees with the suggestion of the Commissioner for Germany that in all cases in which interest is allowed it should be computed up to a common date. While the precise date when the labors of the Commission will actually terminate can not now be certainly determined, in the opinion of the umpire substantial justice will be done by computing interest upon all claims up to and including December 31, 1903. In each case the amount of interest up to that date will be added to the principal sum, and an award made for the aggregate amount in gross.

Shall these awards bear interest? In the opinion of the Commissioner for Germany the arguments for such allowance, upon grounds of equity and justice to the claimants, are strongly put. On the other hand, the Commissioner for Venezuela presents with ability the equitable considerations in favor of the

Government of Venezuela, and insists that the Commission is without the power so to do. It must be conceded that the Commission can not exceed the powers conferred upon it by the high contracting parties, either expressly or by necessary implication. The Supreme Court of the United States so held in the recent case of Colombia *v.* The Cauca Company, decided May 18, 1903,[1] and reduced the award of the Commission in that case some $160,000. It is material to remember, in considering this question, that while the amounts are for the ultimate benefit of the claimants, they are to be included in an aggregate sum of money to be paid by the Government of Venezuela to the Government of Germany. These two nations have stipulated, in the language quoted above, how this amount shall be paid, and partial payments have been already made and will continue to be made monthly. There is no express provision for interest in the stipulation. Is there any necessary implication to that effect? It is argued by the Commissioner for Germany that the agreement on the part of Germany to accept payment in subsequent accruing installments necessarily implies an understanding that the awards should bear interest, while the Commissioner for Venezuela insists that in making so particular a provision for the manner of payment the omission of any mention of interest is significant and decisive that no interest was intended to be allowed on the sum. It does not appear in the evidence whether the Bank of England is to pay interest on the successive payments of the customs receipts or not, and in the opinion of the umpire *it is immaterial.* If the bank does pay interest on these deposits it will increase the amount received by the Government of Germany for the benefit of its claimants. If it does not the Government of Venezuela still has paid and will continue to pay monthly installments in the manner and to the trustees named by the contracting Governments. It must be conceded that Venezuela can not under these circumstances be asked to pay interest on the full amount allowed without having credit for interest on these monthly partial payments. There is no provision made for a future settlement of these charges and credits of interest. No person is designated to compute the same or to settle any difference in the computation of the two Governments. The Chinese Indemnity Fund Commission of 1858 is a case directly in point. The treaty provided for the payment of the fund out of the Chinese customs receipts, as is the case here, but the Commission allowed no interest on awards. (Moore, p. 4627-4629.)

It is by no means settled that in cases where the convention fails to specifically provide for interest there is any power in the arbitrators to allow interest on awards. Referring to the decision of former arbitration commissions, the weight of precedent appears to be against the allowance. As opposed to the precedents cited by the Commissioner for Germany, in the following cases the awards did not carry interest: The Panama Riot Commission; the Mexican Claims Commission; the French Claims Commission of January 15, 1880; the French-American Claims Commission; the case of the Montijo; Ward's case; finally, in the Geneva arbitration of 1871 (Alabama Claims Commission), above referred to, no interest was allowed upon awards.

The umpire is influenced by these considerations to decide that it was not the intention of the high contracting parties that the Commission should allow interest on awards.

It only remains to apply these conclusions to the particular cases referred to the umpire.

The case of Becker & Co. is founded upon an order given in payment of certain blankets, in the following words:

[1] 190 U.S., p. 524.

CARACAS, *July 1, 1892* (29° and 34°)

*To the Citizen Administrator of Municipal Rents:*

To be charged to the expenses of war, according to the authorization of the President of the Republic, please pay to Messrs. O. Becker & Co., successors, the sum of 1,470 bolivars, the value of certain blankets taken by this office for the expeditionary army.

God and the federation.

PEDRO VICENTE MIJARES

There is no evidence of any demand for the payment of this order. Treating it as a draft, certainly a presentment and demand for acceptance is essential before interest will commence to run. Apart from the requirements of the civil law, in which the argument of the Commissioner for Venezuela finds considerable support, the umpire is of the opinion that according to the principles of commercial law the instrument would draw interest only from the date of demand for payment. It was decided by the Supreme Court of the United States that the presentment for payment of a drainage warrant, substantially similar to the order in this case, issued by the city of New Orleans, was necessary to start the running of interest. (New Orleans *v.* Warner, 176 United States Reports. p. 92.) [1]

In view of the full consideration given by the claimant for the order so many years ago, it would not be equitable to decide against any allowance of interest prior to the presentation of the claim to this Commission. The claimant will, therefore, be allowed a reasonable time to prove a demand for payment, so that interest may be computed from that date. The same course will be taken in the case of A. Daumen.

In the case of Christern & Co. simple interest at the rate of 3 per cent per annum will be allowed upon the sums hereafter found due by the Commissioners and the umpire from the dates of demand for payment of the several amounts, and a reasonable time will be allowed to prove such date.

The cases of Fishbach, Friedericy, and Kummerow are not yet ready for a decision on the merits. The umpire is waiting for further briefs from the Commissioners. In case of their allowance they will be governed as to interest by the conclusions reached in this case, so far as they may be applicable.

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KUMMEROW, OTTO REDLER & CO., FULDA, FISCHBACH, AND FRIEDERICY CASES [2]

(By the Umpire:)

The Government of Venezuela is liable, under her admissions in the protocol, for all claims for injuries to or wrongful seizures of property by revolutionists resulting from the recent civil war.

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[1] Under the provisions of an act of Congress, the United States courts administer, in cases at law, the practice of the several States in which they sit. In the State of Louisiana the civil law obtains. (Note by the umpire.)

[2] The Commissioners for Germany and Venezuela both filed opinions in these cases separately, the umpire rendering his opinion in the cases as grouped. The cases of Henry Schussler, Carl Mohle (see p. 413), Gotz & Lange, E. Nicolai, Adolph Ermen, Paul Flothow, and Hugo Valentiner (see p. 403) were also allowed by the umpire for the reasons set forth in the following opinion, the Venezuelan Commissioner holding as in these cases that the Venezuelan Government was not liable for revolutionary damages.

Such admission does not extend to injuries to or wrongful seizures of property at any other times or under any other conditions.

Such admission does not include injuries to the person.

As to these two last classes of claims her liability must be determined by general principles of international law, under which she is not liable, because the present civil war, from its outset, has gone beyond the control of the titular government.[1]

[KUMMEROW CASE]

GOETSCH, *Commissioner:*

By the sworn declarations of the witnesses, Páez, Ojada, and Infante, it is proved that in the months of May, June, and July, 1902, the objects specified in the claim and valued at 3,200 bolivars were taken from the claimant by revolutionary troops at his ranch "Mañongo." The witnesses worked and slept in the place where the events occurred, and were present at the act of confiscation. They state expressly that the authors were troops of *the "Libertadora" revolution* under the immediate orders of Generals Boggier, Bonito Estraño, Raimundo Tejado, and of the official Felipe Colmenares. The supposition that the authors of the confiscation were marauding robbers or highwaymen without any leader is therefore inadmissible. The nature of the objects taken shows that they were destined for revolutionary purposes — that is to say, to carry on war (beasts of burden, rifles, cartridges, field glasses, blankets, and clothing.)

The third article of the protocol of February 13, 1903, is of the following tenor:

The Venezuelan Government admit their liability in cases where the claim is for injury to, or a wrongful seizure of, property, and consequently the Commission will not have to decide the question of liability, but only whether the injury to, or seizure of, property were wrongful acts, and what amount of compensation is due.

By these clauses it has been agreed by contract between the German and Venezuelan Governments that Venezuela makes itself liable for the property of German subjects illegally confiscated by authorities or troops of the Government or authorities or troops of the revolution. If the Government of Venezuela were not liable for the damage caused by the revolution, this ought to have been expressly mentioned in Article III, which otherwise would have no meaning. I mention, moreover, Article I of the protocol by which the Government of Venezuela recognizes the German claims in principle, and therefore, also, the claims for the confiscation of property on the part of revolutionists. Although it is not shown by the proofs, it is nevertheless possible that small bands confiscated the German property in question. The mode of carrying on war here, the difficulty of obtaining resources, the desire to commence depredations, generally obliges the troops of the country to separate into small divisions whereby they do not lose their character of revolutionists, for whose illegal acts the Government of Venezuela is liable in accordance with the protocol. If, in Venezuela, these small detachments are known by the name of guerrillas, the Government will be liable for the damages of guerrillas, since "guerrilla" means nothing else but war on a small scale. The removal of liability of the Government of Venezuela could only be brought into question in treating of personal crimes of rebels or highwaymen, and this is not the case, as is shown by proofs.

Article III of the protocol, which governs the Commission, does not create

[1] Headnotes by the umpire.

a new right which is burdensome to Venezuela or in contradiction to the law of nations.

The law of nations recognizes, moreover, that those States in which revolutions are frequent, and whose governments are therefore subject to frequent changes, are liable for the acts of revolutionists, provided that the revolutionists are, because of the means at their command, the government de facto, so far as the one against which they are exercising their forces is concerned. This liability has been more than once recognized by the judgments of international commissions. Thus the Government of the United States of America has claimed damages and injuries from the Government of Venezuela because of the seizure of American vessels *by Venezuelan revolutionists*, and these have been allowed by a commission. (See Moore, History and Digest of International Arbitrations to which the United States has been a party, Washington, 1898, pp. 1693-1732; see especially pp. 1716-1722-1724.) Thus also the Government of the United States of America demanded an indemnity from the Government of Peru for the robbery committed against an American, Dr. Charles Easton, by a " body of partisans of the rebel chieftain seeking to overthrow the Government," and demanded that the Commission allow it, inclusive of interest at 6 per cent. (History and Digest, pp. 1629-1630.) This case is in every sense analogous to the present case of Kummerow. (See, moreover, Panama riot and other claims, Moore, p. 1631; case of Montijo, seizure of an American vessel by Colombian revolutionists, Moore, p. 1421, where the following opinion of the umpire is found: " But there is another and a stronger reason for such liability — this is, that the General Government * * * failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and the stipulation of said treaty, it was bound to do. The first duty of every government is to make itself respected both at home and abroad. * * * If it does not do so, even by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.")

It is, therefore, beyond doubt that the Government of Venezuela is liable for the damages occasioned by revolutionists, not only by virtue of the precise terms of the protocol, but also by the law of nations, and above all by the decisions of international commissions of arbitration.

Incidentally it may be mentioned that in Germany such liability, by virtue of which a community (the city or the rural district) ought to indemnify the person who has been injured by revolt or riot, has been sanctioned by law.

The present case is analogous to the claim of Christern in Maracaibo (sackage of " El Finglado " by revolutionary troops at the command of Generals Marquez and Zuleta). According to the minutes of the fourth session, the honorable Venezuelan Commissioner has recognized in principle in this case the liability for damage occasioned by revolutionists, and it only remains for the honorable umpire to determine the amount of damage. The recognition has taken place in view of the provisions of the protocol. In the present case it will not be for the Commission to deliberate upon the liability of the Government of Venezuela. It has been materially settled by international law and formally settled by the protocol. The Commission ought preferably to decide upon the illegality of the confiscation and upon the amount of the corresponding indemnity. The illegality of this seizure is fully proved by the testimony of the witnesses, and with respect to the prices fixed for the objects taken, these appear acceptable and no objection has been made by the Venezuelan Commissioner in this respect. The costs of judicial proceedings (200 bolivars), paid by the claimant are a direct injury which the latter has received, and its return seems justified. (Art. 2 of the supplemental convention.) With respect to the interest, reference is made to the opinion contained in the claim of Christern.

The German Commissioner asks that the honorable umpire decide the admissibility of the claim, amounting to 3,200 bolivars, with interest at 6 per cent, beginning from August 1, 1902, until the complete extinguishment of the debt.

ZULOAGA, *Commissioner:*

In this claim of Kummerow, in my opinion, the facts are not proven, nor do I believe that the foundation upon which he bases it justifies the claim. The claim is founded upon the testimony of three witnesses, laborers of the claimant of such an ignorant class that they do not even know how to sign their names. The declarations are dictated in a common formula, and the estimate which they make of the value of the objects stolen proves by its uniformity that it proceeded from orders received, because of the circumstance that it is to be supposed on account of the class of work which they did they could not testify as to the existence in the possession of Kummerow of many of the objects which he says were stolen from him, nor of their value as expert valuers. To the foregoing is added the consideration that they omit all elements of time and other circumstances, which might serve to throw light upon the facts which they alleged. They say that the acts were performed during a period running over three months. It does not appear that any violence was employed, nor that the objects, if there were any, were cared for, not even that they were taken without the consent of their owner. Mr. Kummerow appears to have considered that the State is a sort of surety who pays with increase for every injury that he might suffer. To all this is added the consideration against the claim that the acts were performed by revolutionary bands, as he states. The very character of the acts which are relied upon, if they were committed, and it is of no importance to the case that the robber was called General This or That, since in Venezuela the name "general" in common speech is given in internal disturbances to every one who follows, of his own will, the rebellion against the constitutional authority. These detachments in general do not obey any central political chief, and only accident or circumstances make them join in an army, thus putting an end to the arbitrary proceedings. In the present war the revolutionists have shot down some of these ringleaders. For my part it is necessary to prove that these roving detachments constituted, properly speaking, the forces of the revolution, and if the claimant believes that this justifies his claim he ought to prove it fully.

But there is a further consideration. Since the German Commissioner believes the liability of the Government to be established by virtue of article III of the protocol, I ought to make an explanation concerning my way of understanding it. I confess that my first impression upon reading it was one of extreme uncertainty; but a more careful study of the subject convinced me that it can not in any way be contended that the Government is liable for every wrong committed against Germany.

It is not creditable that Germany seeks to impose on Venezuela rules which she does not consider just, and it is not possible that in order to apply exceptional rules in favor of Germany a mixed commission should be formed whose president and umpire has been named by the President of the United States. These ideas by themselves plainly show that article 3 of the protocol contains nothing distinct from the rules which in general these nations recognize upon this subject, but only a confirmation of those principles with the idea at most of going counter to the doctrine of absolute nonliability of governments in the matter of civil wars sustained by many governments and publicists. If any doubt might exist it would suffice to know that Venezuela is paying to-day the claims of all the powers with 30 per cent of the receipts of two of her custom-

houses, and this supposes that the nationals of all of them should be treated in the same manner and not with the inexplicable and unjust difference in favor of Germany. The Commissioner of Germany also quotes in support of his opinion article 1 of the protocol, which says that Venezuela recognizes in principle the justice of the claims of German subjects presented by the Imperial German Government; but it is to be borne in mind that that article refers to the claims already presented, which are those which article 2 of the protocol treats of — claims which the Government of Venezuela maintains in general were completely unjustified. This article which the German Commissioner relies upon has not, in my opinion, so far as Venezuela is concerned, any other meaning than the necessity to put an end to a state of war. To seek to find in it a pretext for supporting the new claims is to make the work of this Commission useless; it is to make the legation of Germany the exclusive judge of the justice of the claims.

These preliminary considerations having been established, I must seek in accordance with these ideas the principles which, according to international law, must serve to establish the liability of governments in cases of injury; and in order to do this it suffices to set forth those which Germany and the United States profess. Those of Germany appear from a treaty celebrated with Colombia, article 20 of which says:

> It is also stipulated between the two contracting parties that the German Government will not seek to make the Colombian Government liable, *except there might be fault or want of diligence* of the Colombian authorities or of its agents for the damages, insults, or confiscations occasioned during the time of insurrection or civil war to German subjects in the territory of Colombia on the part of rebels or caused by the savage tribes outside the pale of the authority of the Government.

Those accepted by the United States appear in a note of the Department of State to the minister of the United States in Lima. In this note it is said:

> In respect to the latter it is the doctrine of this Department that the Government can not be held to a strict accountability for losses inflicted by such violence. (In speaking of the liability of the Government for acts of insurgents whom it could not control and for the violence of mobs.)

This note relates to the destruction of a Peruvian ship in Chesapeake Bay.

> The position the United States took on that subject was that such destruction having been effected by a sudden attack of insurgents, which could not by due diligence have been averted, the Government of the United States was not bound to make indemnity. (For. Rel. U.S. 1888, pp. 1377, 1378.)

The Commissioner of Germany has set up as a precedent in the case of the *Transportation Company*, but it is to be remarked that in it there are many other complex elements which might have been the efficient cause for the decision, since this is not set down as one of them. Venezuela was charged with negligence in punishing the guilty parties; there was a question of constitutionality and unconstitutionality and the failure to perform contracts made by Congress; they were not residents of the country; they were traveling about in a ship under the flag of the United States, etc. This decision which is cited I believe in no way establishes the principles sought to be maintained, and everything depends upon the appreciation that the judges might make of the facts alleged.

I consider that the protocol can not be interpreted except in accordance with what has already been set forth, and bearing that in mind I am of opinion that the claim of Kummerow ought to be rejected, it being well understood that I also consider that the damage and much less the fault of the Government of Venezuela is not proved.

The circumstances oblige me to make a general statement of the principles, although it may be that the umpire will not think it necessary to consider all of them in the case of Kummerow.

GOETSCH, *Commissioner* (second opinion).

The opinion of the Venezuelan Commissioner in this claim imposes the duty upon me of supplementing my opinion in various ways.

I. Now that the Venezuelan Commissioner seeks to deny, in the present case, the liability of the Government, founding his opinion upon the fact that the authors of the damage were *guerrillas*, it is necessary to make reference to two annexed official telegrams.[1]

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[1] [Official bulletin of the State of Aragua, December 9, 1902. National telegraph from Miraflores to La Victoria.]

DECEMBER 9, 1902—6.40 p.m.

For the PRESIDENT OF THE STATE:

In the most felonious and unjust manner the German and English ships of war have committed the most unusual assault likely to be recorded in history in the port of La Guaira, having captured, without previous notice of war, the steamers *Crespo*, *Ossun*, *Totumo*, and *Margarita*. Therefore, if the same thing should take place in that port, proceed so as to be able to prepare yourself immediately to repel force with force, holding myself responsible to all of you, together with your companions, that the national honor shall remain unsullied in every case. Also you shall proceed to take prisoners all the Germans and Englishmen who may be there, *without any exception, in order that if the foreign rapacity should be directed against you they shall be the first to be fired upon.*

*Thus also you will take possession of all their properties.*

Acknowledge receipt and fulfillment.

CIPRIANO CASTRO

[National telegraph from La Victoria to Caracas.]

DECEMBER 9, 1902

For Gen. CIPRIANO CASTRO, *Caracas:*

The constitutional President of the State, impressed by the contents of your telegram in which you announced the great assault committed to-day in the port of La Guaira against the national sovereignty by English and German men-of-war, has sent me notice by telegram to notify you that in any case the State of Aragua will show itself equal to its great duties in this new and tremendous test to which the destiny of our beloved Venezuela is subjected.

The Araguan people *en masse*, and as soon as they had notice of the nefarious occurrence, hastened to protest with strong words of devout patriotism against the foreigners who thus trample upon the principles of international law, proclaimed and observed by all the civilized nations of the globe. Likewise the Chief Executive charges me to say to you that he and his companions pledge themselves to you that the national honor will remain unsullied in any case, since they will follow you steadfastly along this line until they show not only to those who spurn our inalienable prerogatives as citizens of a free and independent nation, but also to the entire world, that we are the worthy descendants of the forefathers who instituted and crowned with success the great national emancipation.

Your positive orders concerning the most important affair to which this telegram relates have been communicated to all the districts of the State.

FRANCISCO E. RÁNGEL.

[Circular telegram.]

LA VICTORIA, *December 9, 1902.*

*To the Civil Chiefs of the State:*

Immediately after receiving this telegram—that is to say, without losing even a single moment—you shall proceed to place under arrest all the Germans and English-

It will be seen from these that in Venezuela this term is also in current use in the language to designate small bodies of the revolutionary army armed and in the field against the Government. The reasons already set forth in the first opinion fix the responsibility of the Government for the actions of these, unless the responsibility of the Government of Venezuela for damages by revolutions be excluded in principle.

II. Until now the Commissioner of Venezuela has not disputed this responsibility. Like his colleague, Doctor Paúl, a member of the French-Venezuelan Commission, he has recognized until now the responsibility of his Government for revolutionary acts. It so appears in the minutes of the fourth session in the conference concerning the claim of Christern, to which reference is now made; likewise in the conference concerning the claim of Ermen. He has been guided by this interpretation, as appears in the minutes, and his argument in that claim before the honorable umpire. It was there always maintained that in the case mentioned the responsibility of Venezuela should be denied because there was question of guerrillas and not of the regular troops of the revolution. Otherwise the supplemental proof of Mr. Ermen, agreed to by the parties, would be without reason. It is recently that the honorable Commissioner of Venezuela has modified his opinion. It is seldom that in a diplomatic international commission a question of international law already recognized and approved in principle should be disputed later. In the interest of uniformity of judgment of the Commission, it appears desirable that the question of law should not be determined in one way to-day and in another to-morrow.

In any case this change of judicial opinion of his Venezuelan colleague imposes upon the German Commissioner the special duty of showing the honorable umpire, in case he may deem this change of opinion allowable, that the first interpretation of the honorable Venezuelan Commissioner is the just one, and the one which corresponds to the tenor of the protocol and to the principles of international law, without any possible error.

III. The Commissioner of Venezuela asserts that Germany pursues special measures in demanding indemnity for its subjects for damages occasioned by the revolution. Such insinuations should be contradicted. The honorable Commissioner of Venezuela should not be ignorant of the fact that the third articles of the German, English, and Italian conventions with Venezuela contain the same provisions, and that France has also demanded revolutionary damages before the Commission.

In the French Commission the question has already been decided in favor of France, wherefore, as is stated, the Venezuelan Commissioner, and later the umpire of the Commission, have recognized in principle the liability of the Venezuelan Government in all cases. In my first opinion I have expressly shown that the Government of the United States of America has also collected these damages and that it has been allowed them by commissions of arbitration, not only with respect to Venezuela, but also with respect to many other South

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men who may be domiciled in each and every one of the municipalities which compose the district under your command. *You shall likewise proceed to take possession of the properties which belong to the above-mentioned German and English subjects.*

In order that you may understand the rapid and efficacious way in which you ought to fulfill this order, let it be sufficient for you to know that it has been communicated directly from the worthy President of the Republic, General Castro, as a reprisal of the grave assault committed to-day against the national sovereignty in the port of La Guaira by ships of Germany and England.

God and federation.

FRANCISCO E. RÁNGEL.

American States. In Germany itself there exists the same liability legally sanctioned.

To the reference which the honorable Commissioner of Venezuela makes to the German-Colombian treaty, it ought to be objected that the form which they care to give to their respective mutual relations, and if they desire to restrict certain international rules with respect to their citizens, is a matter of policy as between Germany and Colombia. No such treaty exists between Germany and Venezuela. Venezuela can not deduce for herself rights from the German-Colombian treaty, all the less since Colombia has made concessions to Germany in order to obtain the concession noted. The protocol, and in its absence the law of nations, ought to serve as a rule for Venezuela and for the Commission. And to the citation which the Commissioner of Venezuela makes, referring to the United States, in the case of the destruction of a Peruvian vessel in Chesapeake Bay, answer must be made that this case is not sufficient to alter the opinion of the German Commissioner. In the first place, it is known that the matter was afterwards adjusted through diplomatic channels and that Peru was indemnified. (See Moore, History and Digest, p. 1624.) The Mixed Commission which met in Lima only decided that it had no jurisdiction over the claim, and refrained from making an award upon its merits. Apart from this no analogy can be deduced from this case with the United States of America. These States are a powerful, flourishing nation, where order rules, the direction of which is intrusted to a strong hand and affords to foreigners and their interests the most absolute security, as the enormous amount of immigration proves, and where, from every point of view, revolutions like those which in Venezuela are the order of the day are impossible. Under these circumstances the case cited by the Venezuelan Commissioner has no other character than that of a commission of a common crime which the authorities of the United States could not foresee, and on account of which, therefore, liability did not attach to the Government. This is not so in Venezuela. One revolution is substituted for another. Revolution has been made a matter of politics. The confiscation of and damage to property of foreigners are here simply the means for the support of revolutions, and have as an object to bring these to a favorable end, although ordinarily they are only dedicated to the enrichment of a few revolutionary partisans.

Moreover, according to press notices of a recent date, the Government of the United States of America paid an indemnity to Italy for the lynching of Italian subjects.

Besides, the following reasons exist to sustain the responsibility of the Venezuelan nation as such:

(*a*) It has forbidden foreigners to mix in political affairs. This has been decreed anew in Venezuela by the law governing foreigners. If they take part in a revolutionary movement they must suffer severe penalties, and they may even be expelled. They are incapacitated — not so the Venezuelans — from defending their property against losses by force of arms or by their adoption of one of the parties. As a compensation for this the Government of Venezuela is under obligation to protect foreigners. If it does not do so, or if it is impossible for it to do so, there is nothing more just and equitable than to indemnify the person for the losses suffered.

(*b*) The confiscation of foreign property by revolutionists has as a consequence the enrichment of the national wealth of Venezuela at the cost of foreign property. The money, the cattle, the thing taken ought to accumulate somewhere. If the revolutionists surrender, if a reconciliation with the party in power is effected, as usually happens, a general amnesty is decreed, as, for example, in the recent case of the " Hernandistas." Frequently it happens that

revolutionary leaders surrender themselves to the Government and place their troops at the disposition of the latter against the revolution. In this case it never occurs to anyone to return the moneys, merchandise, or objects seized in support of the revolution to their rightful owner, nor does the Government take any proper means to return to foreigners their property or to cooperate in its return. It is therefore an obligation of the nation, founded upon the principles of equity, to make reparation to foreigners.

(*c*) But the real reason is the following: If the Commission denies the liability of the Government of Venezuela, all the foreign residents in Venezuela will be exposed to the mercy of future revolutionists. The decision in international law, of the Commission which denies the liability of the nation, would have in the future, as a consequence, a complete want of consideration for foreigners. The admissibility of enriching themselves at the cost of foreigners would be converted into a policy for the revolutions to come. The Commission would assume a grave responsibility in the eyes of history if it should determine to deny the liability of the Government for damages occasioned by revolutionists.

IV. The Venezuelan Commissioner is of opinion that according to international law, especially in accordance with the opinions of many jurists, professors on the subject, the liability of the Government for damages arising out of civil wars can not be established. Only conditionally and in special cases is this true. The difference rather ought to be established whether or not, in a civil war, the factions enjoy the rights of belligerents (as, for example, in the war in the United States between the North and South). In the first case the damages would fall upon everyone as "casualties of war." (See Moore, pp. 1716, 1718.) In the second case the liability of those states in which revolutions are frequent, as has been shown in the first opinion, is considered as obligatory. In the present case the liability is necessarily established by the circumstance that the actual revolution has not been recognized as a belligerent party by any of the powers.

V. The honorable umpire saw fit at the session of the 22d of the present month to ask a juridic declaration of the Commission, as explicit as possible, concerning the interpretation which article I of the protocol should receive. The declaration there contained by which the Government of Venezuela recognizes in principle the claims presented by the German Government refers, according to the opinion of the German Commissioner, to the claims contained in the ultimatum of the German Government, and published by the Government of Venezuela in its Yellow Book. Article I has been supplemented by article III. There the recognition in principle has been limited, in so far as it pertains to the facilities of the German-Venezuelan Commission, to decide also the material justice of the claims submitted to its jurisdiction. This right of the Commission to decide upon the material part of the claim is in its turn limited by the following paragraph, according to which the Government of Venezuela recognizes in principle its liability in the case of claims for illegal damages to and confiscation of property. It would be superfluous to establish this interpretation; moreover, it would be a pleonasm (a redundancy) if it had to be interpreted in the sense that the Government of Venezuela is liable for that which the *Government itself* had confiscated or illegally damaged. The extent of that liability is understood, and it does not require the solemn declaration of a treaty of peace to fix it.

The only object of this clause has been to assist the Commission placing beyond discussion and dispute by the Commission the liability even for damages of the revolution; a liability maintained in principle by the German Government, and up to now always disputed in principle by the Government of Venezuela.

Otherwise the provision would have no meaning. As for the rest, in the opinion it has already been thoroughly demonstrated, that it is the object of article III to give a conventional form to an international rule, disputed until now by Venezuela.

ZULOAGA, *Commissioner* (second opinion):

It is not true that I deny in principle that which has been admitted before. In the Christern case no question of law nor of fact was discussed, and the German Commissioner can not properly assert on account of any declaration of mine what the reasons were that induced me to allow it. I believe that it is useless to insist upon this disagreeable matter.

I have attempted, inspired in a large degree by the same idea which later the umpire has expressed in the Ermen case — that cases in the relation to revolutionary matters may be very different — not to treat of this the question except in so far as the case necessitates it.

In the Ermen case it appears to me that the question of liability for revolutionary damage is unimportant, since, from the way Ermen states that the act was committed, it is seen that there is question of a common fault which never involves the liability of the Government, be those who have committed the act who they may, to which is added the fact that Ermen himself could not say that they were revolutionists.

In the case of Kummerow I am inclined to believe the same, since in my judgment it is sufficient to notice that neither the acts are proved nor the violence shown. To reject these claims for those reasons does not mean to say that I do not reject them also for other reasons or because Venezuela is not liable in international law for the acts of *guerrillas* because of which claim is made.

The question with respect to guerrillas is in my opinion simple. The guerrillas may in reality belong to the revolutionary army, but they may also not belong to it, and, in general, they do not belong to it, and under this name bands of robbers are shielded who take advantage of the disturbed political situation of the country and make depredations, and in this case the liability of the Government would be as much involved as that of the German or English Governments would be for the acts of the highwaymen of Berlin or London or that of the Government of the United States for the acts of those who stop and rob the trains in the middle of the plains.

In a vast, unpopulated country like Venezuela the question of getting rid of *guerrillas* in certain cases is a different problem, because of the immensity of the forests and plains where they hide themselves. With respect to this, it is worth while to recollect an interesting incident of our history. The war of independence having been terminated, certain marauding bands of guerrillas continued in existence, and among them a band by the name of " Cisneros;" in vain it was pursued; it always escaped. In this state of affairs the President of the Republic, General Páez, resolved to go in person, and an interview was proposed in a forest. Cisneros answered that he would be alone in his den, and Páez went; there the bandit had everything ready to shoot him and drew up his forces and said to Páez that *he* (Páez) should give the order to *fire*; the extreme calmness of Páez saved him, and the bandit submitted himself to the authority of the Government.

In order that the revolutionary question might arise it would be necessary that the claimant should have proof (since it is a principle of law that the burden of proof rests upon the one who sets up the fact) that these *guerrillas* were regular forces of the revolution, as the German Commissioner himself desired that Ermen should prove. But regular forces are only those who are subject to the orders of the chiefs of the revolutionary movement. When this fact has been

proven, then in reality the question arises whether the Government is or is not liable for acts of revolutionists, and until then it seems to me that we are within the domain of common law and of ordinary punishment.

The principle of the liability of the state with respect to damages is, in the opinion of the authors (see Pradier-Fodéré), within the rule of common law that everyone is liable for his acts and those of his subordinates. But as the juridic organization of the state is complex and its acts must be governed by many political economic relations, etc., this principle must be restricted with respect to it. In Venezuela, for example, article 9, law of 1873 (Seijas, vol. 1, p. 57) says —

> That it can not be contended that the nation should make indemnity for damages and injuries or confiscations which have not been committed by legitimate authorities *acting in their public capacity.*

The Government is therefore not liable unless it be proved that the authorities committed the injury acting in their public capacity. (See art. 11 of the decree of June 9, 1893, Official Compilation, vol. 16, p. 544.)

The protocol of February appears to have wished to abolish just this distinction, and thereby violence committed by the forces of the Government, which took advantage of their position, it appears to me, involve the liability of the Government.

In the question of a revolution it appears that, according to these same principles, the government is not and can not be liable for acts which are not its own but those of persons occasionally outside the pale of its authority. The rule, therefore, is the nonliability of the government. (See Seijas, vol. 1, p. 50.) This liability may in law be established according to the doctrines of some countries if it is shown that the state is negligent or blamable in a concrete case for not having furnished timely protection. But this is an exception, by virtue of which in judging the case only the negligence or culpability charged can be considered.

The German Commissioner is of opinion that the protocol of Washington has derogated these principles of the law of nations with respect to Venezuela, but such a thing does not appear. If it had been intended to make such a declaration of exception it would have been essential to state it clearly, and it is a fundamental principle of interpretation that the clauses making exceptions should be interpreted *restrictively.* Besides, article III of the treaty provides that the Commission must decide if the damage or seizure were unjust, and, in accordance with the principles of international law, it can not be said that the acts of the rebels were just or unjust. This is said of the acts of governments.

With respect to persons who are not the legitimate authorities there exists in Venezuela the right of direct action against them for the damages caused, as also for crimes committed — an action which those who have been injured may institute by appearing before the civil or criminal judge, according as the fact is or the relief which the claimant seeks. Article 11 of the law of 1873 says:

> Everyone who, having no public capacity, may decree contributions or forced loans, or commit acts of spoliation of whatever nature, as well as those who execute them, shall be liable, directly and personally with their property, to the injured person. (See Seijas, vol. 1, p. 57.)

*The executive power* is not to intervene in this proceeding and would only be liable if they demanded justice before the judge which should have been impossible for a person to obtain on account of fraud, that is to say, the *denial of justice.* The law of Venezuela in these matters has its importance, since it is a principle of international law, as I understand, that the foreigner has no greater

right than which is granted to nationals, and it is worthy of note that Venezuela does not concede to Venezuelans the right to indemnity for damages committed by the revolution.

The Commissioner of Germany states that Germany is making no special contention, according to the interpretation which he gives to the protocol and the protocols of England and Italy; but I object, for it does not appear that those protocols were interpreted in the manner which he alleges. And nothing appears in the convention of France, and, as that of Paris, payment is to be made in diplomatic debt, not in gold, and there are other reasons or special advantages for Venezuela. The Venezuelan Commissioner might have had sufficient reasons for judging and determining in a different manner, if he did so (which I do not know); or rather to present the questions and their proceedings in other forms. With respect to the United States, I do not know that demands are on Venezuela such as the demand of the Commissioner of Germany and I believe that there will not be any such, bearing in mind the doctrine professed by that country. And since the United States and Spain, as well as other nations, share in the division of the 30 per cent pro rata, I do not understand how one nation can ask more than other nations, since the nations that did not join in the blockade did not insert the third clause, which, interpreted in the form the German Commissioner desires, would be a cause of preference. I consider that they did not believe that this article had such a meaning.

The German Commissioner then enters into considerations of a political nature with reference to Venezuela in order to justify his doctrine. These considerations are so devoid of international equity and contain such strong statements against my country that I prefer to abstain from answering them as they deserve, leaving them to the consideration of the umpire and making only a few concise remarks. If the Commission decides in accordance with the principles which I maintain it will do nothing but keep to the doctrine which, up to now, civilized nations and writers of public law have professed. I do not see why it should be charged with liability before history because it does not care to submit Venezuela to the special theories of the Commissioner of Germany.

The Germans then would enjoy, *as they have been enjoying*, more guaranties than those which the Venezuelans have. I say more guaranties, since, if they preserve their neutrality, they will only be molested occasionally. I shall ask, in my turn, if Venezuela has agreed to establish a mixed commission, and that commission has been established in order to judge in conformity with the principles of equity, what will history say if that commission, because of capricious reasons *of a political order*, should sanction principles contrary to the law of nations in order to apply them to Venezuela? Will it not say that it has disregarded its trust?

To the sketch which the Commissioner of Germany has made, supposing that the Venezuelans are enriching themselves at the cost of the Germans, I am going to oppose a parallel one. A civil war arises in Venezuela; the Venezuelan, more or less involved in the political strife, fears for his property, and if he has cattle or valuables in an insecure place he wishes to rid himself of them; but this operation is not easy. Then appears the neutral, the foreigner, especially those who by occupation are mere merchants, indifferent to the politics of the country. This latter, who solely thinks of his business, shielded by this especially favorable opportunity, realizes the profit in the negotiation, and obtains everything at a low price. Or even more, the same person has no resources, but he has the advantage that he is a foreigner. He insinuates to the Venezuelan that the goods should be placed in his name, and thereby he obtains an advantage; if the goods are lost, he will certainly make an advanta-

geous claim. Or in the midst of the conflict he will be the manager and partner of him who by violence may be able to take possession of the property of others, and by insatiable greed he will institute its destruction, and later, if he be the victim of the natural redress and should suffer the consequence of his acts, he will make there, in the interior of the country, with four witnesses at his command, a proof of violence, and who shall discover the truth? Nevertheless, it is not impossible that some time the corner of the veil which covers these things may be lifted, and it may well serve as an index of what may happen in the case of Otto Redler & Co. (Considerations like these can be found in Pradier-Fodéré). I do not attempt to make a charge against the claimants, nor a general observation concerning them; I speak of what at times happens.

As an opportune observation, it is well to note that the commerce of Venezuela has generally been carried on by Germans and they have entered into the country, driving out the Venezuelans who theretofore carried on this industry. Is not this the reason why the Venezuelans rob them?

The Commission says the convention of Washington shall proceed upon a basis of absolute equity, and if we adhere to this we must decide against the doctrine of the German Commissioner, returning his own argument, that it is not just to demand the same liability of a state of a political organization which is in a certain manner incomplete, as from another which, to its praise, has enjoyed a solid constitution. The man who comes to the United States, for example, has a right to expect more from that Government than the immigrant who comes to these countries whose historical condition is still that of political disturbances, and therefore if the liability is not to be equal the advantage must be with us. Liability is in direct proportion to capacity.

I repeat, and I desire that the umpire shall carefully investigate, this final portion of my opinion to which the absolute necessity of defense urges me, and remember that I would have desired to keep the discussion upon a more elevated plane.

The Commissioner of Germany says that amnesty in Venezuela frequently shields the acts of revolutionists, and it is natural, therefore, that the Government should be held liable for acts done by them. The honorable Commissioner is in error; amnesty only shields *political* crimes, but with respect to the liability at common law that a rebel might have incurred a perfect right of civil or criminal action against him remains to the injured party. This results from the general spirit of our laws.

I seek the truth loyally, and I do not attempt to deny the obligations contracted by Venezuela. The umpire will consider and decide in his high sense of equity, and I will conform my conduct to his judgment.

I am of opinion that the claim of Kummerow should be disallowed.

[OTTO REDLER & CO. CASE]

GOETSCH, *Commissioner:*

The claim of Redler & Co. is composed of three parts.

I. A claim for 7,647.68 bolivars. This sum was admitted by the Government of General Crespo, after his rise to the constitutional presidency of the Republic, as appears from document No. 1 (decree of the National Executive, signed Velutini). The recognition was published in the Official Gazette, No. 7147, of October 23, 1897. The recognition took place by virtue of a decree of June 9, 1893. It has emanated, therefore, from a legal act of Venezuela. This constitutes, according to the opinion of the German Commissioner, a final adjudication, coupled with the circumstance that Venezuela has not paid up to the present. It is not for the Mixed Commission to examine this

decision, nor to seek the origin of this debt; and still less to declare the determination of that Government without force. This would be equivalent to annulling the decree of June 9, 1903, which could not pertain to the jurisdiction of the Commission.

After the Government of General Crespo had become established in a legal and constitutional character, it acquired the right, not only by the constitution of Venezuela, but also by the laws of nations, to adjust, by means of legislation the claims arising out of the revolution. This right has not been disputed by governments subsequent to that of Crespo, and therefore they have recognized the decree and they have also issued similar decrees. If the German-Venezuelan Commission should alter the decree, it would intervene in the order of things legally constituted and would exceed its powers and create a disastrous juridic conflict.

A decree issued at a later date, in consideration of the financial situation of Venezuela, by which only the payment to the creditors of 15 per cent upon their claims is ordered, in no way impairs the legal right which the claimant has, since the debtor — in this case the Venezuelan nation — has no right to reduce at its discretion claims which have been recognized, to the injury of the creditor. Thus, the claimant has shown in a credible manner, in his letter of June 18 of the present year, that, notwithstanding his repeated attempts and owing to the revolution which afterwards arose against General Andrade, he could not obtain the payment of his recognized claim.

The claim of 7,647.68 bolivars appears, therefore, to be justified, as also the 6 per cent interest, counting from the 7th of October, 1893, the date of its presentation to the Commission, which then had jurisdiction, until the payment of the debt.

II. The second claim amounts to 3,732 bolivars. The juridic foundations which support this claim are the same as those in Case I, with the difference that there is no question of *res judicata*. But the claimant having presented his demand at a proper time, it is the fault of the Government then existing that until now no determination in the matter has been reached.

It is for the Venezuelan-German Commission to make satisfaction for the omission. The decree issued by the Government of General Crespo should serve as a guide which permits the determination of the claim. The amount of the claim, 3,732 bolivars, not having been disputed, and the legal relation being the same as that in Claim I, the demand should be allowed, including interest at 6 per cent annually, beginning with January 28, 1893, until the complete extinguishment of the debt.

III. The third claim amounts to 9,932.88 bolivars. Neither the agent of the Government of Venezuela nor the Venezuelan Commissioner disputes the amount of this claim. On the other hand, they deny to claimant, as they do also with respect to claims I and II, the right to present his claims before the Mixed Commission, arguing that because of active participation in the revolution of 1892 — that is to say, ten years ago — he has violated his neutrality, and has thereby lost his right to be protected by the German Government.

In the first place, the German Commissioner notes the lack of strict proof to sustain the objection that the claimant had violated his neutrality in 1892. Mr. Redler has never acknowledged that he knew that the merchandise sold by him was destined to aid the revolution. The sale was made to individuals. With respect to the sale to Ysava, it was only afterwards that the vendor learned that the merchandise was destined for General Crespo. (See letter of Redler, dated June 15, 1903.) In the second case also the sale was made to an individual. The circumstance that he made demand then upon Carlos Herrera for payment proves the good faith of Redler. (See letter of Redler, June 15, 1903.) In this

case also he learned later that the merchandise was for Crespo, for which reason his demand was rejected, and he was compelled to address himself to the Government. But even in the supposition, which is denied, that Redler did not observe the necessary caution, and has failed to observe the neutrality imposed on foreigners, the following observations should be taken into consideration:

The Government of that time would have had to submit Redler to trial and to demand an account of his actions. This has not been done. Moreover, the revolution succeeded and assumed the power. Afterwards amnesty was decreed and put into effect in favor of all the individuals and in relation to all the acts connected in any way with the revolution — a logical attitude, since the triumphant revolutionists could hardly impose punishment upon themselves. The decree of Crespo, dated June 9, 1893, by which all the claims of persons who had furnished aid and support to the revolution are recognized, gave legal expression to the foregoing conclusion.

A similar state of things exists now. All the persons who cooperated in the triumph of General Castro also resisted the laws of the country; but lawfully they must be considered as pardoned, for General Castro had legally attained the constitutional Presidency of the Republic. Thereby Redler, in consequence of the effective and legal amnesty, can not have lost his right to claim before a mixed commission. Moreover, ten years have passed since the pretended violation of neutrality. Therefore the offense made should be considered pardoned, and with it all the consequences which might have been derived therefrom disappear as the general principles of law provide.

It seems absurd to the German Commissioner to contend that the Commission should fulfill the office of a Venezuelan judge, imposing fines upon Mr. Redler for an action which took place ten years ago, and which in general has been wiped out by amnesty.

With reference to the third claim, it is also asked that Mr. Redler be allowed the sum of 9,932.88 bolivars, together with interest at 6 per cent, commencing from the 11th of August, 1902 (the report of the judge of Barquisimeto to the attorney-general of the State), until the extinguishment of the debt. The reasons which impose liability upon the Government of Venezuela in principle in the case have already been set forth in the claim of Kummerow. Reference is made to them.[1]

ZULOAGA, *Commissioner:*

Otto Redler & Co. claim (1) 7,647.68 bolivars, the value of the munitions of war furnished the revolution in 1892 upon the western coast, near Puerto Cabello. In the proof which they present General Mora says that this is proven by the account which was presented to him with the approval, at the foot, of the gentlemen who composed the revolutionary committee. This sum was acknowledged to be due by the Government and was to be paid in debt of the revolution. They claim, moreover, 3,732 bolivars as a balance of the price of supplies of war furnished also to the revolution in 1892, as appears from the receipt of the revolutionary committee, which is produced in copy. As appears from the receipts presented, Messrs. Redler & Co. were revolutionists in 1892, since they furnished munitions of war to the revolutionary parties.

The revolution in 1892 was successful, and the Government paid *those who aided its cause* (as Redler & Co.) with bonds of the revolution. In the Official Gazette, No. 7147, of October 23, 1897, which they cite, it appears *that the*

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[1] See *supra*, pp. 370, 374.

*bonds that belonged to them were at their disposal*, because of the credit which had been recognized. From the moment that the claimants intervened in the revolution of the country they lost their neutrality and the right of diplomatic protection of their Government. This is a principle of international equity generally accepted. And it is, moreover, singular that protection to recover the value of munitions of war furnished revolutionists and to compel them to be paid for under more favorable conditions than the other aiders of the revolution.

The claimants, in their new application which they make, assert that they sold those supplies, some to Casimiro Ysava, who paid for them partly in cash, which is false, since in the certificate of the company it is said that the supplies were furnished to the revolution of the 20th of June and that a sum on account was paid on the 23d of June, three days after the sale. Carlos Herrera, from information which I have received (I do not assert it), appears to be an individual who at that time had been at arms against the Government. The explanation which the claimants make, even if it were true, would not in any way change the situation, since they themselves say that their credits are for supplies to the revolutionists.

I am of opinion, therefore, that the case of the two credits claimed ought to be disallowed and that, it appearing from them that Otto Redler & Co. had interfered in the political strifes of the country, the other claim referring to the sacking of their house in Barquisimeto ought not to be considered, because they lost their neutrality which gives them the right to claim before this Mixed Commission. It would be impossible to acknowledge the right to recover in persons who take part in the politics of the country if the violences which they suffer are unjust or the work of just retaliation on account of their partial conduct.

P.S. — I disallow these claims in the first place because I believe that there can not be admitted to Redler & Co. the right to present them, having lost their neutrality, against the claim of Barquisimeto. In case Redler had not lost that neutrality, the reasons set up by the agent of Venezuela and the general principle that it was an act of the revolution would prevail.

I do not find that the theory of amnesty is in any way applicable to this matter.

## [FULDA CASE]

GOETSCH, *Commissioner:*

From the evidence it is proved that the claimant has suffered damages amounting to 5,000 bolivars occasioned by revolutionists. Neither the fact nor the amount of the damage have been disputed by the agent of the Government of Venezuela.

The German Commissioner is of the same opinion as before and refers to his opinion in the other claims, to the effect that Venezuela ought to repair the damage without considering whether or not it could have been avoided.

The agent of the Government of Venezuela objects that the Government was unable to protect Mr. Fulda against the injury of the revolutionists because this took place during the course of an international conflict; but with respect to this proofs have not been produced nor obtained.

The warlike attitude of the allies limited itself, as is well known, to the seizure of the Venezuelan ships to maintain an effective blockade of the ports of Venezuela without any resistance on the part of the latter. Therefore it is not seen why the state was prevented from properly protecting the resident foreigners in the interior where warlike action on the part of the allies was not conducted, not even expected.

Now, if what is proposed with reference to the international conflict is to

assert that the subjects of the State which finds itself at war with Venezuela can be deprived with impunity of their property so long as the war endures, this would be a doctrine which would be in conflict with the principles of the law of nations, as well as against those of civilized humanity.

The German Commissioner asks that the demand of Mr. Fulda for an indemnity amounting to 5,000 bolivars be allowed with interest at 6 per cent annually from the day upon which the injury was committed until the complete extinguishment of the debt.

GOETSCH, *Commissioner* (second opinion):

The umpire of the German and Venezuelan Commissions, the honorable General Duffield, desires to know the opinion of the Commissioners on the following questions growing out of the claims above mentioned:

I. Is it admissible that the liability of the Government of Venezuela should be limited to damages occasioned by revolutionists in such cases as the Government of Venezuela was able to prevent the damages and did not do so?

II. In case of an affirmative answer to the question contained in No. I, is it for the Government or claimant to furnish the proof that the Government was capable of preventing the injuries and did not do so?

The German Commissioner answers the question I negatively. Bearing in mind the clear provisions of the protocol of February 13 of the present year, he does not hesitate in saying, as his personal and juridic opinion, that in case the Commission should reach a contrary decision it might perchance be considered in contradiction to the terms and spirit of the treaty. Besides, in order to better sustain his opinion, he makes reference to the judgments before cited, of prior international commissions, in the judgments of which the culpability of the Government in no way entered. (See seizure of an American ship by Venezuelan revolutionists, Moore, 1693-1732; the case of Easton, Moore, 1629-30; and the seizure of the American ship *Montijo* by Colombian revolutionists, Moore, p. 1421.) In the last case cited it was said:

> The first duty of every Government is to make itself respected both at home and abroad. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

Besides, after this matter has been settled in the French Commission in favor of the French claimants, the German Commissioner, by virtue of the right of the most-favored nation, ought to insist energetically that the German claimants should not be treated worse than the French claimants, or than the American claimants have been in former cases. Do not equity and justice demand that all foreigners, so long as their governments insist upon it, should be treated alike in Venezuela?

III. If, notwithstanding all this, the honorable umpire should arrive at the conclusion that the question of blame is decisive of the case, the German Commissioner is of opinion that the burden of presenting proofs as to the lack of negligence falls on the Government. The German Commissioner agrees with the honorable umpire in the interpretation, which he has occasionally given orally, that in a constitutional state — and he desires to consider Venezuela as such — the ability of protecting its inhabitants is presupposed.

Besides this, it ought to be considered as an obligation that international law imposes upon all civilized nations, to offer protection to foreigners — an obligation from which Venezuela can not escape. All the less, since by the law of May 14, 1869, she has invited foreigners " to embark their capital and skill in Venezuelan commerce." (Moore, p. 1702.) From the obligation of

furnishing protection springs the obligation of freeing itself from blame in case protection in a particular case was not possible.

In the oral discussion of the question the Venezuelan Commissioner set up the analogy of the civil law and deduced therefrom that the introduction of proofs belonged to the party demanding anything — that is to say, to the claimant. But there also exist in civil law " presumptions of law," which shift the burden of proof (*pater est quem justæ nuptiæ demonstrant.* The responsibility of railroad companies etc.). According to this, presumption of international law should take the place of proof, or, what would be the same thing, the Venezuelan Government should only be able to avoid the liability by the production of counter proof. This in every case would be in accord with the protocol.

He who has recognized in principle his " liability " in cases of confiscation of or injury to property and wishes to free himself from the liability, conventionally assumed, is at least under the obligation to prove facts which would free him from such liability. Besides this, there is the following: The claimant would almost always be unable to present proofs that the Government could have protected him. He does not know the tactical and strategic dispositions and intentions of the Government, and as the peaceful citizen, in the generality of cases, he will not be able to know the objects, management, and movements of the revolutionary troops. On the other hand, it is easy for the Government to show in a particular case why a village should have to be abandoned to the revolution, or the troops and the police of the Government had to be withdrawn from it. Therefore it is equity which places the burden of proof upon the Government.

ZULOAGA, *Commissioner:*

I believe that the claim ought to be disallowed, because of the reasons set forth by the agent of Venezuela. The Commissioner of Germany says that it is well known that the warlike attitude of the allies was limited, after having made capture of the Venezuelan vessels, to making the blockade effective. It is also well known that General Castro, President of the Republic, had completely conquered the revolution in the action at La Victoria; that immediately, therefore, in order to be able to dispose of the remainder of the revolutionary armies, he divided the forces of the Government, sending a part to the east in order to stop the passage of General Rolando, who was marching toward that place, and another to the west in order to quickly overtake the rebels, Matos, Riera, and others; that in this state of things the international conflict arose and the Government prevented, on account of the losses of its ships, from concentrating its forces, Rolando was able to rally in the central region, and even to menace the capital, since the army of the Government had to go overland by forced marches for a great distance.

The Government did at that time everything that was reasonably possible to put a stop to the revolution, as well in a military manner as politically. If the international conflict had not arisen, very probably the revolution would have terminated last year.

The imputation which the Commissioner of Germany casts upon the honorable agent of Venezuela, that the latter might assert that subjects of a state which were not at war with Venezuela might be deprived of their property with impunity, is an uncalled-for accusation, since from the words of the agent of Venezuela it is not possible to loyally deduce what the Commissioner seeks to charge him with. This language of the Commissioner is very poorly suited to facilitating the labors of this Commission. I am of opinion that the claim of Fulda ought to be disallowed.

ZULOAGA, *Commissioner* (second opinion):

The Government is not liable to individuals for the damages which insurgents, revolutionists, or people in revolt, in whatever manner against the constituted authority may cause.

The Government should furnish protection and security, but it is in so far as the means at its disposition and the circumstances under which the acts have been committed permit. And the causes which may make a government more or less culpable are so many and so different that it would be impossible even to form general ideas about the matter. Besides, the circumstances which control in a disturbed society are so complex that it is a question of political tact, which is only exceptionally found in men of the government.

Extreme energy and implacable repression are at times the greatest errors and serve only to foster insurrection. Revolutions are not always occasioned by faults or errors of the Government or by the simple rebellious spirit of the revolutionists. They follow multiple causes, and not seldom upon the political horizon the cloud of revolution is seen and condenses itself without the patriotism of the best citizens of the Government or of the opposition being sufficient to restrain its violent effects, they having their source in such profound economic or political causes.

Europe itself, so proud to-day of the internal peace which its states have been happy to preserve during the second half of the past century, notwithstanding the powerful organization of its governments, sees with dread, to say the least, how each day the social revolution grows to which the entire working masses are affiliating themselves.

Governments are constituted to furnish protection, but not to guarantee it, and it is absolutely impossible that a tribunal such as this should undertake to investigate the causes of an injury upon general principles of internal politics, under the penalty of finally constituting itself as a judge, not of the *cases* for damages submitted to it, but of the Government or of the country itself, which would be an act of intervention contrary to the principles recognized by all states.

Nevertheless some governments and authorities maintain that for certain particular acts, taking into consideration the circumstances of the case, liability may be fastened upon the state for damages which an individual may suffer, if the facts show in a clear and evident manner that the state has been negligent in every way, in furnishing protection which he ought reasonably to expect from it. According to this theory the state is *not liable because of want of protection*, but for such culpable and grave negligence, which is equivalent to its own acts against private property.

He therefore who seeks to recover from a state for damages suffered under those conditions, in order that his action may prevail, has to prove (1) that he has suffered the damage and (2) that the state is in a certain manner liable for its negligence in the concrete case.

This is the doctrine of Fiore. He says:

> It is not sufficient that a state should prove that it has suffered an injury resulting from an act of individuals who reside in another state in order to fasten the liability upon the latter, and to oblige it to make reparation; it is necessary that it prove that the prejudicial act is morally chargeable to the other state, or that that state ought or could have prevented it, and that voluntarily it has been negligent in doing so.[1]

But this is nothing except the application of the principles of common law that the burden of proof is upon the *claimant*.

[1] Fiore Droit Int. Pub., vol. I, p. 582, sec. 673.

In the application of these principles of indirect liability it is necessary to bear in mind that the government of a country during times of war finds itself confronted with greater difficulties and problems than in times of peace, and its special attention must be directed first to the reestablishment of the disturbed peace, and that liability is in direct proportion to capacity.

Fiore, speaking of neutrality, says:

> The incapacity of a neutral state to prevent the violation of the duties of neutrality also excludes the liability of the Government, and therefore the right of the belligerent to consider the neutral state as liable by reason of the violation of the duties of neutrality.[1]

If this rule was concisely expressed concerning neutrality where the obligations of neutral governments are in a certain manner direct, what shall we say if in the case under consideration there is a question of the internal management of a state? This principle of the liability of a state for negligence would have to be further modified by the one which provides that foreigners can not assert more right in the territory than that which nationals may possess, and by the law of Venezuela the state is not liable for revolutionary damages.

Putting aside all this discussion and the principles of international law to which the necessity of interpreting the meaning of certain provisions of the protocol of Washington has brought us, and confining ourselves solely within the scope of absolute equity, I ask, would it be equitable that foreigners who live in the territory of Venezuela should withdraw themselves from the political conditions of the country, and that in advantage over the Venezuelans they should not only obtain an indemnity from the Government for damages which the latter might have caused them, but also for the damages of revolutionists, against whom the Government has had to contend and against whom it has had to employ all its energy and money and sacrifice the lives of not a few Venezuelans? Would it be equitable that between a Venezuelan and a foreigner the first might say: " My home is in mourning, since beloved members of my family have died in the defense of the Government and the constituted authorities; my ruin has been consummated, since I have not been able to carry on my business, or I have been the victim of passions of its opponents, because I have resisted them," and that the foreigner should say: " But I lose nothing, and I live in this community which is in conflict just as if in the best of times. I do not defend the Government, I am not under this obligation, but the Government pays me not only for the injury which it may cause me, but also for the injuries which its opponents occasion." I believe that in equity the claims of Kummerow and F. L. Fulda can not be admitted.

[FISCHBACH AND FRIEDERICY CASES.]

GOETSCH, *Commissioner:*

Various witnesses testify that both claimants were taken prisoners on October 20, 1902, near Carúpano by a revolutionary detachment, with the intention of taking money from them, and that to this end they were insulted, assaulted, robbed, bound to a post, threatened with death, and thrown into a house infected by smallpox, in order that the payment of the sum demanded might be accomplished. The claimants demand for this treatment an indemnity, to which Friederic especially adds the injury resulting in a rupture caused by the tying and other ill treatment to which he was subjected. The detachment in question was commanded by two officers, Gutierrez and Gonzalez,

[1] Idem. Sec. 1569.

and was distinguished, as one of the claimants states, by a white design with black letters thus: " Libertador Army." This proves that the authors were regular troops of the revolution, and not merely marauders or robbers. Both Commissioners ask the honorable umpire to decide for the present, in principle only, the question whether the Government of Venezuela is obliged to pay to the two claimants an indemnity for the ill treatment suffered. The question of the amount of this indemnity will be a matter for future consideration. It is recognized by the law of nations, and also it has been adjudged by international commissions of arbitration, that States may make themselves liable for the unlawful ill treatment and imprisonment of foreign subjects, and that they are obliged to pay a proportional indemnity. Thus it happened in the case of *Col. Lloyd Aspinwall.* " Something would seem to be due to the crew of the vessel as indemnification for ill treatment, as it were." (Moore, History and Digest, pp. 1015 and 1016.) (See also page 1171, Henry Dubo's claim for illegal arrest and imprisonment; also page 1579, the Santo case; 1653, No. 15, Charles Weile; page 1852, Van Bokkelen; see also page 1714 and page 1724, the arrest of the crew of the Venezuelan Steam Transportation Company.)

It is undoubted that the liability *extends* to the arrest and ill treatment suffered at the hands of the officials of the Government; but the liability *might also be extended* to the hands of officials or revolutionary troops.

The principles of international law and those derived from other sources which imply liability in cases of confiscation or damage of property by officers or troops of the revolution that have been already discussed in detail with respect to the claim of Kummerow I refer to said opinion.

These principles fix also the liability in cases of acts executed against the liberty and health of a person, inasmuch as these are properties more precious than material or monetary ones. Likewise, every Government is obliged to furnish protection to foreigners, whose liberty it ought to guarantee. By not doing so it makes itself liable and should make reparation to the person injured. (See Moore, p. 1444, and the Panama riot, p. 1362.) Neither the Government of Venezuela nor that of the revolution has instituted any sort of proceedings against the officials named and the detachment under their command in order to chastise them for the barbarous ill treatment and tying of which they made German subjects the victims. If with reference to this representation before the Government in Caracas it had been attempted, no other result would have been obtained than the statement that the Government had lost control in the neighborhood of Carúpano. In the claim of the Venezuela Steam Transportation Company, an indemnity was allowed by the Commission, at the solicitation of the Government of the United States of America, to the American sailors imprisoned by Venezuelan revolutionists. (Moore, History and Digest, p. 1714-1724.) The honorable umpire is therefore asked to declare in principle the liability of Venezuela in the present case also.

In any case the Government of Venezuela would be liable for the articles stolen, in accordance with article 3 of the protocol.

ZULOAGA, *Commissioner:*

The claims of Friedericy and Max Fischbach are founded, as they say, upon ill treatment which a revolutionary band inflicted upon them. Taking into consideration the facts, if they are proved, I find that they constitute a common injury received from a group of highway robbers, and I believe that the penalties of the case, as, for example, a fine, should be put into effect, but I do not understand why the act which constitutes the private wrong has to be gone into and pecuniary indemnity made by the State to the victims of the atrocity. There

are precedents, it is true, of indemnities claimed diplomatically for unlawful seizures, but as far as I have been able to see they have been committed by authorities in violation of the laws, and in that case the State is liable because its officials are the wrongdoers — because the one who commits the violation of the law is charged with furnishing protection. From this to seek to make the State a sort of surety against every sort of wrongdoing which individuals suffer in its domains there appears to me to be some difference. These acts, as the claimant himself states, are committed by a band of revolutionists — that is to say, by men who proceed upon their own account, without any other rule than to take advantage of the disturbed situation of the country to commit their depredations. Revolutions or political disturbances and their natural consequence of insecurity and violence are social epochs which in general all countries have passed through and against which none can provide nor believe that it may withhold itself definitely, and it is inadmissible that a State should be made liable for private acts, only because of the fact that they are committed during a revolution. By the Venezuelan law a criminal suit can be instituted (1) if the judge has knowledge of the fact; (2) by a *charge* made by the party aggrieved; (3) by information of any citizen to the judge of the act committed. It is therefore in the hands of Friedericy and Fischbach to accomplish the punishment of the guilty parties.

DUFFIELD, *Umpire:* [1]

The Commissioners disagree as to the liability of Venezuela under the protocol for acts of revolutionists in the recent civil war, and as to the responsibility of Venezuela for wrongful seizures of or injuries to property.

The Commissioner for Germany is of the opinion that under Articles I and III of the protocol of the 13th of February the Venezuelan Government is liable in these cases, because of the admission of liability of the Venezuelan Government in those articles, and also upon general principles of international law.

The Commissioner for Venezuela disagrees with the Commissioner for Germany, and is of the opinion that Article III of the protocol contains nothing which differs from the rules —

that nations have laid down in general as established in this connection, but is only a confirmation of those principles, with the intention at most, of contradicting the doctrine of absolute irresponsibility of governments in civil wars as held by many governments and sustained by international authorities.

He also is of the opinion that Article I of the protocol, in which the Government of Venezuela acknowledges in principle the justice of the claims of German subjects *presented* by the Imperial German Government —

refers to the claims already [then] presented, which are those of which Article II of the protocol treats, claims which the Government of Venezuela held were, in general, entirely unjustified.

It is insisted by the Commissioner for Germany that because of the admission made by the Venezuelan Commissioner of the justice in principle of two claims heretofore submitted to the umpire based upon acts of revolutionists, and in which the Commissioners only disagreed upon the question of amount, that the principle must be considered as settled by the Government of Venezuela in this and all future cases coming before this Commission. The umpire agrees

[1] For a French translation see Descamps-Renault, *Recueil international des traités du XX*ème *siècle*, 1903, p. 769.

with this position of the Commissioner for Germany, in so far as the particular claims referred to are concerned. It has been held in former international commissions that there is no power vested in an umpire to grant a rehearing. In the present case the umpire is of the opinion that the true interpretation of the protocol does not authorize any rehearings, unless perhaps in extreme cases where the application is based upon newly discovered substantive and not cumulative evidence. He is unable, however, to go to the length urged by the Commissioner for Germany. It is undoubtedly true, as he says —

> that in the interest of unity of decisions of the Commission a question of law should not be decided in one way to-day and in another way to-morrow.

But, as the Venezuelan Commissioner frankly says in his opinion in one of said former claims —

> although I have accepted the claim in principle, a better study of the matter has convinced me that it is an error, and that the principles which are to govern me are those which appear in my opinion in the matter of Kummerow (claim No. 7),

in which he says —

> I confess that my first impression upon reading it (Article III of the protocol) was one of extreme perplexity and uncertainty, but a more careful study of the matter convinced me that it could in no way contain a rule of exception which goes so far as to make the Government responsible for every injury done a German,

the umpire is of the opinion that it is not only the privilege but the duty of the Commissioner for Venezuela to present his more carefully studied opinion on the question, the more so because the first impression of the umpire upon reading it "was one of extreme perplexity and uncertainty," and because the question is complicated and not readily solved. Moreover, the question is one of great gravity and importance, and upon its correct decision will depend the allowance or disallowance of many claims involving in the aggregate a very large sum of money.

The disagreement between the commissioners is evidence that the language of the article appears to be susceptible of two contrary meanings, and in determining which is the correct construction regard must be had to the situation of the high contracting parties and the circumstances preceding and surrounding the execution of the protocol. (Opinion of Umpire Little in the United States and Venezuelan Commission, 1889 and 1890.) After a considerable period of diplomatic correspondence between the two Governments with reference to the claims of German subjects against the Republic of Venezuela, without reaching any agreement as to a satisfactory adjustment of the same, the German Government on the 7th day of December, 1902, submitted an ultimatum containing the following:

> In addition, the manner in which the German claims arising from the wars have been treated by the Government of the Republic has led the Imperial Government to believe that the other credits also of her subjects against the Republic need her protection to obtain a just settlement. In that sense are to be considered the German claims arising from the present civil war, the credits of the German houses growing out of the construction of the slaughterhouse in Caracas, and the sums owing the Gran Ferrocarril de Venezuela for the interest and amortization of the bonds of the Venezuelan 5 per cent loan of 1896, which were delivered to it in the place of a guaranty of interest. Instructed by the Imperial Government, I must also ask the Venezuelan Government to immediately make a declaration to the effect that it recognizes in principle that these claims are well founded, and that it is ready to accept the decision of a mixed commission with the object of having them settled and assured in all their details. (P. 40 of Correspondence of the Department of Foreign Affairs of the United States of Venezuela, published

under the authority of an executive decree of the Republic of Venezuela, December, 1902.)[1]

A similar position was taken by the other allied powers, and on the 9th day of December, 1902, the allied powers established the blockade of the ports of Venezuela and seized certain of her war vessels.

The protocols of February 13 and May 7, 1903, were entered into by the parties while the war vessels and ports of Venezuela were still in the control of the allied powers, and as the only amicable mode of raising the blockade and restoring peaceful relations between the respective Governments.

Soon after the institution of the blockade the Government requested Mr. Bowen, envoy extraordinary and minister plenipotentiary of the United States to Venezuela, who was also the temporary representative of British and German interests in Venezuela, to propose to Great Britain and Germany that the claims for alleged " damages and injuries to British and German subjects be submitted to arbitration." With the consent of his Government he was soon after appointed such arbitrator and mediator.

The ability and diplomacy with which he performed the duties of his office have resulted in the meeting now in Caracas of international arbitration commissions between Venezuela and ten of the principal nations of the world, to adjust amicably and according to the principles of justice and equity their conflicting claims; the most notable instance of international arbitration in the history of the world.

In the correspondence which took place during these negotiations the following statements by the representatives of the respective Governments are material:

To the request of the Government of Venezuela through Mr. Bowen, that those Governments would refer " the settlement of claims for alleged damages to the subjects of the two nations during the civil war " to arbitration (Mr. Bowen's pamphlet, Venezuelan Protocols, p. 2),[2] the Government of Great Britain and the German Government replied through the Secretary of State for the United States, December 22, 1902.[3]

His Majesty's Government have, in consultation with the German Government, taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela. The proposal is as follows:

" That the present difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection be submitted to arbitration. The scope and intention of this proposal would obviously require further explanation. Its effect would apparently be to refer to arbitration only such claims as had reference to injuries resulting from the recent insurrection. This formula would evidently include a part only of the claims put forward by the two Governments, and we are left in doubt as to the manner in which the remaining claims are to be dealt with. * * * "

His Majesty's Government desire, moreover, to draw attention to the circumstances under which arbitration is now proposed to them. The Venezuelan Government have during the last six months had ample opportunities for submitting such a proposal. On July 29, and again on November 11, it was intimated to them in the clearest language that unless His Majesty's Government received satisfactory assurances from them, and unless some steps were taken to compensate the parties injured by their conduct, it would become necessary for His Majesty's Government to enforce their just demands. No attention was paid to these solemn warnings, and in consequence of the manner in which they were disregarded, His Majesty's

[1] See the original Report, Appendix, p. 971.
[2] Idem, Appendix, p. 1029.
[3] Idem, Appendix, p. 1033.

Government found themselves reluctantly compelled to have recourse to the measures of coercion which are now in progress. His Majesty's Government have, moreover, already agreed that in the event of the Venezuelan Government making a declaration that they will recognize the principle of the justice of the British claims and that they will at once pay compensation in the shipping cases and in the cases where British subjects have been falsely imprisoned and maltreated, His Majesty's Government will be ready, so far as the remaining claims are concerned, to accept the decision of a mixed commission, which will determine the amount to be paid and the security to be given for payment. A corresponding intimation has been made by the German Government. This mode of procedure seemed to both Governments to provide a reasonable and adequate mode of disposing of their claims. They have, however, no objection to substitute for the special commission a reference to arbitration with certain essential reservations. These reservations are, so far as the British claims are concerned, as follows:

1. The claims, small as has already been pointed out in pecuniary amount, arising out of the seizure and plundering of British vessels and outrages on their crews and the maltreatment and false imprisonment of British subjects, are not to be referred to arbitration.

2. In cases where the claims is [are] for injury to, or wrongful seizure of, property the questions which the arbitrators will have to decide will only be *(a)* whether the injury took place and whether the sentence [seizure] was wrongful, and *(b)* if so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

3. In the case of claims other than the above we are ready to accept arbitration without any reserve.

This was sent from Washington December 27, 1902, by cipher cable, and on the 31st of December, 1902, President Castro wrote to Mr. Bowen: [1]

I recognize in principle the claims which the allied powers have presented to Venezuela. They would already have been settled if it had not been that the civil war required all the attention and resources of the Government. To-day the Government bows to superior force, and desires to send Mr. Bowen to Washington at once to confer there with the representatives of the powers that have claims against Venezuela, in order to arrange either an immediate settlement of all the claims or the preliminaries for a reference to the tribunal of The Hague or to an American Republic to be selected by the allied powers and by the Government of Venezuela.

The reply of the German Government, through the United States ambassador at Berlin, to the Secretary of State, and by him to Mr. Bowen, on the date of January 6, 1903, stated among other things:[2]

The German Government learns with satisfaction that the Venezuelan Government has accepted its demands in principle. Before further negotiations can be undertaken with Venezuela, however, it seems necessary that the President of Venezuela should make a definite statement as to the unconditional acceptance of the three preliminary conditions set forth in the German memorandum of December 22, 1902.

On the following day President Castro wrote to Mr. Bowen: [3]

Mr. MINISTER: The Venezuelan Government accepts the conditions of Great Britain and Germany; requests you to go immediately to Washington for the purpose of conferring there with the diplomatic representatives of Great Britain and Germany and with the diplomatic representatives of other nations that have claims against Venezuela, and to arrange either an immediate settlement of said claims or the preliminaries for submitting them to arbitration.

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[1] Idem, Appendix, p. 1034.
[2] Idem, Appendix, p. 1035.
[3] Idem, Appendix, p. 1036.

At the instance of the German Government Mr. Bowen, under his authority from Venezuela, signed the document of January 24, 1903, containing this language: [1]

II. All the other claims which have already been brought to the knowledge of the Venezuelan Government, in the ultimatum delivered by the imperial minister resident at Caracas — i.e., claims resulting from the present civil war, further claims resulting from the construction of the slaughterhouse at Caracas, as well as the claims of the German Great Venezuelan Railroad for the nonpayment of the guaranteed interest — are to be submitted to a mixed commission should an immediate settlement not be possible.

III. The said commission will have to decide both about the fact whether said claims are materially founded and about the manner in which they will have to be settled or which guaranty will have to be offered for their settlement. Inasmuch as these claims result from damages inflicted on property, or the illegal seizure of such property, the Venezuelan Government has to acknowledge its liability in principle, so that such liability in itself will not be an object of arbitration and the decision of the commission will only extend to the question whether the inflicting of damages or the seizure of such property was illegal. The commission will also have to fix the amount of indemnity.

From these documents it clearly appears that Germany and Great Britain insisted upon the admission of the justice in principle of the claims of their subjects already presented, and specifically demanded that in respect to claims for injuries to or wrongful seizures of property arising from the present civil war, * * * the questions which the arbitrators will have to decide will only be (*a*) whether the injury took place and whether the sentence [seizure] was wrongful, and (*b*) if so, what amount of compensation is due. That in such cases the liability exists must be admitted in principle. Three. In the case of claims other than the above we [they] are ready to accept arbitration without any reserve.

The result was the execution of the protocols of February 13 and May 7, 1903, under which this Commission is acting.

All of the protocols between Venezuela and the peace powers are in the same language, mutatis mutandis, as the United States protocol. (Note to the United States protocol in Mr. Bowen's pamphlet, p. 30.)[2]

It is therefore too plain to need argument that if any effect whatever is to be given to Articles I and III of the German-Venezuelan protocol, the rule of liability must be different from that under the protocols of the peace powers.

The umpire, therefore, agrees with the argument of the Commissioner for Germany that Articles I and III of the protocol can not be treated as merely superfluous or redundant. Certainly the admission which was required as a sine qua non to any arbitration, which was the consideration to the allied powers for returning to Venezuela the control of her war vessels and her ports, can not be disregarded in determining her liability.

Marshall, Chief Justice, says, speaking for the United States Supreme Court, in the *Nereide*, 9 Cranch, 419:

Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and can not be supposed either to omit or insert an article common in public treaties without being aware of the effect of such omission or insertion; neither the one nor the other is to be ascribed to inattention.

This must be equally true in the case of the insertion of an article most uncommon, if not unprecedented, in treaties, and which contains a general ad-

[1] Idem, Appendix, p. 1037.
[2] Idem, Appendix, p. 1047.

mission of liability. A fortiori in this case, where an admission of liability is contained only in the protocols of those Governments which still held control of the war vessels and ports of Venezuela.

It is therefore the plain duty of the umpire, under the protocol, to treat those provisions in Articles I and III as substantive and material, and to give them the interpretation which they should have in the light of the circumstances immediately preceding and surrounding their execution.

The umpire agrees in opinion with the Venezuelan Commissioner that the fair construction of Article I, in which the Venezuelan Government "recognizes in principle the justice of claims of German subjects 'presented' by the Imperial German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to "those originating from the Venezuelan civil wars of 1898 to 1900" and provides for their payment modo et forma. Moreover, there is a plain inference, from the special admission of liability in Article III in cases of wrongful seizures of or injuries to property, that the parties did not consider that Article I covered that class of claims. It is therefore necessary to determine the true intent and meaning of these words in Article III.

The German claims not mentioned in Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the engineer, Carl Henckel, in Hamburg, and of the Beton and Monierban Company (Limited), in Berlin, for the construction of a slaughterhouse at Caracas are to be submitted to a mixed commission.

Said commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to or a wrongful seizure of property, and consequently the commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

In the opinion of the Commissioner for Venezuela the words of the article can not be literally interpreted —

because [he says] that it would then make Venezuela admit her liability for any common crime committed by an individual upon a German subject, and that inasmuch as it is self-evident that this class of seizures or of injuries to property, while within the literal wording of the provisions, is not within its reason, it is the duty of the Commission to classify these wrongful seizures of or injuries to property.

And he suggests this classification: That the admission of liability includes all injuries to or wrongful seizures of property by the governmental troops or Government officials, but that it *does not include* wrongful seizures of or injuries to property by revolutionists.

The umpire agrees that the admission does not embrace common individual crimes not resulting from insurrectionary events, because it is quite apparent that with respect to wrongful seizures of or injuries to property the high contracting parties had in mind only those occurring during the present civil war. (See the ultimatum of Germany, above quoted, and the British memorandum of December 22, speaking also for Germany in regard to the terms of arbitration.[1]

The umpire can not agree with the opinion of the Venezuelan Commissioner that the admission of liability by Venezuela is restricted to wrongful seizures of or injuries to property inflicted by the authorities of Venezuela acting in their

[1] Idem, Appendix, p. 1033.

official character. The Commissioner in support of this position quotes from Seijas the law of Venezuela of 1873, which enacts that the nation will not be expected to indemnify for injuries, damages, or seizures which were not caused by the legitimate authorities, acting in their public character, and he says —

> the protocol of February seems to have wished to abolish this just distinction, and for the reason that injuries inflicted by the forces of the Government, taking advantage of their position, it seems to me, makes the Government responsible;

and he continues:

> In the matter of the revolution [revolutionists] it results, according to those same principles, that the Government is not and can not be responsible for acts which are not its acts, but the acts of persons temporarily withdrawn from its control.

And that this rule of nonliability is —

> not only declared by the act referred to, but by the concensus of opinion of international law writers and precedents.

His argument, in brief, is that Venezuela only admitted, first, that German subjects would not be compelled to regard the provisions of the law of February 14, 1873, and present their claims to her *courts*; second, that said law should not be the test of liability in cases of injuries to or wrongful seizures of property, although he insists that the law declares the international rule of liability. It is to be remarked in passing that his statement is not accurate, because he does not deny the liability of Venezuela for acts committed by revolutionists who afterwards succeeded in establishing a new government, thus making the wrongfulness of the seizure depend not upon the act itself, but the result of the revolution.

It is plain that the admission was not demanded by Germany for the first reason, because that purpose was contemplated and actually consummated by the submission to arbitration and is explicitly stated in the first paragraph of Article III. As to the second, passing, for further consideration later in this opinion, the correctness of an interpretation of general words of admission of liability which permits their restriction to one of several grounds of liability, it is equally clear that this purpose is fully accomplished by the provision in the protocol with reference to local legislation.

It is now argued in behalf of Venezuela that her law in respect to acts of revolutionists declared the recognized rule of international law. It would seem logically to follow that her admission of liability would be as broad as the statute. And if the statute and the rule of international law were equally broad, her admission would cover both. It certainly can not be argued that while she admitted in general words her liability, contrary to the conditions of the rule laid down in her own statute, she may now claim nonliability under a rule of international law which she alleges is recognized by the consensus of opinion of all authorities on international law. Manifestly this is no admission at all.

From what has been shown by the correspondence it plainly appears that the principal bone of contention between the parties was their disagreement as to Venezuela's liability for injuries to or wrongful seizures of property resulting from the present Venezuelan civil war. Venezuela claimed nonliability because of her statute which she then insisted and still insists declared the correct international-law rule of liability. Germany denied this. Venezuela, from the necessity of the situation, receded from her position and admitted her liability. Now she contends: " I did not admit my liability under international law, although I did admit my liability under my statute, which declared the same principle of immunity I am now contending for. I did admit my liability under my statute, but I did not admit it under the principles of international

law unanimously conceded, notwithstanding the rule of liability is the same in both."

Coming now to the final argument of the Commissioner for Venezuela, that international law absolves Venezuela from liability for acts of revolutionists and that her admission must be interpreted in the light of this rule —

Is his premise well founded? International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice or by the superior force of the particular nation or nations whose interests are involved.

Applying this inherent nature of international law to the question under discussion, it follows that neither Germany nor Venezuela was by force of law compelled to accept the other's judgment as to a principle of international law upon which they differed. Each nation held to its own opinion of what the correct rule of international law was in the premises — Germany, that Venezuela was liable for injuries arising from insurrectionary events, and Venezuela that she was not. Arbitration is proposed by Venezuela. This, if accepted, would unquestionably leave the question of liability to be decided upon principles of international law. But Germany says, " No! I will not refer these claims to arbitration unless Venezuela first admits her liability." Now, Venezuela having by her admission regained control of her ports and her war vessels, contends that she admitted liability only in cases where she was legally liable. Certainly, this position can not be maintained. She was always liable for claims for which she was legally liable. Hence she admitted nothing. And yet we have seen of what momentous consequence this admission was to her. It is perfectly plain that Germany would never have released the ships and ports from which they were in position to make payment of the claims of their subjects if Venezuela had then interpreted her admission as she now seeks to do, or if Germany had had any conception that such interpretation would be sought to be given to words admitting liability generally.

The case of Venezuela falls within the rule stated by Vattel:

> If one who can and should clearly and completely explain has not done so, it is to his damage; he will not be allowed afterwards to bring forward restrictions [limitations] which he has not expressed. (Vattel, book 2, sec. 264.)

Here Germany requires from Venezuela an admission of liability in as broad terms as can be used. Venezuela could and should have explained her understanding of them. Not having done so then, she can not do so now. When Venezuela admits, without qualification, her liability for wrongful seizures of or injuries to property growing out of insurrectionary events during the civil war, she must be held to admit her liability for all wrongful seizures of persons and property during that period and under those conditions.

Moreover, substantially all the authorities on international law agree that a nation *is responsible* for acts of revolutionists under certain conditions — such

as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injury. *There is*, therefore, a rule of international law under which Venezuela would be held liable in certain cases for acts of revolutionists. And there are some very respectable authorities which hold that a nation situated with respect to revolutions as Venezuela has been for the past decade and more, and with the consequent disordered condition of the State, is not to be given the benefit of such exemption from liability. These considerations may be presumed to have been in the mind of either or both of the contracting parties, and to have induced the insertion in the protocol of the admission of liability.

The case, therefore, is one in which two nations who are presumably aware of this diversity of opinion among nations as well as between themselves as to the liability of governments for the acts of revolutionists enter into a solemn agreement containing an express admission of liability for *all wrongful seizures of or injuries to* property growing out of insurrectionary events in a civil war. Can there be any other conclusion than that they intended to settle themselves this question of liability and not leave it to be determined as a commission might decide, one way or another? Whatever strength the argument might have if there was the unanimity of opinion claimed, and therefore the admission of liability might be interpreted as a mere declaration of an existing uniformly recognized principle of international law, the argument fails when it appears in the case before us that there is a contrariety of opinion on the subject. Moreover, the well-recognized canons of construction prohibit a restricted interpretation of this article. It is a uniform rule of construction that effect should be given to every clause and sentence of an agreement. The result of the construction insisted upon by the Commissioner for Venezuela would be to give the same meaning to the German protocol and to those of the peace powers, in effect striking out Article III. It is a conceded principle of interpretation that an admission is taken most strongly against the party making it. (Vattel, above quoted.) Finally, it is a rule of construction of treaties, sustained by the highest authorities, that if a clause in a treaty is susceptible of two interpretations, one broad and the other restrictive, the courts will give the clause the former interpretation in favor of private rights. In the case of Shanks *v.* Dupont (3 Peters, 242, 250) the Supreme Court of the United States, in construing the treaty of the United States with Great Britain of 1794, confirmed this rule. Mr. Justice Story delivered the opinion of the court. In it he said:

> If a treaty admits of two interpretations, and one is limited and the other liberal, *one which will further and the other exclude private rights*, why should not the most liberal exposition be adopted? * * * This part of the stipulation, then, being for the benefit of British subjects who became aliens by the events of the war, there is no reason why all persons should not be embraced in it who sustained the character of British subjects, although we might also have treated them as American citizens. * * * In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rule of interpretation applicable to treaties between independent states, the objections taken to the right of recovery of the plaintiffs can not prevail.

The rule is again affirmed by the same court, speaking through Mr. Justice Swayne, in this language:

> Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (Hauenstein *v.* Lynham, 100 U.S., 483.)

The principle was recognized by the Commission under the United States and Venezuelan convention, in Aspinwall *v.* The United States of Venezuela.

The Commissioner (Little), speaking for the Commission, says,[1] this doctrine —

is thoroughly embedded in the jurisprudence of the United States, and is believed to be, internationally, a sound one. * * * [And] this finds support, if any were needed, in what Grotius says: " In the things which are not odious, words are to be taken according to the general propriety (totam proprietatem) of popular use, and, if there are several senses, according to that which is widest." (De Jure Belli ac Pacis, book 2, chap. 16, par. XII.)

In discussing the language of the treaty of 1819 between the United States and Spain, which it was contended did not include claims on torts, Mr. John Quincy Adams, Secretary of State, referring to the fact that in the course of the negotiations a proposal was made to omit the renunciation which included the latter class of these claims, said:[2]

As there is no limitation in the words of this renunciation, with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. They were claims, of all of which it was believed that the only possible chance of obtaining any satisfaction to the claimants, consisted in the execution of the treaty.

It has been suggested that this interpretation will extend the liability of Venezuela to all injuries, because the word " wrongful " does not precede the word " injury; " that the clause must in that case be read " The Venezuelan Government admit their liability where the claim is for *any injury* to property," whether accidental or justifiable. Even if the word " injury " is taken in its generic or popular sense, the umpire is of the opinion that this interpretation is forced and untenable. The word " injury " when used in a legal or moral sense involves intentional wrongdoing.

" Injury in morals and jurisprudence is the intentional doing of wrong." (Fleming, Webster's Unabridged Dictionary, " injury.")

Again it is suggested that the word "wrongful " must be interpreted by reference to international law, and that Venezuela admits liability only for those seizures and injuries which are wrongful in the light of international law. This is incorrect. The admission is confined to property rights and must be read in that connection. It clearly means that the injury or the seizure shall be wrongful in respect to the right of property of the owner — *his title to the property* — and that any act which violates that right is wrongful. This right of property or title must be decided by municipal or local law, because it is derived from and is conferred by that law. One does not derive his title to property in any country through international law, but through the local law of the country. That law confers, permeates, and restricts his title. He takes his title subject to any and all the qualifications and limitations of the local law at the time of its acquisition.

It is also suggested that if Venezuela is held liable for injuries caused by the acts of insurrectionists, it will tend to discourage future revolutions. If the suggestion were pertinent, it might be possible to argue the opposite result; that, in the language of an eminent representative of the United States, " revolutions might then become a pastime for foreigners." But it is not pertinent. The functions of the Commission are strictly judicial. They have nothing to do with questions of statecraft and diplomacy. Their simple duty is to determine the rights of the parties according to justice and equity. They must not be influenced in reaching their conclusions by theories or predictions as to the possible effect of their decisions upon the political future of Venezuela. It is none of their concern. Fiat justitia ruat cœlum.

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[1] Moore's Arbitrations, 3624.
[2] Moore's Arbitrations, 4504.

In view of these considerations, the umpire is of the opinion that the admission of liability in Article III extends to claims of German subjects for wrongful seizures of or injuries to property resulting from the present Venezuelan civil war, whether they are the result of acts of governmental troops or of Government officials or of revolutionists.

This, however, does not dispose of the entire question. First, the admission of liability in Article III does not include injuries to the person; it covers only seizures of or injuries to property. Second, of these it only includes those resulting from the present Venezuelan civil war. The liability in these two classes of claims must be determined, therefore, upon the general principles of international law, because under the language of the protocol, read in the light of the British and German memorandum of December 22, 1902, *they* are referred to " arbitration without any reserve."

In thus determining them it is not, however, necessary to discuss the general question of the character and extent of the liability of a nation for acts of insurgents. There is diversity of opinion among the authorities on the question.

In the opinion of the umpire, however, the modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular government. It is not necessary that either a state of war, in an international sense, should exist or any recognition of belligerency. Immunity follows inability.

This rule was very recently affirmed and approved by the United States Spanish Treaty Claims Commission sitting at Washington April 28, 1903 (Opinion No. 8).

Judicial cognizance can properly be taken of the condition of Venezuela during the present civil war. And there can be no doubt that from its outset it went beyond the power of the Government to control. It was complicated by the action of the allied powers in seizing the forts and war vessels of Venezuela; and if it is now fully suppressed (as is to be hoped), its extinction was only within a few days past. During all this period considerable portions of the country and some of its principal cities have been held by revolutionary forces. Large bodies of organized revolutionist troops have traversed the country, and in their train have followed the usual marauding and pillage by small bands of guerrillas and brigands. The supreme efforts of the Government were necessary and were directed to putting down the rebellion. Under such circumstances it would be contrary to established principles of international law and to justice and equity to hold the Government responsible.

It only remains to apply these conclusions to the particular claims submitted for decision.

The claim of Otto Kummerow is for property taken by the revolutionists from his residence in Naguanagua in May, June, and July, 1902.

It is specially objected to by the Venezuelan Commissioner on the ground that the testimony is insufficient to establish it, because the witnesses are servants on the claimant's farm and are so ignorant that they can not sign their names; that their testimony is word for word the same, and their appraisals of the value are precisely alike. From these facts he urges that their testimony is not to be received. He also claims that the time and other circumstances of the occurrence are too generally stated, and that the entire list of articles taken are said to have been taken in the course of three months, without any specification as to the dates or the number of seizures or as to what articles were taken at each seizure. He further objects that there is no evidence of any violence or even that they were taken without the consent of the owner, and finally that the acts were committed by revolutionary guerrillas as shown by the character of the acts mentioned. In reply to the last objection the Commissioner for

Germany insists that the witnesses testified expressly that they were revolutionists and give the names of their officers. No reply is made by him to the other objection to the credibility of the witnesses.

In the opinion of the umpire the proof fails to make out a case. While he can not agree with the argument of the Commissioner for Venezuela that the witnesses are to be discredited because they are ignorant farm hands or servants, the vague generality and at the same time verbatim identity of their testimony mark the case as one which might easily be manufactured.

In view of these facts, and the further fact that as to many of the articles it is obvious that the witnesses were not competent judges of their value, the umpire is compelled to disallow the claim for lack of sufficient proof.

Certainly if evidence of this character is to be received, there would seem to be no protection whatever for Venezuela as against manufactured claims, and it is significant in this connection that the claimant claims to have gone to considerable expense in the employment of an attorney, whose first and natural duty should have been to have presented the case of the claimant in a more satisfactory manner.

The first item of the claim of Otto Redler & Co. is for 9,932.85 bolivars, for the sacking of their store on the 26th of June, 1902, by revolutionists under the command of Gen. Lidano Mendoza.

The injuries occurred during the siege of Barquisimeto, which lasted from the middle of June, 1902, until June 26, when the revolutionists occupied the city. The house of the claimants was occupied by forces of the revolutionists under the command of Col. Manuel R. Vilaro, whose troops by night and day took away many articles of gold, hardware, and brass ware.

The proof seems to be complete as to the taking of the articles and the fact of the sacking of the store, and a district judge who took the testimony certifies that he has carefully examined the books of the firm, and the balance sheet shows the loss of 9,932.85 bolivars as correct.

This item of the claim falls within the ruling of the umpire upon the liability of Venezuela under her admission in Article III of the protocol.

The second item of 7,647.68 bolivars is for goods supplied the revolutionary forces under General Crespo, and it is not disputed that the government established by General Crespo, of which he was the constitutional President, acknowledged the claim. It is claimed, however, in defense of this item that the claimants were aiding the revolutionists by supplying them with munitions of war, and that having been shown thereby to have been revolutionists they have forfeited their claim. While, on the other hand, it is contended on the part of Venezuela that the authority of the revolutionary committee, upon whose action is based the third item of the claim for 3,732 bolivars, is not shown. It is further contended, as to the second item of 7,747.68 bolivars, that Venezuela offered to pay the claimant in bonds or evidences of debt, and that the claimant should have taken it, and not having done so can not now assert his claim.

The umpire is of the opinion, first, that it does not clearly appear that the claimant knew, in the case of one of the sales at least, that the purchasers were revolutionists. But in his judgment this whole claim of defense is disposed by the fact that these revolutionary forces were successful, and that Venezuela is estopped to refuse compensation for goods received from the claimants which materially assisted in the establishment of the Crespo government, whose title was never attacked. They are likewise estopped from claiming any pains or penalties or forfeitures against foreigners on the ground that the foreigners assisted the Crespo party in obtaining possession of the government.

The third item of the claim of 3,732 bolivars is based upon the same fact as

the second, although it does not clearly appear whether this item of the claim was recognized, as the second was, by the decree of the Crespo government. The same objection therefore obtains against the claim of defense to this item.

The umpire can not agree with the position taken on behalf of Venezuela that the claimants were bound to take bonds of Venezuela in payment of their claim. Even if the Government had tendered them cash in payment of their claim and the tender had been refused, its only effect would be to stop interest. But certainly if Redler & Co. had a claim, as has been adjudged, they were not bound to take in satisfaction thereof anything but cash.

It results, therefore, that the claim of Redler & Co. will be allowed for the full amount claimed, namely, 17,050.05 marks, with interest at 3 per cent per annum from the time of the presentation of the claim to the Commission up to and including the 31st day of December, 1903.

The claim of Luis Fulda is for property taken, a portion by " Venezuelan forces under the command of Gen. Nicolás Rolando " and a portion by forces of General Matos. Both the Commissioners, however, agree that the property was taken by revolutionary forces. Neither the fact nor the amount of the damage is denied by the Venezuelan Commissioner. It nowhere appears in the evidence when these injuries happened, but in the brief of the Venezuelan agent it is stated as a ground of defense that the international conflict, meaning the seizure of the war vessels and ports of Venezuela by the allied powers, had commenced at that time. This statement is not denied by the Commissioner for Germany.

The claims therefore fall within the above ruling of the umpire as to the extent of the admission of liability by Venezuela for acts of insurgents growing out of the present civil war, and as there appears to be no dispute as to the amount, it will be allowed at the sum of 5,000 bolivars, with interest at 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including December 31, 1903.

The claim of Max Fischbach is for 19,200 marks for gross personal injuries committed by bands of revolutionists on October 24, 1902, in Los Azufrales, in Carúpano. They took away from him his watch and kept him until some friends came along and ransomed him and his fellow-sufferer Friedericy by the payment of 10 pesos. On the day of making the declaration of his claim, November 20, 1902, he alleges that he was still suffering from the effects of his injuries.

The claim of Richard Friedericy is based on practically the same assault by the same parties, because he protested against the treatment of Fischbach. He claims he was recovering from a rupture and his treatment brought back his troubles, from which he was still suffering on November 20, 1902. He claims the same amount, 19,200 marks.

These two claims are not within Venezuela's admission of liability, save as respects the watch taken from Fischbach, as to the value of which no evidence is given and no specific claim made, and the money taken from them both.

The claims for personal injuries will be, therefore, disallowed, and each claimant awarded the sum of 5 pesos, with interest at the rate of 3 per cent per annum from the date of the presentation of their claims to the Commission up to and including December 31, 1903.

The umpire is under appreciated obligation to the commissioners for their painstaking and able expositions in presenting the important questions arising in these cases.

VALENTINER CASE

Damages for loss of crop because laborers who were hired to gather it were drafted by Venezuelan troops held to be remote damages and disallowed.
Costs of preparation for suit also disallowed.
Damages occasioned by revolutionary troops allowed because of admissions in protocol.
Where constitution provides against drafting of Venezuelans for army except upon previous proclamation as to the portion of the territory in which guaranties of constitution are to be suspended, the draft held to be presumed to have been legal in the absence of any proof that such proclamation was made.
Opinion of witnesses as to nationality of persons incompetent evidence.

DUFFIELD, *Umpire:*

The evidence in this case satisfactorily establishes that on the 22d of December, 1901, a detachment of Government troops, under the command of Capt. Pedro Gonzalez, sent out by the jefe civil of Guarenas with orders to recruit soldiers, came to the coffee hacienda, " La Hondonada," owned by the claimant. The laborers, who were taken away by the force, were 63 Venezuelans and also some foreigners. They had all been hired under valid contract by the agent of the claimant to pick the crop of coffee on the hacienda, which was then ready to gather. The superintendent of the hacienda informed the officer in command of the patrol of these facts, and that if the men were taken away the crop would be lost, to which the officer answered that he must obey orders. It is also satisfactorily established by the evidence that it was impossible to secure new men for twenty-five days after the draft, even in Caracas, and that during this time a great part of the coffee ripened and fell and was lost, the amount so lost being more than 400 quintals, which the testimony shows was worth 45 bolivars a quintal.

The Commissioner for Germany is of the opinion that the claimant is entitled to recover the amount. He is also of the opinion that the claimant is entitled to damages for four huts burned by the revolutionists of the Matos revolution, worth 800 bolivars, and for legal expenses in the matter of preparation of his claim for presentation, 312.60 bolivars.

The Commissioner for Venezuela differs in opinion with the Commissioner for Germany, and is of the opinion that there can be no recovery against Venezuela for the loss of the coffee crop. He does not refer in his opinion to the destruction of the huts or to the question of legal expenses, but he admits that Venezuela should pay for the value of a mule which the claimant alleges he lost, and 50 pesos which the claimant asks for wood burned by the forces of the Government.

It is argued by the Commissioner for Germany, in support of the claim for loss of the coffee crop, that the recruiting officer had no authority to take from the plantation either Venezuelan or foreign laborers, and that such taking was " usurpation of the rights of the claimant," and that, inasmuch as the testimony shows clearly that claimant could not for twenty-five days replace the laborers who were so illegally drafted, the loss of the crop was a natural and proximate consequence of said illegal draft.

In opposition to this position, the Commissioner for Venezuela insists that the evidence shows the drafting of the 63 Venezuelans and only 6 foreigners, so called; that the Venezuelans were liable to draft, and that there is no evidence of the foreign citizenship of the so-called foreigners, and that there is no evidence that the so-called foreigners did not gather the coffee, meaning that there is no testimony showing how long they remained away from the plantation, and there

is some testimony that some of them returned very shortly; and, finally, that the loss of the crop is an indirect damage, and remote and consequential.

The umpire is of the opinion that under the testimony in the case the loss of the crop is not a proper element of damage. It is extremely doubtful, in his opinion, whether it would be even if all the laborers who had been engaged to gather it had been illegally taken from the plantation.

It has been held repeatedly that the loss of future crops is too remote to constitute an element of damage where the owner was prevented by the wrongful act of another from planting and harvesting them. So, too, where the seller of an agricultural machine fails to deliver it within the time stipulated, it is held that the loss of crops through the deprivation of the use of the machine is not a proper element of damage against him. Also, where the owner of a crop is deprived of an animal with which to harvest them. But it does not appear in this case whether the deprivation of an animal was by a tortfeasor or because of a breach of contract.

The same is held where the crop is lost by the loss of a servant or a slave. But it is, however, held in the latter case that where the owner of the crop can procure no other assistance he may recover compensation for the loss. (Sedgwick on Damages, Vol. I, p. 298, sec. 202, and the cases cited.) And it was held in McDaniel *v.* Crabtree, 21 Arkansas, 431, that where the defendant wrongfully seized the plaintiff's negro the profits of a crop plaintiff expected to plant and cultivate by means of the negro were too uncertain to afford ground of recovery.

On the other hand, in an action of contract, it was held in Louisiana, in which the civil law obtains, that on the failure to deliver a sugar mill the purchaser may recover compensation for the crop lost. (Goodloe *v.* Rogers, 9 Louisiana Annual, 273.)

In Sledge *v.* Reid, 73 North Carolina, 440, the defendant wrongfully seized the plaintiff's mule, which the latter intended to use to cultivate his crop. The loss of his crop was held both too uncertain and too remote for compensation. But Mr. Sedgwick says of this case (Sedgwick on Damages, vol. 1, sec. 191):

> If the mule were intended to be used for the harvesting of a crop already matured, the loss would not be too uncertain.

Access can not be had to these cases cited to ascertain the condition of the crops at the time of the injury or breach of contract. But in the case here presented there are so many elements of uncertainty dependent upon conditions of weather, health, and industry of laborers preparing the crop for shipment and transportation, and ultimate realization on the crop, that the umpire is inclined to the opinion that the damage would be too remote.

However, the number of so-called foreigners drafted, at most only six, less than 10 per cent of the number of the Venezuelans drafted, will not warrant the charge against Venezuela if the draft of the Venezuelans was legitimate.

It is claimed by the Commissioner for Germany that under article 17, paragraph 5, of the constitution of Venezuela, the 63 Venezuelans were not legally liable to draft. On the other hand, the Commissioner for Venezuela insists that according to article 89, paragraph 20, subdivision 7, and paragraph 21, such draft was legitimate. To this the Commissioner for Germany agrees, provided that the previous declaration, required by subdivision 7 of paragraph 20 of article 89, had been made affecting the territory in which the plantation " La Hondonada " was situated, but he insists that such previous declaration is not proven, and that in the absence of that proof it must be presumed that the draft in question was contrary to the constitution and illegal.

The umpire can not agree with this latter contention. It being conceded

that given the prerequisite of an antecedent declaration of suspension of the constitution, embracing the locus in quo, the draft would be legal, the umpire is of the opinion that under the general presumption of law, in the absence of any testimony to the contrary, the draft must be considered lawful. Omnia rite acta præsumuntur. This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons. Moreover, it seems at least doubtful whether the provision in subdivision 7 of paragraph 20 of article 89, read in connection with paragraph 21, is mandatory and not merely directory.

Furthermore, the evidence does not satisfactorily establish the nationality of the so-called foreigners. Certainly the testimony of the witnesses in their depositions taken under the commission, does not prove the fact, except as to Beauregard, who testifies as to his own nationality. The opinion of witnesses as to the citizenship of an individual is clearly incompetent to prove the fact. The letter attached to the " expediente," even if admissible in evidence, which is doubtful, because unsworn to and unauthenticated, and the signatures of Serrano, Mosquera, and Pereira not proven, is open to the same objection.

It results, therefore, that the proof fails to make out a case of illegal draft of any of the laborers of the claimant, except Beauregard; but as to him the proof shows he was absent from the plantation but a short time, and there is nothing in the evidence from which the amount of the value of his services, over and above his wages, can be computed. This item of the claim must be disallowed.

The item of legal costs and preparation of his claim for presentation is also disallowed.

*As a general rule, costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action.*

Accordingly, it has been held that the mere fact that a party deems it necessary to resort to law to enforce or protect his rights does not, in general, give him the right to recover as damages the fees he may have paid legal counsel in the cause,[1] in the absence of a contract stipulation therefor, or provision of statute permitting. (American and English Encyclopedia of Law, 2d ed., Vol. VIII, p. 673.)

It results from these conclusions, therefore, that the claimant can only be allowed for the value of four huts burned, 800 bolivars; and wood, also burned, 50 pesos; and a mule taken by revolutionists, 160 pesos, aggregating 1,640 bolivars, with interest from the date of the presentation of the claim, July 1, 1903, to up to December 31 proximo, inclusive, at 3 per cent per annum.

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## VAN DISSEL & CO. CASE

(By the Umpire:)

Meaning of the words " present Venezuelan civil war."
Venezuela not liable for revolutionary damages under principles of international law.

GOETSCH, *Commissioner.*

The Commissioners agree that on July 30 and 31, 1901, a detachment of troops under the orders of Gen. Juan Marquez confiscated from the claimant firm 158 mules, of which there were afterwards returned to the house 43, 9, 3, and 4 — in all 59 — so that there was a loss of 99 animals (6 saddle mules and 93 pack mules).

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[1] Flanders *v.* Tweed, 15 Wall., 450; Day *v.* Woodworth, 13 How., 363; Arcambel *v.* Wiseman, 3 Dall., 306.

They disagree (*a*) upon the question whether Venezuela is responsible for the loss, (*b*) the Venezuelan Commissioner denies the responsibility of Venezuela:

First, because there is question of an invasion of Colombian troops; and, second, because there is question of an incident which ought not to be considered, " as of the last civil war," in the sense in which the decision of General Duffield gives to this phrase.

I. The political event upon which the claim is based forms an epoch in the revolution against President Castro — an epoch which the honorable umpire describes in his personal opinion relative to the historical events in Venezuela, as follows:

*In July, 1901, General Rángel Garbiras, as provisional leader of the Nationalist party during the imprisonment of General Hernandez,* organized an army of about 4,000 Venezuelans and troops of the regular army of Colombia and invaded Táchira by way of Encontrados and overland to the city of San Cristóbal.

A detachment of these troops under the orders of Juan Marquez marched to the north and committed various depredations along the route to Encontrados, and at this last-named place also. Amongst others this detachment sacked, on July 27, 1901, the mercantile establishment " El Finglado," belonging to the firm of Christern & Co., and, moreover, they confiscated the mules mentioned in the claim of Van Dissel & Co. It is clear from every point of view, according to what has been stated, that there is no question of a warlike attack on the part of Colombia, but of a revolutionary uprising of Venezuelans who had fled into Colombian territory and lived in the frontier districts. They were the " Nationalistas," partisans of General Hernandez, and authors of the movement. The generals in chief, Rángel Garbiras, Juan Marquez, and Trinidad Zuleta, are Venezuelans. It is not impossible, and it is even probable, that among the invading revolutionists there were some Colombians, which in no way modifies the fact that there was question of a revolutionary movement of Venezuelans, who perhaps in attending to their own interests and political outlook, knew how to attract some Colombians to their flag. It has not been alleged or proved that the Colombian Government had any knowledge of the invasion, and even less that it had set it on foot. This is the view taken by the Government of Venezuela, who replied to an inquiry of England (see the English Blue Book, p. 55) on the 20th of November, 1901 — that is to say, that at the root of the invasion of Garbiras there was not a state of war existing with Colombia. Venezuela would not have received quietly a warlike attack from Colombia and would have replied to its neighbor by warlike measures. In the case of Christern & Co. the Commissioner of Venezuela has taken for granted that the act was committed by Venezuelan revolutionists. Since there is question of the same time, of the same troops, and of the same generals, it can not be seen why the authors of the deed could have suddenly become Colombian troops as against Messrs. Van Dissel & Co. Besides, all the witnesses testify that they were Venezuelan revolutionists.

II. As is seen from a study of the protocol of February 13, 1903, the Government of the German Empire took exclusively upon itself the adjustment of the claims arising out of the civil war of 1898-1900, or, say, the revolution organized at the time when Castro was seeking power, and, as far as they were at that time presented, held them to be fixed (Art. II), while the other claims, especially those arising out of the last civil war, were submitted for their decision to the Mixed Commission (Art. III). The German Commissioner has not the least doubt that under the term " last civil war " the revolutionary movements organized *against* President Castro ought to be included, the consequences of which have not yet been adjusted. It is this and nothing else which was in-

tended to be expressed. Since how can it be supposed that the Government of the German Empire could only have had in mind the Matos revolution, and that there could not have entered into its scheme the demand of satisfaction for the other damages which had occurred in the intermediate interval? (That is to say, from the time that Castro assumed power up to the uprising of Matos.) It was its idea to clear the table (to liquidate), and that all the claims of German subjects not adjusted up to date should be decided by the Commission.

There is no doubt that this was the intention of the Government of Venezuela. The same reason supports the interpretation that of the revolution and revolutionists against General Castro, enumerated one by one by the honorable umpire and of the individual existence of which perchance the German Government did not have notice, were united by the German and Venezuelan Governments under the term "last civil war." If the opinion of the Venezuelan Commissioner is to be considered correct, according to which only the uprising of Matos should be considered as "the last civil war," this interpretation would in no way modify, because of its slight importance, the judgment of the German Commissioner, who would demonstrate the liability of Venezuela in the present case by a different sort of reasoning.

The first paragraph of article III says:

> The German claims not mentioned in the Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, * * * are to be submitted to a mixed commission.

The words "in particular" show that outside of the claims of the "last civil war" ready to be submitted to the jurisdiction of the Commission all those claims remaining which have not yet been adjusted; that is to say, in a given case also the claims for the intermediate period (until the uprising of General Matos). The German Commissioner understanding until now that these claims refer to claims for the failure to fulfill agreements, or claims during the period prior to 1898, but at the same time he asserts that in case the interpretation of Dr. Zuloaga should be correct, there shall be included also claims which bear no relation to the revolution of Matos, but to the revolutions of the intermediate time (Hernandez, Garbiras, Paredes, Peraza, and Acosta).

The second paragraph of Article III refers entirely to the first paragraph. If in the second paragraph the Government of Venezuela has recognized in principle its responsibility with relation to claims for damage to or illegal confiscation of property, its admission refers to the claims of which the first paragraph of Article III speaks — that is to say, to those German claims not mentioned in Articles II and VI — therefore, *in particular* to the claims of the present civil war, to those of the *intermediate interval*, and, therefore, to the claims arising out of the invasion of Garbiras and Vargas. Therefore, in the present case also, the liability of Venezuela should be fixed, being based upon contracted obligations.

III. The German Commissioner can not estimate by his own experience the value of the animals confiscated. He must bear in mind the sworn statements of the witnesses, who are agreed that the prices mentioned are reasonable.

Besides, the firm of Van Dissel enjoys such a reputation for honesty and respectability that it is not to be supposed that they would demand false or exaggerated prices. Add to this that the mountain mules must be selected animals of great strength in order to resist the fatigue incident to an exceptionally mountainous and muddy region. Finally, it is necessary not to lose sight of the fact that the house suffered a considerable indirect damage because of the confiscation of the animals (as all the witnesses testify) and that the direct

damage will require many years to be liquidated. All this should be taken into account in valuing the mules.

The prices indicated by the Commissioner of Venezuela are not in the first place sworn to, and besides they are given by individuals who did not know the animals in question, while the sworn witnesses ought to have known the exact value of them. Lastly, the prices refer to regions which are not in the mountains of Maracaibo, the high price which is paid in the mountains for mules being well known.

The German Commissioner therefore asks that the honorable umpire shall award the claimant firm the whole of the sum claimed, amounting to 51,000 bolivars, together with interests at 3 per cent per annum from the date of the presentation of the claim to December 31, 1903.

ZULOAGA, *Commissioner:*

Van Dissel & Co. make claim for 100 mules, which they say the troops of a commander, Juan Marquez, took on the 30th and 31st days of July, 1901, in a pasture field near El Azufre, in the jurisdiction of Michelena, State of Los Andes, and that they took them to Colombia via San Faustino. This claim is based upon acts of an obscure origin, with which the Government of Venezuela charges the Government of Colombia, since it was an invasion of the territory of Venezuela by revolutionary forces which, generally speaking, were battalions of the Colombian army, as appears even from the deposition itself presented as the testimony of the witness, David García. I do not understand how, under these circumstances, liability can be attached to the Government of Venezuela.

Nor even in the case that this act against the property of Van Dissel & Co. could be considered as the work of an internal revolution would the Government of Venezuela be liable, since it is an act of revolutionists, and besides, according to the interpretation given to the protocol by the honorable president of the Commission, the admission of the liability of Venezuela for acts of revolutionists is limited to the *present war*, which can not be any other except that which had for its leader Gen. M. A. Matos, a political movement perfectly well defined and distinct from every former revolution. I therefore reject the claim upon its merits; but it is also to be observed that mules, in the poor state which those which are the subject of this claim were, are not worth more than 80 pesos, or, say, 320 bolivars, as may be learned from the statements of informed people. The value of things at current prices should naturally govern the arbitrators, and with relation to them they are not to be governed by the declaration of witnesses who are set up as experts. Moreover, in the matter of experts it is universally determined that the judge is at full liberty to accept the valuation or not, and a judge of equity has that right all the more.

DUFFIELD, *Umpire:*

The claimants in this case base their claim upon injuries to and seizures of property belonging to them at their farm, El Azufre, in the jurisdiction of Michelena, State of Los Andes, by the troops of General Garbiras in July, 1901.

The Commissioner for Germany is of the opinion that the acts complained of occurred during the present Venezuelan civil war, as described in the protocol, while the Commissioner for Venezuela insists that these words in the protocol embrace only the so-called Matos revolution, which originated in or about December, 1901.

The importance of a correct interpretation of the words " present Venezuelan civil war " is self-evident. To arrive at a proper interpretation of them it is

material and necessary to ascertain the political situation in Venezuela at and prior to the execution of the protocol. The following statement of the various revolts against the Government, which was established in October, 1899, by General Castro, is accepted as substantially correct by both Commissioners.

General Castro entered Caracas October 22, 1899; assumed power October 23, 1899, as " director y jefe de la revolución restauradora." Shortly thereafter he declared himself " supreme chief of Republic " and appointed a cabinet.

General Hernandez on October 27, 1899, secretly left Caracas, and on October 28, 1899, issued a manifesto against the Castro government. He was defeated and captured and imprisoned until December 11, 1902, when he was released and came to parley with (then) President Castro.

Gen. Antonio Paredes, military governor of Puerto Cabello, initiated a revolt in November, 1899, but on November 11 and 12, 1899, he was completely defeated, captured, and imprisoned until December 11, 1902.

December 14, 1900, Gen. Celestino Peraza issued a proclamation inciting an insurrection against the Castro government. There was no serious fighting, and he was soon defeated, captured, and imprisoned until December 11, 1902.

October 24, 1900, Gen. Pedro Julian Acosta revolted in Yrapa, and after a number of minor engagements in the States of Cumana and Margarita in February, 1901, he was captured and imprisoned and has not been released.

In July, 1901, General Garbiras, as provisional leader of the nationalist party during the imprisonment of General Hernandez, organized an army of about 4,000 Venezuelans and troops of the regular army of Colombia, and invaded Táchira by way of Encontrados and by roads to the city of San Cristóbal. A small skirmish took place at Encontrados July 28, 1901, which resulted in favor of the Government, but on the 28th and 29th he was defeated in a serious engagement at San Cristóbal, lasting from 2 p.m., July 28, until 4 p.m., July 29, between the main body of the Garbiras army and the Government troops under Gen. Celestino Castro, commander in chief of the army under appointment by General Castro.

August 8, 1901, another armed force invaded Venezuela from Colombia, via San Faustino, but was repulsed at Las Cumbres by Gen. Ruben Cardenas.

Finally, in February, 1902, Gen. Rángel Garbiras, with other leaders and a Colombian battalion of the line, again invaded Venezuela, via San Antonio simultaneously with other officers from other points, but they were all defeated with heavy losses.

During the blockade Gen. Rángel Garbiras issued a manifesto early in 1903, abandoning his pretensions and being still a refugee in Colombia.

Gen. Horacio Ducharme, nationalist leader in the east, and his brother Alejandro joined in this movement from September 30, 1901, to the beginning of November, 1901, when the eastern section of the country was pacified.

In the beginning of October, 1901, Gen. Rafael Montilla revolted in the State of Lara and occupied Coro with a considerable army, but was defeated October 25, 1901, by Gen. Rafael Gonzales Pacheco, president of the State. He took refuge in the mountains of Guaito until the revolution of Matos gained head, when he joined it and participated until the end.

At the end of October, 1901, Gen. Juan Pietri issued a revolutionary proclamation, dated at La Sierra, Carabobo, although he had not then reached that point. He was almost immediately captured, brought to Caracas, and set at liberty in the Plaza Bolívar, while the revolutionists were routed at Guigue, in the State of Carabobo. Pietri again left Caracas by stealth toward the end of December, 1901, presumably to join General Matos's army or raise his own

standard, but he was again captured December 31, 1901, and imprisoned until the blockade, when he was released.

November 21, 1901, a number of citizens of Caracas, including Gen. Ramón Guerra, minister of war and navy, who had lent their support secretly to Gen. Manuel Antonio Matos, who was then in Paris stirring up and providing means for an insurrection, of which he was to be the head, uniting the liberal elements and the nationalists, whose leader, Hernandez, was still in prison on the fortress of San Carlos.

December 19 Gen. Luciano Mendoza, whose term as provisional president of the State of Aragua was drawing to a close, and who was supposed to be about to assume the constitutional presidency of Carabobo, went to Vil de Cura gathering some 300 men whom he had gotten in readiness. He counted on various uprisings on the same day in Carabobo, Cojedes, Lara, and Coro, but Gen. J. V. Gomez pursued him with vigor and dispersed his forces at or near Cojedes, and drove him into hiding.

At the end of December, 1901, General Matos circulated a proclamation dated on board the *Libertador*, formerly the *Ban Righ*, and declared by the National Government to be a pirate vessel. The forces of Gen. Antonio Fernandez in Aragua and the rebels in Coro were defeated and destroyed; but early in January, 1902, bodies of revolutionists began to rise in the east, relying on the Matos support and that of the steamer *Libertador* with General Matos on board, which on the 7th of February, 1902, engaged and destroyed the national steamer *Crespo*.

February 14 Gen. Gregorio Riera landed at Cauca and issued a proclamation, and engaged in battle the Government troops under Gen. Ramón-Ayala. General Gomez came to his assistance and the revolutionists in Coro were annihilated.

As early as March, 1902, the eastern portion of Venezuela was in arms in support of the revolution. Gen. Domingo Monagas, in Barcelona, and Gen. Nicolás Rolando, in Maturín and Cumaná, commanded troops. They gained signal victories at La Sutela of Barcelona, March 27, San Augustin del Pilar on April 2, and Guanaguana April 22. Gen. Calixto Escalante, who conducted the military expedition in the east, was completely routed and with many officers was taken prisoner. Rolando occupied Carúpano and defeated General Gomez in a hard battle. General Matos then came to Carúpano and began his march to the center, via Maturín and Carúpano. Meantime, in Lara and Yaracuy, General Amabile Solagure had acquired strength and was enlisting support with southwestern states to the movement in connection with General Montilla in Lara and Generals Mendoza and Batalla in the west.

By this time the occupation of Ciudad Bolívar by Col. Ramón Farreras and his possession of the State of Guayana, after serious engagements at Ciudad Bolívar, San Felix, and other points, had occurred.

While the forces near La Guaira, in the valleys of the Tuy and the Guarico, had been organized in expectation of the coming army of the east in Coro, General Riera obtained decisive victories which made him master of that state, and General Ayala was a captive in Barcelona.

During these events General Castro sent General Velutini to Barcelona to check the advance of General Matos's army, but the Government forces under Gen. M. Castro were defeated by the army of the east under General Rolando. President Castro thereupon took personal command of the army, and on August 18, with a considerable army, started for San Casimiro, where he was joined by other troops, and moved rapidly to Cua, but removed to Ocumare because of the defection of the troops under Gen. P. Perez Crespo, and remained until the beginning of September, 1902, when he returned to Valencia to meet the

revolutionist forces from the west, who, by a succession of victories, had control of the states of Coro, Barquisimeto, Cojodes, Portuguesa, and Yaracuy. In spite of General Castro's efforts to prevent it, the revolutionist armies united at San Sebastian and he fell back to Victoria. The united armies of the insurgents here attacked him vigorously from October 13 to November 2, but were compelled by the strong defense to withdraw from the field, and Matos took passage for Curaçao. Many revolutionists then surrendered themselves and the Government regained its coast and interior towns.

But in January, 1903, a reorganization of the revolutionists was consummated with considerable forces in Critinuco and Barlereuto under General Ronaldo; in Guarico, General Fernandez; in Coro, Gen. Gregorio S. Riera; in Barquisimeto and Yaracuy, under Generals Peñaloza, Solaguie, and Montilla. And after the signing of the protocols with the allied powers, February 13 of the present year, the struggle began again. It was only finally quelled by the taking by General Gomez of Ciudad Bolívar in the closing days of the present month.

It is claimed by the Commissioner for Venezuela that the words "the present civil war" in the protocol must refer to the revolution of Matos (so called) only. Is this correct? It is, literally, because at the date of the execution of the protocol there was no other revolution actively and aggressively prosecuted. But may not the parties to the protocol have used these words in a broader sense to indicate all the revolutions which had broken out against the Castro government?

From this statement it appears that prior to the Matos revolution a number of separate and disconnected revolts occurred, most of them of comparatively small importance; two of them in the year 1899, two in 1900, and four, including the Garbiras insurrection, in 1901; but all of these, except the Garbiras movement, were almost immediately suppressed. Of these revolutions that of General Ducharme alone appears to have been in answer to the call of General Garbiras. Of the leaders in these separate revolts, General Hernandez, General Paredes, General Peraza, and General Acosta were captured, and except General Acosta, who is still a prisoner, were imprisoned until December 11, 1902, when they were released by the Venezuelan Government at the time of the blockade by the allied forces. General Ducharme, being hard pressed, reembarked for Trinidad in November, 1901.

The insurrection headed by Gen. Ramón Garbiras in July, 1901, was organized and set out from the neighboring Republic of Colombia, and contained many troops of the regular Colombian national army. It was believed by the Government of Venezuela, and so announced by it in a proclamation addressed to the other nations of the world, dated August 16, 1901, that there was either complicity on the part of the Government of Colombia or an entirely unjustifiable lack of effort to prevent participation in it by its regularly enlisted troops. Notwithstanding the fact that General Garbiras had invaded Táchira by way of Encontrados, and thence by road had proceeded to the city of San Cristóbal with an army of about 4,000 Venezuelans and troops of the regular army of Colombia, on the 28th and 29th of the same month he was defeated in a serious battle at San Cristóbal by the Government troops under Gen. Celestino Castro, commander in chief of the Venezuelan army, and retired to Colombia. It was in this invasion that the injuries complained of occurred.

The so-called Matos revolution was announced by the proclamation of Gen. Manuel Antonio Matos in December, 1901, dated and issued on board the steamer *Libertador*, formerly the *Ban Righ*, then cruising in Venezuelan waters. She was denounced by a decree of the Venezuelan Government dated December 30, 1901, and in February, 1902, she engaged and destroyed the

Government steamer *Crespo*. This proclamation, which was extensively circulated by General Matos, was the culmination of an agitation begun by him in Paris some months previously, looking to an extensive insurrection which he was to lead. He hoped to unite upon him as their leader the liberal elements and the followers of General Hernandez, called Nationalistas, whose chief was still a prisoner in the fortress of San Carlos. To this end he had advanced liberally of his means, which were large, and had enlisted the support of the Venezuelan minister of war and navy and a number of the citizens of Caracas. He did not profess or declare any connection with a prior insurrection, or any intention to support the cause of any former leader, but to initiate and successfully carry through a new and independent revolution.

Yielding to public opinion, and attentive to the honor which a large number of my distinguished compatriots have conferred on me, by designating me in their generosity to lead this redemptory crusade, I hasten to comply, and to bring with me the necessary elements of war to strengthen your desires, render them irresistible, and at the same time to serve as a tie of union to all Venezuelans, in order to save our beloved country from ruin. (From Venezuelan Herald of December 31, 1901.)

Through the entire period of December, 1901, until his defeat and proclamation of peace, from Curaçao, whither he had fled after his defeat in June, 1903, there is no indication whatever that the movement he was conducting had the slightest connection with any of the previous revolts. Although he naturally hoped and probably expected to bring together all the dissatisfied elements in the Republic under his banner, it was with a like hope and expectation that they would abandon their former chiefs and adopt him as their leader.

None of these former revolutions compared with the Matos movement in importance or in their chances of success. None of them were still active. All of them had been suppressed. And with the exception of the followers of Hernandez, who was himself in prison, there were no considerable numbers of organized revolutionists. All of their chiefs were imprisoned. General Garbiras only avoided imprisonment by flight into Colombia.

It appears, therefore, that at the time of the signing of the protocol there was no existing civil war with any leader or any organization save that of Matos, and that all previous revolts had been put down by August, 1901, except the comparatively insignificant movement of General Ducharme, Nationalist leader in the east, which existed from September 30 to the beginning of November, 1901, at which date the entire eastern section of the country was pacified, and two small desultory events, one by Gen. Rafael Montijo, in the State of Lara, which was quelled in a few weeks by the president of that State, and one by General Pietri, who was defeated and captured before he reached the point from which his proclamation of revolution was dated, and his followers at the same time routed at Guigue, in the State of Carabobo.

If there were any connection shown between the Matos revolution and these prior ones, there would be much force in the argument of the Commissioner for Germany that the high contracting parties had in contemplation, by the words "present Venezuelan civil war," all the insurrections against the Castro Government, but in the light of the facts stated above it clearly appears that the Matos revolution was independent.

Taking the words in their literal sense, in which they must be interpreted unless some special reasons require otherwise, they refer to the one civil war then pending in Venezuela.

The umpire is therefore of the opinion that the admission of Venezuela in the protocol of liability for injuries to and wrongful seizures of property does not embrace the insurrection headed by General Garbiras, in which the claimant

suffered from acts of revolutionists. It is true that in February, 1902, General Garbiras, with other leaders and 4,000 soldiers, including the Colombian battalion of the line, again invaded Venezuela, via San Antonio, simultaneously with forces from other points, but they were all defeated very soon after.

As to this claim, therefore, the liability of Venezuela must be determined by the general principles of international law, and under them the umpire is of the opinion that no liability exists.

As has been shown above, the forces which committed the injuries in this case were composed in large part of the national troops of Colombia; that the expedition was organized in Colombia; that the Government of Venezuela had no warning from Colombia of its preparation and no reason to expect it, because her relations with Colombia were then friendly and included an interchange of diplomatic representatives, that the expedition penetrated only a short distance into Venezuela coming by way of Encontrados by water, with San Cristóbal as its objective point, and that the Government took such prompt and vigorous means in opposition to it that, although General Garbiras had an army of some 4,000 men, many of which were the trained troops of the Colombian regular army, he was defeated and driven out of the country in less than a month.

Even if the question is to be answered upon the assumption that it is the duty of a government to protect foreigners absolutely from acts of revolutionists by preventive measures, and it is doubtful if the rule goes so far, Venezuela can not be held liable here, because the uprising did not begin in her territory, but in a neighboring state, which gave it immunity from any surveillance or repression, if not a fostering support.

Under these circumstances, in the opinion of the umpire, it would be contrary to justice and equity and at variance with the principles of international law to hold Venezuela liable in this case.

It is not intended by this opinion to decide that Venezuela may not be liable for acts of revolutionists in an insurrection prior to the Matos movement where that insurrection is shown to be associated with and a part of that movement.

It results, therefore, that the claim must be disallowed.

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## MOHLE CASE

Damages occasioned by revolutionary troops allowed because of admissions in protocol.

Doubt expressed by umpire whether he can accept statements of revolutionary authorities who are not experts or agents of the Government as to value of property taken.

Evidence as to values of like articles in another case before the Commission followed by umpire in the fixing of prices.

DUFFIELD, *Umpire:*

In this claim the Commissioners differ in opinion. The acts upon which it is based occurred during the revolution of General Matos, and the injuries complained of were done by his troops. Under the decision of the umpire in the case of Kummerow, the Government of Venezuela is liable by reason of its admission of liability in the protocol, the Matos revolution being embraced in the present civil war.

The Commissioner for Venezuela, while denying the liability of Venezuela, admits the committing of the injuries, but insists that the values of the property

are exaggerated by the claimant, and contends that if Venezuela is liable it is only for 11,923.72 bolivars, for the reason that the appraisal of values made by the revolutionist officials who took the property can in nowise bind Venezuela and is no evidence of value. But the Commissioner for Germany, while admitting that they do not conclude Venezuela, insists that they are competent evidence of value, and is of the opinion that the full amount claimed should be allowed.

The Commissioner for Venezuela lists the articles taken at what he says are current prices, and is of the opinion that if any award is made it should be on this basis.

The umpire is of the opinion that, perhaps, under the Fennerstein Champagne cases, in the Supreme Court of the United States,[1] current prices are admissible in evidence. But there is, in his opinion, much force in the objection made by the Commissioner for Germany as to their accuracy in the appraisal of such property as is here in question. Moreover, the current prices which the Commissioner for Venezuela mentioned are not verified by price lists or any other evidence.

On the other hand, the umpire is extremely doubtful whether he would be authorized to follow the appraisal made by the revolutionist officials, who are not agents of Venezuela, and not shown to be familiar with the value of any of the property, except, perhaps, the horses. In this uncertainty he deemed it entirely proper to refer to the evidence put in the claim of Van Dissel by the Commissioner for Venezuela, stating the values of property of like character with that the values of which are disputed in this case. The competency of this evidence was not questioned by the Commissioner for Germany in that case.

Upon this basis the claimant will therefore be allowed for his items of damage as follows.

The following items the values of which are undisputed:

| | *Bolivars* |
|---|---|
| Fence | 1,200.00 |
| 1 saddle horse | 800.00 |
| Medicine | 158.00 |
| 1 horse | 180.00 |
| Medicine | 74.52 |
| Do | 166.00 |
| Do | 44.00 |
| Do | 197.60 |
| Do | 194.56 |
| | 3,014.88 |

And the following items, the value of which is disputed, but are fixed by the umpire, as follows:

| | *Bolivars* |
|---|---|
| 125 head of cattle, at 63 bolivars | 7,875.00 |
| 9 donkeys, at 40 bolivars | 360.00 |
| 24 head small cattle, at 40 bolivars | 960.00 |
| 10 horses, at 240 bolivars, 2,400 bolivars; less 3 horses returned, 720 bolivars | 1,680.00 |
| 8 head of cattle, at 63 bolivars | 504.00 |
| 1 cow and 1 bull | 130.00 |
| 1 cow | 60.00 |
| 1 head of cattle | 48.00 |
| | 11,617.00 |

[1] 3 Wall., 70 U.S., p. 145.

Total, 14,631.88 bolivars, with interest at the rate of 3 per cent per annum from July 15, 1903, up to and including December 31, 1903.

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## RICHTER CASE

### Discussion of facts

DUFFIELD, *Umpire:*

The Commissioners disagree only as to the amount which should be awarded to the claimant. The claim is for injury to and taking of property of the claimant at his hacienda, Tucua, in the district of Mariño, in the State of Aragua. His original claim was for 19,262 pesos (77,048 bolivars), which sum, less 400 bolivars, viz, 76,648 bolivars, the Commissioner for Germany is of the opinion should be allowed at its full amount, with interest.

The Commissioner for Venezuela, however, is of the opinion that only 22,000 bolivars should be allowed. He bases this claim upon the following grounds: First, that the claimant claimed as lost things of which there is no proof, as, for instance, two trunks and a valise with clothes and jewels, which he values at 500 pesos; cash, 200 pesos; destruction of houses, which he values in different lots at more than 2,000 pesos. He is also of the opinion that the claimant largely exaggerates the value of the property, specifying growing crops of cane ready to cut as valued at 800 pesos per tablon, when it is not worth more than 200 pesos; also a 7-months' cane growth at 500 pesos per tablon, when it is not worth more than 150 pesos. He also thinks it a grave circumstance, indicating bad faith on the claimant's part, and an intention to make his claim as large as possible, that the claimant, after —

> this Commission decided that he should make his proof anew and before the judge of the court of first instance of La Victoria, the agent of the Government of Venezuela being present, the claimant, without waiting for a note to reach that judge, named two experts to judge of his list of prices.

Taking these objections in their order, the umpire is of opinion that there is proof of the loss of two trunks and the valise with clothes and jewels, and cash, and the destruction of the houses which the claimants values at more than 2,000 pesos. The list of articles taken, which the claimant made the basis of his claim, was, by order of the judge, annexed to the moving papers. And the witness Torealba testifies of his own knowledge that among the losses of the claimant were animals kept for working and breeding purposes, beasts, furniture, personal effects, cash, houses and huts on the hacienda, and a great number of working implements.

As to the exaggeration of values, the umpire finds no specific evidence to confirm the general statement in the opinion of the Commissioner. The testimony of the experts is not contradicted by any other specific evidence, and the appraisal is approved of by the judge after a personal survey of the premises. They are accredited by their appointment by the judge, and the umpire has found nothing in the case to indicate any lack of good faith and honesty on their part.

The objection by the Commissioner for Venezuela that two of the witnesses testify from notoriety and not from personal knowledge is not supported by the proof as to all the matters testified to by them while it is warranted as to certain matters. If they were the only witnesses there would be force in the objection to the extent that their testimony is based upon notoriety or hearsay. But the witness Torealba does testify from personal knowledge and is not contradicted.

The objection as to the exaggerated values is based upon the unsworn statement of the agent of Venezuela. It is not supported by the oath of any witness or corroborated by a detailed statement of particulars upon which the umpire can form any judgment except as to the value of the growing cane and the oxen. As to these a letter from a reputable commission house, dealers in and familiar with the value of these articles, is put in evidence, in which the value of a tablon (10,000 square varas) of cane, in the neighborhood of La Victoria, ready to be cut, is appraised at 800 bolivars, and a tablon of cane 7 months' old is appraised at 600 bolivars, and a pair of oxen at 400 bolivars, as against the claimant's figures on a tablon of cane ready to cut of 800 pesos (3,200 bolivars) and a tablon of cane 7 months' old, 500 pesos (2,000 bolivars). The discrepancy is so large that it is not reconcilable by mere difference of judgment. But on the one hand is the testimony of witnesses who swear they knew the property, while on the other the testimony is based on general market values. Ordinarily the first-mentioned testimony should govern, and if the witnesses had testified more in detail, and especially if they had testified as to a personal knowledge of the crops before their destruction, the umpire would have felt bound to accept their appraisal. In the absence, however, of such particularization, and considering the entire disinterestedness of the commission house in its appraisal, the umpire is convinced that there must be an error in the claimant's figures, notwithstanding their corroboration by the witnesses. For example, he claims for one tablon of "young" cane growth, one-half of which he claims was destroyed, as much as the commission house values a tablon of 7-months growth. For three other tablons of "young" cane growth, destroyed in whole or in part, he claims 500 pesos per tablon. For a tablon of 2-months growth he claims 300 pesos. In the opinion of the umpire these valuations are exaggerated and should be reduced. The umpire is of opinion that a fair value of a yoke of oxen would be 125 pesos. The umpire also allows the expenses of the additional testimony called for by the commissioners, 50 pesos, or 200 bolivars. The total cane destroyed is allowed at 6,500 pesos (26,300 bolivars).

While the testimony therefore is meager, and is especially so as to values, in the absence of any proofs to the contrary the umpire believes it his duty to accept it, save in the particulars above specified. The objection based upon the alleged lack of good faith and apparent intent of the claimant to recover an exaggerated and unjustifiable amount of damages by asking a different judge to select the experts would have had great weight with the umpire if the facts warranted it. But the umpire is unable to find any such proof in the "expediente" or in the proceedings of the Commission. First, it is inaccurate to say that the claimant had knowledge that this Commission decided that new proof must be made before the judge of the court of first instance of La Victoria. The record of the eighth session reads as follows in this respect:

> And that he [the claimant] prove also, by means of a formal amplification of the proofs presented, the amount of the damages which he says he has suffered, with the intervention, if possible, of the representative of the agent of the Government of Venezuela, for which purpose the Venezuelan Commissioner will take charge of the steps necessary to be taken and will present at the next session informal letters, which he will address for the purpose to the judicial authorities in whose jurisdiction the above-mentioned properties are situated.

It appears by the records of the next sessions that such letters were not presented. The Commissioner for Germany states that in a letter dated the 27th of June last, a copy of which is attached to his opinion, he stated to the claimant that —

the Commissioner for Venezuela will address a letter to the judges having jurisdiction, so that you will not meet with difficulties in the examination of the witnesses or experts you may present.

That the claimant on receipt of this letter asked the Commissioner for Germany if he could go to Tucua to gather proof, and if the communication had yet been sent to the judge, to which the Commissioner replied that it had left, having been shown by the Commissioner for Venezuela the draft of his note to the judge. It is also stated that the claimant had twice demanded that the President of the State of Aragua should name an agent to represent the Government.

It seems to the umpire that this conduct of the claimant is entirely consistent with good faith on his part. The agent of the Government was present at the examination of the experts and made no objection to the irregularity of the appointment. He was the legal representative for Venezuela and acted for her in the premises, and therefore had authority to waive any such irregularity and by his conduct in making no objection did so waive it. Moreover, it will be borne in mind that the only irregularity was the appointment of the experts, and that the taking of the testimony was before the judge agreed to by the parties.

It is quite clear to the umpire that the understanding evidenced by the record of the eighth session was not to dispense with or throw out the testimony of the witnesses taken in 1902, but to amplify the proof with respect to values, and give the Government of Venezuela an opportunity to be present when testimony as to values was taken. This seems to have been done.

The umpire is therefore of the opinion that the claimant is not entitled to recover, under the proofs, the amount found due him by the Commissioner for Germany. It would undoubtedly have been more satisfactory if the clairmant had made a more full presentation of evidence, both as to the property taken and as to its value. On the other hand, the character of the occupation of the hacienda by the troops of the Government was, at least to the claimant, a notorious event, and this may have induced him to think that comparatively little testimony was needed. It is also a fact of which the umpire can take judicial cognizance that occupation by troops of a property of this nature is always very destructive and damaging, especially to growing crops.

The claimant is therefore allowed the sum of 49,288 bolivars, with interest from the 22d of June, 1903, up to and including the 31st of December, 1903, at 3 per cent per annum.

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## METZGER CASE

Law of domicile rules as to class of claims for damages to decedent which will survive to his estate.

Under the law of Venezuela the heirs may recover for bodily injuries, but not for damages to personal feelings or reputation.

DUFFIELD, *Umpire:*

The claimant alleges that on the 28th of May, 1902, while lawfully going from his house to his office, in Carúpano, he was assaulted by an officer of the Venezuelan army because the claimant would not give up the mule he was riding. The officer attempted to take the mule by force, and upon the claimant resisting another officer struck him two severe blows on the shoulder with a saber, inflicting serious injury. His life was also threatened, and he was subjected to other indignities.

If the occurrence had not arisen out of the demand for the mule it might be held that this was a purely wanton assault by the officer, for which, as the

Venezuelan Commissioner contends, the Government of Venezuela could not be liable under the circumstances in the case.

But it is so notoriously the practice of army officers to impress property of this kind for the use of the Government, that I think Venezuela must be held liable for the act of the officer, if proven. It is said by Hall (4th ed., p. 226) that a government's —

> administrative officials, and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. * * * Where, consequently, acts or omissions which are productive of injury, in reasonable measure, to a foreign State or its subjects, are committed by persons of the classes mentioned, their Government is bound to disavow them, and to inflict punishment and give reparation when necessary.

It is contended, however, by the Commissioner for Venezuela, in opposition to the opinion of the Commissioner for Germany, that Venezuela is liable, that the " expediente " does not prove the case. He objects to the form of the testimony of the witnesses, and " their omission to explain the facts." He also claims that " Buran did not see what took place, as is inferred from the letter of the claimant on his complaint," and also that the testimony of the witnesses and the statement of the claimant conflict. Certainly the certificate signed by the two witnesses is irregular in form, and if the case stood only on it the umpire is of the opinion that it is insufficient. It has been held, however, in this Commission that under the protocol the declaration of the claimant is competent evidence.

The letter of the complainant, in the opinion of the umpire, is not susceptible of the inference that Buran did not see what took place. That letter simply named two witnesses. It is true that Buran was not one of them. He, however, took the place of one who was named and presumably for some reason did not testify. Neither do the testimony of the witnesses and the statement of the claimant disagree. The former is, as has been said, scarcely competent evidence, and is confined to the mere statement of the injuries. In this particular respect there is no discrepancy, the only difference being that the complainant amplifies, and properly so, the statement of facts.

Considering the case made by the proofs in its entirety, and especially the letter from General Velutini, in which he states that the " assailant of Mr. Metzger is still in prison expiating his crime," the umpire is of opinion that, notwithstanding the irregularities and insufficiencies pointed out by the Commissioner for Venezuela in the testimony, the fact of the injury itself is established.

The Commissioner for Venezuela, however, insists that the right of action does not survive and pass to the heirs of Metzger, who are, as shown by the proofs, his mother, sister, and brother, all of whom are German subjects. It is conceded that under the laws of Germany such right of action does not survive, but the German Commissioner is of the opinion that this is not a claim between an individual and Venezuela, but " an international demand which the German Empire makes." In the opinion of the umpire this position is not maintainable. A similar question arose before the American and British Claims Commission in the cases of McHugh, No. 357, Elizabeth Sherman, No. 359, and Elizabeth Brain, 447. (Moore's Digest of International Arbitration, vol. 4, p. 3278.). The United States demurred to the claim, insisting that the right of action did not survive, and that that was the law of both Great Britain and the United States. In the McHugh case the demurrer was sustained, apparently because he left only collateral relatives not dependent upon him for support. In the other two cases the demurrers were overruled, Mr. Commissioner Frazer dissenting. Upon the final hearing upon the merits,

however, the claim of Mrs. Sherman was disallowed unanimously, and although an award was made in favor of Mrs. Brain it was only on account of property taken from her husband and included no damages for his imprisonment. (Moore, etc., p. 3280). All the Commissioners seem to have agreed with Mr. Commissioner Frazer in the opinion that under the treaty only claims "on the part of citizens or subjects of the respective countries are submitted to the Government." The protocol under which this Commission is acting is substantially similar, and the umpire agrees with the reasoning of Mr. Commissioner Frazer, and is of the opinion that the claim now before this Commission is not a claim of the German Nation but a claim of an individual.

The Venezuelan code gives the injured party a right to recover his damages in a civil action in all cases of torts. (Código Civ., Arts. 1116, 1118.)

ART. 1116. Every act of a man which causes injury to another makes him through whose fault the injury happened liable to make reparation for the same.

ART. 1118. He is also liable not only for the injury which he caused by his own act, but also for that caused by the act of persons for whom he is responsible, or by the things which he has in his care.

This is in addition to fine and punishment in a criminal prosecution.

The heirs of a decedent succeed to all his property rights at the moment of his death, and no actual taking of possession is necessary. (Id., Arts. 894 and 896.)

ART. 894. Succession is opened at the moment of death at the place of the last domicile of the deceased.

ART. 896. Possession of the property of the deceased passes by law to the heir without the necessity of taking physical possession.

A right of action for damages for personal injuries is property. A fortiori is the claim in this case which had been presented and proved before the death of Metzger.

It appears, therefore, that under the laws of Venezuela the right of action for personal injuries does survive and pass to the heirs of the deceased, in so far as damages for corporeal injuries is concerned. This, in the opinion of the umpire, presents a different case from the above cited. The question is ably and, in the opinion of the umpire, convincingly argued in the opinion of Mr. Commissioner Frazer. Following its reasoning, the umpire is of the opinion that the law of the domicile determines the rights. Metzger, therefore, being domiciled at the time of his death in Venezuela, his heirs will take according to Venezuelan law, and they may recover in this case such damages as are just for corporeal injuries, including the expense and loss of time which naturally followed the injury, but not for the damages to his feelings and reputation. Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, because it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment.

The claimant states his damages at 20,000 bolivars, and the Commissioner for Germany is of the opinion that he should be allowed one-half that sum, or 10,000 bolivars. There is no evidence in the "expediente" to show how severe his wounds were, nor any evidence of medical or surgical treatment or of any expense on account of same, and the clear presumption from the proofs is that the injuries were not permanent and did not in any way conduce to his death. As has been said, the action of the Venezuelan Government in promptly arresting and punishing the offender relieves her from any liability for a malicious injury, and the damages which Metzger might have recovered, if still living, because of the insults and indignities and damages to his reputation

and standing in the community, not passing to his heirs under either the German or the Venezuelan law, which excludes all damages save those based on corporeal injuries, the umpire is of the opinion that the amount allowed by the German Commissioner is not warranted. If the claimant had, as was his duty, particularized the nature, extent, and severity of his wounds, it would be much easier to make a satisfactory assessment, and if the amount allowed should not be full compensation, it is because of this lack of evidence.

Basing the amount to be awarded upon the grounds above stated, in the opinion of the umpire the sum of 3,000 bolivars is ample. It results that the claimant will be allowed 3,000 bolivars without interest.

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## BISCHOFF CASE

Damages allowed for unreasonable detention of property, and injuries resulting thereto during that time, where original taking was lawful.

DUFFIELD, *Umpire:*

This claim is based on the taking of a carriage belonging to the claimant, at Caracas, in August, 1898, during an epidemic of smallpox. Information came to the police that the carriage had carried two persons afflicted with the disease, and the police conveyed it to the house of detention, where it remained for a considerable time. During this time it was exposed to the weather, and the claimant alleges it was substantially injured. Upon ascertaining that the information upon which they had acted was false, the police offered to return the carriage to the claimant, and the claimant refused to accept it unless they would pay for damage done to it. The claimant also asks 18,000 bolivars for injury to his business, counsel fees, 40 bolivars, and legal costs, 25 bolivars.

The Commissioner for Venezuela is of the opinion that there is no liability under this state of facts. The Commissioner for Germany, however, while admitting " that the taking was made in good faith, and because of the smallpox epidemic then existing was justified," is of the opinion that the claimant was not bound to accept the return of the carriage, and that Venezuela is liable for its value.

It seems to be well settled by the authorities that in the case of an original wrongful taking of personal property the owner is not bound to receive the property in an injured condition.

> Where the owner of personal property has been tortiously deprived of it, he is not, it has been held, bound to accept its return or restoration, if proposed, but may stand upon his legal rights. (American and English Ency. of Law, 2d ed., Vol. VIII, p. 692, and cases cited.)

But this principle only applies in cases of wrongful taking. The case shows, and the Commissioner for Germany admits, that the carriage was taken in the proper exercise of discretion by the police authorities. Certainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made. But it is held in a number of cases before arbitration commissions involving the taking and detention of property, where the original taking was lawful, that the defendant government is liable for damages for the detention of the property for an unreasonable length of time and injuries to the same during that period. (Moore, Vol. 4, pp. 3235 and 3265.)

In the case at bar the umpire is of opinion that these are the only damages

recoverable. As the claimant presents no evidence of the amount of these injuries he can not recover on the case as made. His mistake in refusing to accept the carriage was a mistake of law and not of fact, and, in strict right, he perhaps can not demand an opportunity to show the amount of these injuries. The case, however, is a hard one, inasmuch as he has lost his carriage through the mistaken though lawful action of the police, and has undoubtedly suffered damage to his business, which, however, is not legally recoverable. Under the words of the protocol providing for the examination and decision of claims "according to principles of justice," and that "the decisions of the Commission shall be based upon absolute equity," in the opinion of the umpire it is a proper case in which to allow the claimant an opportunity to show his actual damage. If the Commissioners can not agree upon this amount without further proof the claimant will be allowed five days in which to make the same.

It results, of course, that there can be no allowance made for extrajudicial or other legal costs. In any event, the former are not recoverable under the opinion of the umpire rendered in the case of Hugo Valentiner. As to the latter, the umpire is of opinion that there is no power in the Commission to allow the costs of proving the claim. In all civil actions costs are created by statute, and only such are allowed as the statute provides for. It is true in the claim of Richter the claimant was allowed the costs of the additional testimony, but that was because the Commission itself had directed him to take it.

An entry will be made in the record in accordance with the above opinion.

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## FLOTHOW CASE

Meaning of protocol in the provision for extending time for submission of claims

DUFFIELD, *Umpire:*

In this case the opinion of the Commissioner for Germany is that the case should be received by the Commission and acted upon notwithstanding the fact that the time fixed by the protocol has expired, as has also the extended term fixed by the Commissioners at the seventh session, June 22, 1903. The Commissioner for Venezuela disagrees with this conclusion and is of the opinion that the extension of time made at the seventh session of the Commission, on the 22d day of June, 1903, exhausted the power of the Commissioner to make further extension, and that, moreover, the period covered by that extension having expired, the Commission has no power to create a new term.

The extension of the term at the seventh session was made by the agreement of the Commission without consultation with the umpire.

There is a decided misunderstanding by the Commissioners as to their action on the 22d of June, 1903, and even as to the accuracy of the record of that date. Fortunately it is not necessary to decide this difference. It appears upon a careful examination of the protocols that the translation into English which the Commission have been using contains a material error in the first paragraph of Article III of the additional agreement of May 7, 1903, the language of the translation being:

> The claims shall be presented to the Commissioners by the Imperial German minister at Caracas before the 1st day of July, 1903. A reasonable extension of this term may eventually be granted by the Commissioners —

while the original English duplicate, signed by Mr. Bowen and Baron von Sternberg, reads:

The claims shall be presented to the Commissioners by the imperial German minister at Caracas before the 1st day of July, 1903. A reasonable extension of this term may in proper cases be granted by the Commissioners.

If the former translation were correct, there would be much force in the argument of the Commissioner for Venezuela. The Commission, however, must accept the language of the protocol signed by the representatives of the two countries. Under its language no authority is given to the Commission to make a general extension of the term for the presentation of claims. This is the necessary and only inference from the words " in proper cases." The umpire is therefore of the opinion that the action of the Commissioners on June 22 does not affect the power of the Commission to consider on its merits the application of the claimant for permission to present his claim.

In the German text of the original protocol, signed by Baron von Sternberg and Mr. Bowen, the word " Commission " is used instead of the word " Commissioners " in the clause providing for the extension in proper cases. Basing his argument upon the English translation, the Commissioner for Venezuela has suggested that this may be a case in which the umpire, in case of disagreement of the Commissioners, has no power to decide. Even if the German original did not differ from the English, the umpire is of opinion that the word "Commissioners " as used in this article should properly be interpreted to mean the Commission. In other parts of the protocol the words " Commissioners " and " Commission " seem to have been used synonymously, and it is obvious that if the umpire had no authority to decide what is a reasonable extension in case of disagreement of the Commissioners, it would be entirely in the power of the Venezuelan Commissioner to prevent any extension that did not seem to him reasonable. Such an intention on the part of the representatives of the two countries can not, in the opinion of the umpire, be fairly presumed. Moreover, in the original protocol of February 13, 1903, to which the agreement of May 7 was supplemental, it is provided in Article IV: " in each case where the two members come to an agreement on the claim, their decision shall be final. In cases of disagreement *the claims* shall be submitted to the decision of an umpire to be nominated by the President of the United States of America." The claimant asks leave to present his claim upon the following grounds: It is based upon alleged injuries to and wrongful seizures of property on his breeding ranch, some of which occurred as late as May, 1903. This property was in charge of an agent of the owner, the latter having left Venezuela in 1901 and removed to Madrid with his family, where he still lives. It appears that the agent took the proofs which are offered in support of the claim in the latter part of June. They seem to be in proper form, although perhaps the evidence of the agent's authority may be subject to technical objections. Possibly on this account or for prudential reasons the agent deemed it necessary to send it on to his principal for approval. For some reason which does not appear they were sent to Germany and did not reach the claimant until about July 31, 1903. This occasioned the delay.

Under these circumstances the umpire is of the opinion that the case falls within the provision in the additional agreement of May 7, and is a proper one in which to grant an extension of the term fixed by the representatives of the two Governments.

While there is force in the objection of the Commissioner for Venezuela that the claimant may be presumed to have had knowledge of the protocol of February, it appears that the two Governments did not consider their convention complete as to modes of procedure and other matters provided for by the additional agreement of May 7. The earliest date, therefore, at which it would seem to have been incumbent on claimant to set about preparing his claim and

proofs would be May, 1903, and as it also appears in this case that the injuries and seizure of property continued into that month, the case does not show, in the opinion of the umpire, an unreasonable delay on the part of the claimant.

In accordance with these conclusions, the claim will be admitted for the consideration and such disposition as the proof may warrant.

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## BREWER, MOLLER & CO. CASE [1]

Taxes apparently legally levied and paid without protest can not be recovered

DUFFIELD. *Umpire:*

The claimants ask to be allowed the sum of 20,283.20 marks which they have paid on account of taxes assessed against them by the municipality of San Cristóbal. They introduce in evidence a resolution of the municipal council of the district, dated the 28th day of September, 1902. This resolution recites that in the exercise of their authority under article 32 of the law providing for taxation for municipal purposes they have assessed the warehouses of the first class the sum of 3,000 bolivars every three months, and directs the junta clasificadora — board of assessors — to make the proper assessment and classification. Under this municipal action the claimants paid the sum above mentioned. They now seek to recover it from the Republic of Venezuela.

The Commissioners disagree as to the liability of Venezuela.

The umpire is unable to see any ground whatever on which to sustain this claim. The uniform presumption of the regularity and validity of all acts of public officials applies to this case, and there is not the slightest evidence or attempt to prove that these taxes were illegally levied. There is a statement in the expediente that only warehouses owned by Germans fell under the operation of this law. If it were shown that this tax was specially levied upon Germans owning warehouses, because they were Germans, or that for any other reason they were unlawfully classified, the allegation might need further consideration; but it so clearly appears that the tax is a general one, and that the classification is made upon a basis of the values of property, that it excludes any such inference. Moreover, the claimants do not appear to have raised any objection to the classification, but paid the taxes voluntarily. It is a settled law that the voluntary payment of taxes purporting to be levied under a valid law waives all irregularities in the assessment. It is very doubtful if the Republic of Venezuela could under any circumstances be made liable to the amount of irregular or illegal taxes collected by one of the municipal districts. But it is not necessary to decide this, as upon the whole case as made there is an absolute want of equity in the claim, even as against the municipal district of San Cristóbal.

It results that the claim must be wholly disallowed.

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## CHRISTERN & CO. CASE

Beckman case affirmed (see p. 598).

In the absence of specified rate of interest only legal rate recoverable. Compound interest refused.

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[1] The cases of Adolph Noack and Steinworth & Co. were also disallowed for the reasons given in the following opinion.

DUFFIELD, *Umpire:*

The claimant asks the sum of 21,256.12 bolivars. This sum is made up of 2,800 bolivars for cattle taken by the Government, 7,996.71 bolivars for war duties, so called, being an increase of 30 per cent of the previous customs duties imposed by a decree of the National Government dated the 16th of February, 1903, and 10,459.41 bolivars for a debt of the State of Zulia.

The Commissioners disagree as the liability of Venezuela for the first and third items, but agree to the disallowance of the second item.

The umpire is of the opinion that the proofs do not make out a case of vested right in the claimants under the customs law which they count upon, and that the decision of the Commissioners in respect of this item is correct.

The Commissioner does not dispute the fact or the value of the cattle taken by the Government of Venezuela, but he claims that Venezuela is discharged from liability because of a novation between the claimants and the State of Zulia. Granting this premise, the umpire is of the opinion that the Government of Venezuela is still liable for the claim. His reasons for this conclusion are stated in full in the case of Beckman.[1]

The decision in that case also decides the liability of Venezuela for the loan to the State of Zulia. The Commissioner for Germany, however, allows the claimants the full amount of this item of their claim, 10,459.41 bolivars, with the usual interest. This amount includes interest at 1 per cent a month, compounded with yearly rests, and increases the original amount of the item thereby 4,589.37 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest. Neither do the proofs show that under the agreement made on the 14th of February, 1900, between the representatives of the government of Zulia and the parties who made the war loan for the purpose of adjusting the amount due, of which the claimants' share was 11,625.04 bolivars, there was any agreement for any rate of interest on the amount then agreed upon. There is also an entire absence of proof as to the rate of interest which the original loan was to bear. It is too clear to need argument that if no rate of interest is agreed upon by the parties, only the legal rate can be allowed. This rate in Venezuela is 3 per cent per annum. Instead, therefore, of allowing the sum named by the Commissioner for Germany, the item is allowed at the sum of 6,083.22 bolivars, being the original amount of loan, 11,254.04 bolivars, with interest at 3 per cent from February 14, 1900, to December 31, 1903, less the payments made thereon and interest on those payments.

For the same reasons the umpire concurs in the decision of the Commissioner for Germany as to the first item, and awards therefor the sum of 2,800 bolivars, with interest from the date of the presentation of the claim, August 3, 1903, up to and including December 31, 1903. Total amount awarded claimants, 8,917.74 bolivars.

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## ORINOCO ASPHALT CASE

A government has no right to close ports of the country which are in the hands of insurgents unless it can maintain the blockade by force[2]

DUFFIELD, *Umpire:*

The Commissioners have agreed upon the allowance of the first six items

[1] See *infra*, p. 436.

[2] See Topaze case, Vol. IX of these Reports, p. 389; De Caro case, *infra*, p. 635; Martini case, *infra*, p. 644.

of the claim, at 4,414.82 bolivars. They disagree upon items 7 and 8. These are based upon the alleged refusal of the Venezuelan consul at Trinidad, for the period between April and October, 1902 — twenty-two weeks — to give clearance papers to the boats of the company, *Ibis* and *Explorador*, from Port of Spain, Trinidad, where the principal office of the company is, to the Island of Pedernales, where its mines are, in consequence of which the said boats were forced to lie in Port of Spain for the period in question, and communication between the mines and the outside world was cut off. In addition to its rights under international law, the company asserts the concession to it from the Government of Venezuela to maintain communication between its mines and Trinidad by means of its boats used for that purpose, and in support of it sets up an Executive decree of February 7, 1901; it also claims a right under the laws of Venezuela — la ley XVI de Hacienda, Articulo 39. The damages arising from this act of the Government are presented in detail.

The Commissioner for Venezuela maintains that his Government is not liable, because in April, 1902, revolutionary forces occupied the country about Pedernales, where the mine of Pedernales is, and Guiria, where the custom-house of Venezuela for that territory is situated, and the Venezuelan consul refused to clear the boats on that account. He insists that the action of the consul was justified because the —

> boats which were cleared from Guiria would serve the revolution which took them; and besides, if the revolution collected duties it would bring them in money resources, and that the Government of Venezuela had declared the blockade of these regions, and the consul in Trinidad obeyed the Government's decrees. That because of the war, guarantees were suspended, and in such a period free transit or free traffic especially suffers when it is a traffic of boats which may serve or do serve the revolutionists, and that in no event would Venezuela consuls clear boats for places occupied by the rebels.

The first contention of the Commissioner for Germany, based upon an alleged concession to the company, is not supported by the facts. Article 1 of the Executive decree of the 7th of February, 1901, is as follows:

> ARTICLE 1. The port of Pedernales, on the island of the same name in the delta of the Orinoco, is established only for the exportation of asphalt and petroleum which is taken from the mines belonging to the Orinoco Asphalt Company.

In the opinion of the umpire, this is in no legal sense a legal concession; no consideration appears to have been given for it. It is a mere privilege or favor shown to the company, by which, instead of clearing for or from Guiria, they may clear from Port of Spain to the island where their works are, and *vice versa*. So far as this decree goes, the umpire is clearly of the opinion that it might be at any time revoked by the Government of Venezuela.

The argument that any special rights were conferred upon the company or any other importers by article 39 of the sixteenth law of hacienda is not, in the opinion of the umpire, maintainable. The law merely provides and prescribes the official duties of consuls, for the ordinary breach of which it would seem clear that Venezuela would not be liable, and that the party injured thereby must look to the consul and his bond for indemnification.

The case, therefore, must be decided upon general principles of international law, whether Venezuela, even though her ports were in the possession of revolutionists, might lawfully close them to traffic with neutrals. That she did so in this case, and that the consul acted under her instructions, is not disputed.

It is said in Wharton's Digest of International Law, section 361, that the received tenets of international law do not admit that a decree of a sovereign

government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect, unless sustained by a blockading force sufficient to practically close such port.

Mr. Lawrence, in a note on Wheaton, Bk. IV, chapter 4, paragraph 5, states the rule and the reasons for it as follows:

Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest can not be prevented by a municipal interdict of the other. For this on principle the most obvious reason exists. The waters adjacent to the coast of a country are deemed within its jurisdictional limit only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases.

In 1861 New Granada being in a state of civil war, its Government announced that certain ports would be closed, not by blockade, but by order, and it was held that the method was one which could not be adopted against a foreign enemy holding the ports in question, and consequently could not be adopted against a domestic enemy. Lord John Russell said on this subject that —

"it was perfectly competent for the government of a country in a state of tranquillity to say which ports should be open to trade and which should be closed; but in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were de facto in the hands of the insurrectionists, and that such a proceeding would be an invasion of the international law relating to blockades." Subsequently the Government of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that " Her Majesty's Government entirely concur with the French Government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognized maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade." In neither case was the order carried out. In 1885 the President of Colombia, during the existence of civil war, declared [certain ports] to be closed without instituting a blockade. Mr. Bayard, Secretary of State for the United States, in a despatch of April 24th of that year fully adopted the principle of the illegitimateness of such closure, and refused to acknowledge that which had been declared by Colombia. (Hall, p. 37, note.)

In the case of the *Only Son* the umpire of the United States and British Commission of 1863 allowed the claim of the owners of the schooner of that name for the wrongful act of the collector of customs at Halifax, Nova Scotia, compelling the master of the schooner to enter his vessel and pay duty on his cargo, instead of reporting for a market and proceeding elsewhere if he thought it advisable. In the preceding diplomatic correspondence the British Government had acknowledged its liability, but claimed that no loss was suffered. (Moore on Arbitration, pp. 3404-3405.)

In the case of the *William Lee*, a whaling ship detained for three months by the refusal of the port to give a clearance, the claimant was allowed $22,000. (Moore, pp. 3405-3406.)

In the case of the *Labuan*, United States and British Claims Commission, 1871, the claimant was allowed by the unanimous judgment of the Commission $37,392 because the custom-house officials at New York refused his vessel a clearance from November 5 to December 13, 1862. The action of the customhouse in New York was in pursuance of instructions from the United States Government, which claimed the right to detain the ship, in common with other vessels of great speed destined for ports in the Gulf of Mexico, in order to prevent the transmission of information relative to the departure or

proposed departure of a military expedition fitted out by the authorities of the United States. The contention of the claimant's counsel was that the refusal to clear the vessel was in effect taking private property for public use, and, while it may have been justified by the necessity of the case, it involved the obligation of compensation, citing 3 Phillimore, 42, and Dana's Wheaton, 152, note. (Moore, pp. 3791-3793.)

The umpire is therefore of the opinion that the Government of Venezuela was not justified in directing its consul at the Port of Spain to refuse clearances to the ships of the claimant company. It appears from the case, however, that the Venezuelan consul at the Port of Spain offered to clear —

> the boats belonging to that company, which she intends shall carry provisions to the laborers in the mines. * * * But under the written conditions sent by the Government * * * that that company must pay into this consulate, upon the delivery of the clearance of this boat, the amount of all the duties which it would have to pay at the custom-house at Guiria.

This conditional permission was not accepted, and the claimant was justified in refusing it.

It results that the claimant company is entitled to recover such damages as they have established by their proof, which are:

Item 7a, 640 bolivars for the loss of freight for the lighter *Ibis*, 40 tons capacity one trip in the month of April.

Item 8a, for loss of freight of lighter *Ibis*, twenty-two weeks, 22 voyages, at 1,248 bolivars the round trip, 27,456 bolivars. It is held by the courts of England and the United States that damages in cases of demurrage, which is entirely analogous to the claimant's claim, if it is not in fact demurrage, are measured by the value of the use of the vessel. (Re Trent *v.* Humber Company, Eng. Law Reports, 4th Chancery, 112; The *Pietro G.*, 39th Federal Reporter, U.S., 366.) The United States Supreme Court have held, in The Potomac *v.* Conor (105 U.S., 630), that the average of net profits on the trip for the season may be adopted as the measure of damages for the loss of the use of the vessel resulting from collision. This latter case, however, was the case of a merchant vessel doing a general carrying business. The *Ibis*, it appears, was the company's own property and engaged in transporting the company's freight. It is quite certain that it would have had full freight from Pedernales to Trinidad on every voyage, and, taking into consideration the carrying on the return trip of supplies for the mines and food for the men, as well as machinery, it is fair and reasonable to believe that she would have had full freight on her return trip. The umpire therefore agrees with the Commissioner for Germany in the allowance of items 7 and 8a, viz, 624 bolivars and 27,456 bolivars.

Item 8b, for injuries occasioned to the *Ibis* by her long stay in salt water, 728 bolivars, is certainly a proper charge. It is held by the Supreme Court of the United States, if a vessel is capable of being repaired and restored to her original condition, the cost of such necessary repairs is a correct rule of damage. (The *Granite State*, 3 Wall., 310; The *Baltimore*, 8 Wall., 377.)

Item 8c, 4,520.66 bolivars for the wages of the captain and crew of the *Explorador* during the time she was detained in Port of Spain, seems reasonable in amount, and no reason is presented in the opinion of the Commissioner for Venezuela why it should not be allowed. The umpire agrees in the allowance by the Commissioner for Germany of this item.

The same is true of item 8d, which is like 8b except that it is for the *Explorador* instead of the *Ibis*. For the reasons stated in the other item, the amount is allowed, 829.74 bolivars.

Item 8h, 161,200 bolivars, is made up by the claimant as follows: By reason

of the action of Venezuela, through her consul in Trinidad, the *Explorador* and the *Ibis* were practically put out of commission from the latter part of April to some time in October, 1902 — twenty-two weeks. As the claimant was unable to use the boats, and presumably for the same reason which prevented their use could not have obtained the services of any other vessels, even if they could have cleared for Pedernales, which under the decree establishing that port is doubtful, all operations at the mines were stopped because the character of the asphalt was such that any long exposure depreciated its quality and value. The claimant therefore charges for one hundred and twelve working days during this period, and claims that the normal production of the mines was 30 tons a day, and they could have produced during those days 3,360 tons, which was worth $25 United States gold (130 bolivars) a ton, which was the average price for the whole of that year, aggregating 436,800 bolivars, less the expense of production, transportation, and exportation, 275,600 bolivars, leaving a balance of 161,200 bolivars. It will be seen, however, that this makes no deduction for the value of 3,360 tons of asphalt at the mine; but this asphalt was never removed, and is still presumably as good in its natural state as it was during the period in question. There is no claim that the market value of the asphalt has fallen, and for three months of the year 1902 the claimant's basis of $25 United States gold (130 bolivars) per ton would govern. There is no evidence of the value of the asphalt at the mines in its natural state, although in its trial balance of December, 1901, the company puts in the item of real estate, including the asphalt mine at 405,326 marks. It seems very clear that the principal sum of 161,200 bolivars can not be recovered.

In the absence of any testimony on which any definite appraisal of the value of the asphalt at the mines can be based, the claimant has not shown the actual amount of his damage. In the opinion of the umpire a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mines would have sold during the period of stoppage of traffic. Perhaps mathematical accuracy might require this interest to be calculated for the average time, but under all the circumstances of the case the umpire is of opinion that it is just to allow interest for the entire period. The award made by the Commissioner for Germany on this item will therefore be reduced to interest for one hundred and fifty-four days at 5 per cent on 161,200 bolivars, namely, 3,447.84 bolivars.

On these figures the aggregate sum of 42,027.78 bolivars is awarded to the claimant, which includes the 4,466 bolivars agreed to by the commissioners for items 1-6, inclusive, with interest at 3 per cent per annum on 37,606.46 bolivars from the date of the presentation of the claim, August 10, 1903, to and including December 31, 1903.

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## WENZEL CASE

Amnesty granted by the Chief Executive of Venezuela, being in excess of his powers, does not make the State liable for damages inflicted by the persons pardoned

DUFFIELD, *Umpire:*

This claim is for 19,801.31 marks. The commissioners agree that certain items of the claim should be disallowed, but disagree as to item 4, for injuries to property inflicted by the revolutionist forces under General Hernandez in November, 1899, and March 1900, for which damages are claimed in the sum of 15,035 bolivars.

The Commissioner for Germany is of the opinion that this item should be

allowed at its full amount, with interest, while the Commissioner for Venezuela is of the opinion that it should be entirely disallowed. The Commissioner for Venezuela is of the opinion that because the acts complained of were those of revolutionists Venezuela is not liable and because the claim is covered by the decision of the umpire in the case of Van Dissel & Co. In the claim of Van Dissel & Co. the acts of revolutionists under General Garbiras were under question, and the opinion specially confined the effect of the decision to that revolution saying: "It is not intended by this opinion to decide that Venezuela may not be liable for acts of revolutionists in an insurrection prior to the Matos movement." Following this decision, the claim of John Roehl, No. 31, was disallowed. In that case the injuries complained of were by Hernandez revolutionists. The case, however, was presented to the umpire for a formal decision, the commissioners agreeing upon the amount and that it was controlled by the Van Dissel case.

In the present case the Commissioner for Germany insists that Venezuela is liable for the acts in question, first, because the admission in Article III of the protocol should receive a broader construction than given to it by the umpire in the Van Dissel case,[1] and, second, because a general amnesty was granted to the Hernandez revolutionists and General Hernandez himself is now representing the Government of Venezuela as its minister to the United States.

The umpire is unable to agree with the Commissioner for Germany in his construction of Article III, but adheres to his former opinion. The second point, however, is for the first time raised in this Commission. The precedents of former arbitral commissions seem to be in favor of the contention of the Commissioner for Germany. In the *Montijo* case the Hon. Robert Bunch, British minister to Bogotá, was the umpire. It was argued by the arbitrator for Colombia on this point that as a general amnesty in favor of Messrs. Herrera, Díaz, and all other persons concerned in the attempted revolution of April and May, 1871, was subsequently granted by the President of the State of Panama in the exercise of his constitutional powers, no judicial proceedings could be instituted against them as revolutionists, and consequently for injuries done by them nothing could be recovered from them by either foreigner or native.

To this argument the umpire noted two objections:

> The first is that, even in the absence of any express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon toward persons or things over which the grantor has no control. In the present case it will scarcely be contended that the captors of the *Montijo* had any right beyond that emanating from a revolutionary movement to take the vessel from the dominion of her owners. * * *

If no amnesty had ever been granted, and had Herrera, Díaz, and their associates been honestly and effectively proceeded against in the courts of the Republic and cast in damages toward the owner, the aspect of the case would have entirely changed. It would have been at least an open question whether their possible or even notorious inability to pay those damages would have rendered Colombia at large responsible for their act. But the amnesty deprived the Messrs. Schuber of the power of trying the question. Therefore the President of Panama, having no right to dispose of interests, which were not his property, and which, on the contrary, he was bound by a public treaty to protect, assumed the responsibility to the owners of those interests of the persons

[1] See *supra*, p. 405.

by whom they had been injured. It is an old saying that one must be just before one is generous. In Spanish the version is "*La bolsa ajena es muy franca.*"

The distinguished rank of the umpire as a diplomat and the legal ability which is shown in all his opinions, as well as the reasons given for his conclusions, make his opinion worthy of the most serious consideration. (Moore on Arbitration, 1421, 1427, 1438. See also decision of the Mixed Commission on the *Col. Lloyd Aspinwall* case; Moore, 1015-1016.)

But it must be borne in mind that it appeared in that case that a treaty of peace was made by the president of the State of Panama with Herrera, chief of the revolutionists, by Article VII of which a complete amnesty was reciprocally granted and " the Government assumes as its own the expense of the steamers and other vehicles which the revolution has had to make use of up to that date." (Moore, p. 1428.) The decision might well have put in this provision, and that portion of the opinion as to the effect of amnesty generally may be treated as obiter dictum.

Venezuela was held liable in damages by the United States and the Venezuelan Commission, under the convention of December 5, 1885, for not punishing the insurgents who attacked General García's forces on board the American steamer *Apure* in 1865. The Commission held that there was not a state of war in Venezuela, although there was an armed conflict between the president of the State of Apure and his enemies under Generals Sosa and Mendez. (Opinions, pp. 481-482; Moore's Arbitrations, p. 2967.)

Mr. Commissioner Little said:

> The criminals were the conspirators upon the shore. Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could be reasonably required in that behalf, she is to be held blameless; otherwise, not. Without entering upon a discussion of the investigation instituted and conducted by her, * * * it was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the Government's investigation disclosed their innocence and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one. But neither of these things appears to have occurred. * * * On the whole, however, considering the heinous character of the offense, it may fairly be said that Venezuela here fell short of her entire duty.[1]

Mr. Commissioner Findlay said:

> A State, however, is liable for wrongs inflicted upon the citizens of another State in any case where the offender is permitted to go at large without being called to account or punished for his offense or some honest endeavor made for his arrest and punishment. (Opinions, p. 486; Moore's Arbitrations, p. 2969.)

It must be borne in mind that this case was a seizure of an American steamer, which may be distinguished from injuries or seizures of property by movements of opposing troops in active operations. (See brief of counsel for claimant in the Venezuelan Transportation Company case.)

In the United States and Venezuelan Claims Commission in 1895, in the case of the Venezuelan Steam Transportation Company, the Commissioners awarded the claimant damages for injuries to the steamers belonging to the claimant inflicted by insurgent authorities.[2] (See Report of Commission.)

In an exceedingly able opinion, Mr. Commissioner Andrade dissents from

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[1] See discussion of this point in Poggioli case, *infra*, p. 669.

[2] Upon this point see comments of Umpire Plumley, Vol. IX of these Reports, p. 432.

the award of the Commission. But in the course of his reasoning he does not deny the above rule, but impliedly, if not expressly, admits it. He says:

> As a general rule the private acts of citizens do not compromise the liability of the State, save when it can prevent these and fails to do so, or when, after their consummation, it approves or ratifies them in some way. (Moore, p. 1730.)

In the case before him, however, he claimed that if for reasons of state Venezuela thought proper, in 1873, to seal the national peace with forgiveness for all political offenses, no other sovereignty has the right to call her to account for that sovereign act.

In the opinion of the umpire, while this statement is true, it does not follow, and the learned Commissioner seems to have refrained from saying, that the consequences of such forgiveness of political offenses which have injured neutrals may not be a liability on the part of the State. In that case, however, the revolutionists who committed the injuries succeeded and their leader, General Blanco, established a constitutional government.

There are no reasons stated by the majority of the Commissioners for the award, but from the brief of counsel for the claimants it appears that it may have passed on other grounds, viz., the culpable failure of the Venezuelan Government to take adequate measures to prevent the seizure of the company's steamers, although they knew that they were in danger, and that they were carrying Venezuelan mails under the United States flag; that the Government allowed the town of Bolívar to remain for nearly six months in the hands of the "Blues," and permitted them to move quietly away when the Government forces approached; that a fort near the mouth of the Orinoco was held against the Venezuelan Government as late as January, 1872, by a "Blue" officer and his wife with two old-fashioned smoothbore guns, equally dangerous at both ends; and that the right granted the company by the Venezuelan Congress to fly the flag of the United States on their vessels was a pledge by the people of Venezuela that they would not violate any of the rights and privileges of the vessels or their officers under its protection. And special stress was laid by counsel upon the distinction between injuries to persons or property in the theater of active hostilities, "for which," they say, "governments are not responsible, and deliberate seizures of neutral vessels under the flag of their country."

The case of Divine (Moore, p. 2980) is contra. The claim was for setting fire to a house and all its contents in Matamoras, Mexico, in 1851.

> The city [says Moore] had been in the possession of General Avalos, military commander of the State of Tamaulipas, and General Carvajal had placed himself at the head of a movement to displace his authority. Carvajal besieged the city, and at length assaulted it. In the course of the assault the house in question was destroyed, though the American consul, at the risk of his life, placed himself between the combatants, and, displaying the American flag, besought them to spare the property.

Mr. Ashton, agent of the United States, in his brief to support the claim, established that General Carvajal, having been conquered in Tamaulipas, was pardoned by means of a general amnesty and restored to his civil rights; was afterwards a brigadier-general and civil and military governor of Tamaulipas and other States, and was afterwards, in 1864, sent to the United States as commissioner with extraordinary powers, and was named and continued to be a major-general in the Mexican army. Under these circumstances Mr. Ashton sustained the liability of the Mexican Government.

The umpire, Sir Edward Thornton, said:

It is alleged by the claimants themselves that the destruction of the property on account of which the claim is made was due to the acts of rebels, and for this reason alone the umpire is of opinion that the Mexican Government can not be called upon to make compensation for the damage done. * * * It is urged [he adds] that the Mexican Government granted an amnesty to Carvajal, and therefore made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels.

But it is further contended by the Commissioner for Venezuela that there was no amnesty granted to the Hernandez revolutionists, and the imprisonment of General Hernandez, the leader, lends this position some support.

In connection with the release of General Hernandez, General Castro, on the 9th of December, 1902, issued a proclamation in which, after denouncing the action of the allied powers in seizing the war ships and ports of Venezuela, and calling on all Venezuelans to lay aside all differences and rally to the defense of their country, said:

> And seeing that this [the country] can not be great and powerful except in the pure air of brotherhood of all its sons — and circumstances demand the union of them all — in the name of my sentiments and her necessities above expressed, I open the doors of all the prisons of the Republic to the political prisoners who are still confined therein. I likewise open the doors of the country to Venezuelans who for the same reasons are in foreign lands, and I restore to the enjoyment of the constitutional guaranties property of all revolutionists which was embargoed for reasons of public order.

It is contended by the Commissioner for Venezuela, first, that this language can not be interpreted as an amnesty; and, second, that under the constitution of Venezuela the President has no power to grant amnesty. In the opinion of the umpire a general pardon of past offenses by a government is an amnesty, which is commonly defined to be an act of oblivion. Its effect is that the crimes and offenses named in the act are obliterated, and they can never again be charged against the guilty parties. Where no offenses are named in the act the amnesty is general. The preamble of this proclamation would seem to necessitate an interpretation of the paragraph above quoted, which absolves from all punishment in the courts or by the authorities of Venezuela all political prisoners in Venezuela and all political offenders in other countries for any act committed by them while in rebellion.

Under a system of Government in which the Executive has the pardoning power it might be difficult to sustain the contention of the Commissioner for Venezuela. But it is not necessary to decide this question. The constitution of Venezuela is peculiar in this respect, and in the opinion of the umpire it sustains the position of the Commissioner for Venezuela. It confers no power upon the Executive to grant amnesties, but in express terms gives the legislative branch of the Government that power. Article 54, section 21, of the constitution of Venezuela of 1901 provides:

> The Congress of the United States of Venezuela shall have the following powers: * * * to grant amnesties.

General Hernandez on the 2d of March, 1898, organized an insurrectionary movement which extended to all the States of the Republic. It ended with the capture of General Hernandez at La Vega on the 12th of June. It comprised eighty-four armed encounters, in one of which General Crespo was killed — the battle of Carmelora, in the year 1898. General Hernandez was captured and imprisoned at San Carlos fortress. The revolution of the restoration under General Castro began on May 23, 1899, on which day, after his first battle at

Tonono, he issued a manifesto, taking for the standard of his armed movement the restoration of the constitution he alleged had been violated by the high powers of the nation. General Hernandez was still in prison in San Carlos fortress, but many of his followers joined in the Castro insurrection. On the day after General Castro made his triumphal entry into Caracas, he set at liberty the political prisoners whom the government of Andrade had imprisoned, and among them General Hernandez, leader of the first nationalist revolution, and appointed the latter his minister of public works. A few days thereafter Hernandez left Caracas by stealth, accompanied by the forces of Gen. Samuel Acosta, his companion in arms in the first nationalist revolution, and proclaimed a revolution against the government of General Castro. It was in this last revolution that the injuries complained of occurred. He was again defeated, and on May 27, 1900, imprisoned in the fortress of San Carlos for some time He remained there until the 11th of December, 1902, when he was set at liberty under the proclamation above referred to and came to Caracas, to parley with General Castro. He has since then supported the Government and has been sent to represent it as minister to the United States.

The claim therefore falls within the decisions in the cases of Van Dissel & Co., No. 11, and John Roehl, No. 31, and is disallowed.

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## BREWER, MOLLER & CO. CASE (second case)

Beckman case *(infra*, p. 436) affirmed.
Faber case *(infra*, p. 438) affirmed.
Meaning of "local legislation" and "technical objections," as set forth in protocol.

DUFFIELD, *Umpire:*

The claim in this case is for 843,705.36 bolivars, made up of the following items:

1. War duties.
2. Acts of piracy.
3. There is no proof of item 3 and no reference to it in the expediente.
4. The debt of the State of Zulia.

5 and 6. Injuries to and seizures of property by Government troops and revolutionists.

Part of 7 and all of 8. Damages caused by the closing of ports on the Catatumbo and Zulia rivers.

Part of 7. Stoppage of mails in connection with the closing of the ports on the Catatumbo River.

9. Share of claimant in the claim of the Lake Maracaibo and Catatumbo River Navigation Company.

Of these items 1 and 2 were disallowed by agreement of the Commissioners; 5 and 6 allowed by agreement of the Commissioners at 33,958 bolivars.

Item 4, for the debt of the State of Zulia, is allowed by the umpire under the decision in the case of Beckman & Co., No. 47, in the sum of 53,296.67 bolivars.[1]

Part of 7 and all of 8 are disallowed by the umpire under the ruling in the case of George Faber, No. 53.[2]

The remaining portion of item 7, for damages alleged to have been suffered by the interruption of the postal service in connection with the closing of the ports on the Catatumbo River, 75.000 marks, is, in the opinion of the Commis-

[1] See *infra*, p. 436.
[2] See *infra*, p. 438.

sioner for Germany, a valid claim against Venezuela and should be allowed. He is of the opinion that the stoppage of the mails is in violation of the International Postal Union treaty of Washington.

It appears from the statement of the claim that following the closure of the ports on the rivers Zulia and Catatumbo this stoppage of mails occurred. It is evident that the established postal route between Maracaibo and Cucuta was necessarily abrogated by this action of the Government of Venezuela, and it is difficult to see how a claim can be sustained before this Commission on this ground. However, it clearly appears from the "expediente" that there is no proof of any special elements or items of damage to the claimants upon which any calculation or legal estimate of the amount of damage they suffered in consequence can be made. In the absence of any such proof, therefore, the sum claimed can not be allowed.

Item 9, 98,240 bolivars is for the claimant's share, 25 per cent of the credit which the Lake Maracaibo and Catatumbo River Navigation Company have against the Government of Venezuela. It is agreed by the Commissioners that this credit amounts to 162,218.03 bolivars. But it is claimed by the Commissioner for Venezuela that claimants have no legal interest therein. In support of this contention he cites the Venezuelan Code of Commerce, page 388, articles 242-247. The first five articles describe "Associations of accounts in participation" (Asociaciones de cuentas en participación), and the rights and liabilities of persons interested therein. Article 247 exempts these associations from the formal requisites required from companies by articles 162, 163, and 168.

By article 242 the party giving participation in the profits or losses of his business on one or more operations thereof is the managing agent, and by article 244 the persons participating in the profits or losses have no right of property in the effects and property of the association, not even in that which they themselves have contributed. Their only right is to have an account of what they have contributed in the losses or profits of the operation. By article 245, in case of failure, they are placed in the column of creditors in case their contribution of capital exceeds its proportion of losses.

It is agreed by the Commissioners that there is no regularly formed association or partnership known as "Lake Maracaibo and River Catatumbo Navigation Company," but that the concern popularly so known is in reality Piñedo, García & Co., Brewer, Moller & Co., Luciano Añez & Co., and Van Dissel & Co. On the 1st of October, 1900, they formed this association by the articles of agreement marked "Exhibit 6" in the "expediente." Under them Piñedo, García & Co. are made administrators and have entire charge of the management of the business and the control and conduct of its properties, and in all respects appear to be the "merchant" — "comerciante" — described in article 246 of the code of commerce above referred to. Under these circumstances the umpire is clearly of the opinion that none of the other parties to the agreement of October 1 have, in the language of article 244, "any right of property in the effects of the association, not even in those in which they themselves have contributed."

But it is claimed by the Commissioner for Germany that under the precedents of decisions by former international tribunals co-owners of property such as the "owners of commercial funds may enforce their several interests in a claim in a diplomatic proceeding," and that the objection of the Venezuelan Commissioner that "the company can only figure as an entity," and that it is inadmissible to award their parts to each of the partners, is a technical objection, lacking support in international law; and, further, that the provisions of Vene-

zuela are not binding on this Commission under the protocol which requires that it disregard provisions of local legislation.

Taking up these objections in their inverse order —

First. The umpire is of the opinion that the articles of the code in question are not local legislation within the meaning of the protocol. The parties to the protocol primarily intended by these words, it is quite evident, that Venezuela should be estopped from insisting upon the general provision in her law requiring foreigners as well as citizens to present their claims against the Government to the courts of Venezuela. Incidentally, of course, like provisions of local legislation were intended to be excluded; but it can not be presumed that all the laws of Venezuela with reference to the formation of corporations or of partnerships, or of limited associations, or in respect to the rights and obligations of holders of real estate were so included. Neither can it be reasonably presumed that it was intended to estop Venezuela from invoking the provision of local legislation to which foreigners, by associating themselves with Venezuelans, and by their voluntary and solemnly executed consent, had agreed. A fortiori must this be the case under circumstances like those under consideration, where, by the agreement between the foreigners and the Venezuelan citizens, the foreigners expressly stipulate that all right of property in the effects of the association shall be vested in the Venezuelan citizen.

Second. The umpire is unable to regard the objection of the Commissioner for Venezuela as a technical one, in the sense of the protocol. Certainly under the protocol this Commission can not take jurisdiction of a claim which is not owned by a German subject, and if, as has been stated, Piñedo, García & Co. were the owners in law of the property, and their German associates have only a right to an accounting for their contribution and its profits, they are not the legal owners of the debt or of any interest therein.

It appears by the code of commerce above cited that in case of failure of the "merchant" — *comerciante* — with whom they are associated they would be required to suffer the loss of their entire contribution of capital, if that should be the proportion of the total losses, after which they would be considered creditors pro tanto their contribution. It is therefore in law entirely uncertain whether they will receive, upon an accounting, any part of the claim against the Government.

In a case where all of the parties interested are foreigners, and therefore all of them are competent to associate themselves together in such a manner as has here been done, without need of or regard to the provisions of Venezuelan legislation, quite a different question would arise. The question, however, does not arise in this case, and it is not necessary for the umpire to decide it. He therefore expresses no opinion upon it. The item will therefore be disallowed without prejudice.

The claimant will therefore be allowed the amount of items 5 and 6, agreed to by the Commissioners at 33,958 bolivars, and 53,296.67 bolivars, allowed by the umpire on account of the debt of the State of Zulia, aggregating 87,254.67 bolivars, without interest.

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## CHRISTERN & CO. (LIQUIDATORS) CASE

Assignees for the benefit of creditors considered purchasers for value and entitled to recover, although claim in its origin was not entirely German.

DUFFIELD, *Umpire:*

It is conceded that the claimants are the properly appointed and lawfully authorized assignees for the benefit of the creditors — *liquidadores* — of Minlos,

Witzke & Co., of Maracaibo. The latter have a claim against the State of Zulia under an agreement entered into between the representative of that State and Brewer, Moller & Co., dated January 2, 1902, adjusting the amount of the debt of the State with the various members "of the commerce" — *del comercio* — of Maracaibo, for a loan enforced by the State of Zulia on behalf of and for the benefit of the Venezuelan Government.

The validity of the claim as respects Minlos, Witzke & Co. is adjudged by the decision of the umpire in the case of Beckman & Co.,[1] No. 47, but it is claimed by the Commissioner for Venezuela that Christern & Co. can not recover in this case because one of the two partners of Minlos, Witzke & Co. was a Dane. The umpire is unable to perceive the force of this objection. By an instrument attached to the " expediente " Christern & Co., whom it is conceded are German subjects, are vested with a full and absolute title, legal and equitable, to the share of Minlos, Witzke & Co., in the fund in question. It is true Christern & Co. hold it in trust for the creditors of Minlos, Witzke & Co., and of course any surplus thereafter will go to the latter. But that does not affect the title which Christern & Co. have to the fund. It is a familiar rule of law that assignees for the benefit of creditors are bona fide purchasers for value, and that after the assignment the assignors have no title whatever to the assigned property, and Christern & Co. stand in this position. Certainly if Minlos, Witzke & Co. had sold and conveyed this claim to Christern & Co. the fact that one of the former was a Danish subject could not affect the latter's right to recover. It is true that the debt was of such a nature as to be non-negotiable in the sense of the law merchant, and that Venezuela would, as against any subsequent holder of the debt, avail herself of any defense she might have against the original holder; yet it was assignable in law and capable of having the entire legal and equitable title to it transferred and conveyed.

In the opinion of the umpire, therefore, it is clear that Christern & Co. are the legal owners of the claim and, being German subjects, are entitled to an award by this Commission for the amount thereof.

The claim is therefore allowed at the sum of 28,135.85 bolivars, which includes interest up to and including the 31st of December, 1903.

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## BECKMAN & CO. CASE

Central Government liable for forced loan by one of the constituent states the proceeds of which were used for the defense of the entire nation.
Where no rate of interest is specified only the legal rate is recoverable.

DUFFIELD, *Umpire:*

The claim is for 227,756.54 bolivars, composed of the following items:

| | *Bolivars* | *Marks* |
|---|---|---|
| A. Debt of the Government of the State of Zulia | 13,584.62 | 10,867.70 |
| B. War duties on importations | 10,772.24 | 8,617.79 |
| C. Export duties | 19,749.24 | 15,799.39 |
| D. Loss on coffee and hides caused by prolonged storage | 25,014.36 | 20,011.49 |
| E. Interest on capital lying idle | 50,496.08 | 40,396.86 |
| F. Loss caused by the suspension of mail service | 50,000.00 | 40,000.00 |
| G. Losses in salaries, rent, etc. | 58,140.00 | 46,512.00 |

[1] See *infra*, p. 436.

As to the first item (A) there is no disputed question of fact. The State of Zulia confessedly owes the claimant the sum of 13,584.62 bolivars. The amount due the claimant was agreed upon and officially published in detail in the Official Gazette of the State of Zulia of the 16th of February, 1900, together with the stipulation of the Government for its liquidation in monthly payments. Since the 20th of August, 1901, these payments have been suspended, and there remains of the original debt due the claimant the sum stated above.

The Commissioner for Venezuela denies the liability of his Government, because, in his opinion, the debt is that of one of the States of the Republic of Venezuela and that the latter can not be held responsible. The expediente shows that the origin of the debt was forced loans made by the State of Zulia for the benefit of the National Government, and presumably by its direction. At all events, there is no denial that the money was expended for the benefit of the National Government, with its knowledge.

It is argued by the Commissioner for Germany that in any event the National Government is responsible for the debt of one of its States, and in support of this contention is cited the very able opinion of Mr. Robert Bunch in the *Montijo* case. (Moore on Arbitration, 1421-1447.)

In the opinion of the umpire it is not necessary in this case to decide the question. He prefers to put his opinion upon the concrete base, which is that in the efforts of Venezuela to suppress insurrection and put down rebellion she called upon the State of Zulia for assistance. In pursuance of this call the State enforced the loans in question. It now finds itself either unable or indisposed to make any more payments to the creditors on this account.

Under these circumstances, in the opinion of the umpire, it would be inequitable and unjust to the State of Zulia, as well as to the claimants, to remit the claimants to a suit at law against her. Morally and equitably, if not stricto jure, the Government of Venezuela is bound to repay the State of Zulia these moneys which were advanced for the common defense of the nation. The citizens of the State of Zulia can properly be called upon to pay their quota of the national debt, but it is manifestly unjust to assess upon them the entire amount of these forced loans, and absolve the other citizens of the Republic of Venezuela from the payment of their own proportion thereof.

The Commissioner for Germany, however, allows the claimant the full amount of this item of his claim, 13,584.62 bolivars, with the usual interest. This amount includes interest at 1 per cent per month, compounded with yearly rests, and increases the original amount of the item thereby 5,147.26 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest. Neither do the proofs show that under the agreement made on the 14th of February, 1900, between the representative of the government of Zulia and the parties who made the war loan for the purpose of adjusting the amount due, of which the claimant's share was 15,417.36 bolivars, there was any agreement for any rate of interest on the amount then agreed upon. There is also an entire absence of proof as to the rate of interest which the original loan was to bear. It is too clear to need argument that if no rate of interest is agreed upon by the parties only the legal rate can be allowed. This rate in Venezuela is 3 per cent per annum. Instead, therefore, of allowing the sum named by the Commissioner for Germany, the item is allowed at the sum of 12,186.54 bolivars, being the original amount of the loan, 15,417.36 bolivars, with interest from February 14, 1900, to December 31, 1903, less the payments made thereon and interest on those payments.

The umpire agrees with the Commissioners in the disallowance of Claim B,

10,772.24 bolivars, for the reasons stated in his opinion in the case of Christern & Co., No. 50.[1]

Item C of the claim for 19,749.24 bolivars, in the opinion of the Commissioner for Germany, should be allowed at its full amount, but he gives no reason for that opinion. The Commissioner for Venezuela, without giving any reasons therefor, is of the opinion that this item should be disallowed. It appears from the expediente that the Government of Venezuela on the 16th of February, 1903, imposed an export duty of 2 bolivars on each 50 kilograms of coffee and 4 bolivars on each 46 kilograms of hides. It is not contended by the claimant that this duty in and of itself would have been injurious to them or was an unlawful exercise of power by the Government; but they claim that because of the closure of the river by the Government decree of the 15th of January, 1903, the duties fell upon coffee which would otherwise have been exported prior to the date of the decree. This claim, therefore, depends for its allowance upon the decision of the question of the liability of Venezuela for closing the River Zulia, and is disallowed for the reasons stated in the opinion in the case of Faber, No. 53.[2]

The remaining items of the claim — namely, D, E, F, and G — for injury to coffee and hides caused by the prolonged storage of the same, and interest on the capital lying idle during the closure, and loss caused by the suspension of mail service, and loss on account of salaries, rent, etc., also depend on the decision of the same question, and are disallowed.

The claim is therefore allowed at the sum of 12,186.54 bolivars, which includes interest to December 31, 1903.

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## FABER CASE

(By the Umpire:)

Consular certificates admissible as evidence.[3]
International mixed commissions not bound by strict technical rules of evidence.

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[1] *Supra*, p. 423.

[2] See below.

[3] The question as to what papers are receivable in evidence before international commissions was extensively discussed by counsel for the claimant and respondent governments before the United States and Chilean Claims Commission of 1897, the briefs being summarized as follows:

The position of counsel for the United States upon this question is:

(1) That this Commission must receive *as evidence all* written documents and statements which are presented by either Government and must consider them in arriving at its conclusions.

(2) That these documents and statements are to be given such weight as they seem to be entitled to, both intrinsically and in view of surrounding circumstances and other facts proven in the case; and

(3) That the mere fact that they are *ex parte* may possibly affect their *weight* when contradicted by other proof, but can not possibly affect their *admissibility* as legal evidence.

Reliance was placed upon Article V of the treaty, stating that—

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

The United States counsel conceded that the civil law upon this subject was not as strict as the common law, as might be seen in the following citations:

French Civil Code, articles 1317-1333; Code of Civil Procedure (in force in Spain, Cuba, Porto Rico, and the Philippines), articles 577, 595, 601; Mexican Code of Civil Procedure, article 289; Colombian Civil Code, articles 1758-1766; Chilean Civil Code, articles 1699-1707; Louisiana Civil Code, articles 2234 (2231) to 2251; Walton's Civil Law in Spain and Spanish America, pages 346-348.

States through the territory of which navigable streams flow, although these streams rise in the territory of other States, have the right to close these rivers to navi-

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Footnote 3 *(continued)*

It was, however, contended further that all Government reports were so closely related to the claims as to be almost part of the res gestæ.

Citations were made from the Claims Treaty of 1794 with Great Britain. Treaties and Conventions between the United States and Other Powers, pages 383 and 384; the treaty of 1819 with Spain (Ibid., 1020); treaty of 1834 with Spain (Ibid., 1024); treaty of 1853 with Great Britain (Ibid., 446); claims convention of 1868 with Mexico (Ibid., 701); treaty of 1857 with New Granada (Ibid., 211); claims convention of 1866 with Venezuela, and that of 1885 providing for a rehearing (28 Stat. L., 1057), and claims convention of 1880 with France, act of Congress approved March 3, 1849, to settle claims of American citizens against Mexico (9 Stat. L., 393), and act of June 19, 1878, authorizing the Court of Claims to take jurisdiction of the Caldera claims (20 Stat. L., 172), for the purpose of showing that the universal diplomatic rule was that the commissioners should receive all documents or statements which might be presented to them on behalf of their respective Governments. Reference was had to the Caldera case, 15 Court of Claims Reports, 546-606, for the purpose of showing that—

International tribunals are not bound by local restraints. They always exercise great latitude in such matters (Meade's case, 2 Court of Claims Reports, 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

The Meade's case, above cited, was quoted as authority for the fact that the adjustment of international claims should not and could not be subjected to the narrow technical rules of ordinary tribunals.

The Treaty of Washington of May 8, 1871, Article XXIV, was cited to show that the Commissioners "shall be bound to receive such oral or written testimony as either government shall present," and that, as appears by Moore, page 728, the Commission decided that ex parte affidavits should be admitted.

Moore, pages 1435 and 1753, was cited as equally conclusive, the first reference being to the Montijo case and the second being to the claims of Pelletier and Lazare.

To the third point attention was called to the convention between the United States and Chile of November 10, 1858 (Moore, p. 4690), where the decision was of necessity made solely upon ex parte testimony.

Reliance was placed upon the Walker case in the Chilean Commission. All such letters as were introduced were strictly ex parte, and a decision of the Commission, dated December 22, 1897, was to the effect that a lengthy affidavit by Bacigalupi was evidence, and in the Levek case Chile had introduced a letter.

Reference was made to the fact that some question arose before the former Chilean Commission, as shown by pages 152 to 155 of the agent's report, being raised in the Murphy case, and the Commission ruled that it was "at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever, according to circumstances," and to the fact that in the Read case, No. 13, agent's report, general affidavits were accepted as the foundation for an award.

Upon the same subject-matter, the agent for Chile filed a brief, in which, after citing the opinion of Mr. Hale, agent of the United States before the Anglo-American Commission, as shown on page 4 of his report, with relation to the disadvantage of the Government in defending claims, he maintained:

First. That the officers before whom the various affidavits filed in those cases were taken were not duly authorized to certify to the affidavits, and

Second. That affidavits can not be considered as evidence by this Commission. The Commission is governed by the rules of law existing in the two countries, which in this case are in harmony in regard to the nature of the evidence by which claims may be supported or refuted.

His brief further cited Article V of the convention of August 7, 1892, authorizing the Commissioners to decide "upon such evidence information only as shall be furnished by or on behalf of the respective government," arguing that this emphasized the evidential character of the information to be furnished. He further cited the seventh article of the rules of procedure of the Commission established in 1893, showing that the claimant "shall be required to establish" all the material allegations

gation at their discretion, and no appeal will lie therefrom. This doctrine would seem to apply even though these rivers emptied directly into the sea instead of

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Footnote 3 (continued)

of the petition "by legal and sufficient evidence." He relied upon Article XV of the rules of 1893, as follows:

The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the Commission, with reference to the convention under which it is created, the laws of the two nations, the public laws, and these rules.

From this he argued that the claimants should support the facts upon which their allegations were founded with legal and sufficient evidence. He argued against the propriety of accepting affidavits taken before ministers of the United States, secretaries of legation, or consuls, citing Calvo, Droit International, section 612, third edition; Heffter, Le Droit International Public, section 216, No. 2; Bluntschli, Le Droit International Codifié, article 221, and Field's International Code, article 172.

As fortifying the opinion that ex parte proofs should have no legal weight, the Chilean agent quoted Greenleaf, volume 1, chapter 3, section 446, page 541, and as showing the necessity for notification to the other side, so that the witnesses might be cross-examined, he cited the Laws of Chile, Prontuario de los Juicios, law xxiii, title 16, paragraph 3.

As indicating the little weight to be given to ex parte evidence and the necessity for cross-examination are cited People *v.* Cole, 43 New York, 508; Revised Statutes, United States, chapter 17, title "Evidence;" Foster's Federal Practice, second edition, pages 502 and 1267; Greenleaf's Evidence, section 321, page 414; volume 1, section 164; Best on Evidence, page 83; Wharton's Law of Evidence, section 177; Wharton's Book 3, section 110, chapter 13, and sections 872, 873, 875, 879, 881, and 882 of the New York Code of Procedure; as also A. 425, A.426, A. 430, A. 434 of the Code of Procedure of Louisiana, and section 2033 of the Code of Procedure of California.

As showing that affidavits are not receivable in the Court of Claims, section 1083 of the Revised Statutes is cited, and 2 Court of Claims, 345, as well as the rules of procedure of that court.

As showing that ex parte affidavits were excluded by the Court of Claims, citation is made of Main *v.* U. S., 21 Court of Claims Reports, page 54.

Attention is called to the Shrigley case before the prior Commission (Moore, 3711), in which depositions, not taken in accordance with the rules of the Commission, were suppressed, and showing that there was no appearance on the part of the claimant or notice for taking depositions.

The case of Murphy (Moore, 2262) was relied upon as showing that the kind of evidence under discussion should be received "not as evidence but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proofs of a more conclusive character," and the decision in the Thorndike case (Moore, p. 2274) is referred to as indicating the opinion of the Commission that such evidence lacked sufficient legal weight to warrant a decision against the respondent.

The French-American Commission, sitting in Washington from 1881 to 1884, it is said, citing from the Murphy case, adopted the same principle.

The agent admitted that official communications written in the discharge of official business should necessarily be admitted in evidence.

The agent for the United States replied to the foregoing brief, contending that the following propositions had been established:

1. The Commission is "bound to receive and consider all written documents or statements" presented by either Government as evidence.

2. This ipso facto makes all such writings, whether affidavits or mere letters, *legal evidence*, no matter what the ordinary rules of law may be concerning them, but leaves it open for the Commission to attach such weight to them as they intrinsically seem to deserve.

3. This rule, as established by the convention, is different (and is conceded by both sides to be different) from the rule either of the common or the civil law upon the subject, although the civil law seems to be much more liberal in this respect than the common law, as witness the case cited in the preceding brief from 159 United States Reports, page 204.

debouching into an inland lake, as in the case under consideration, wholly within the territory of the State seeking to control the navigation of these rivers. This doctrine being applicable to the inhabitants of the State at the headwaters of the streams is all the more applicable to domiciled foreigners.[1]

GOETSCH, *Commissioner:*

The Department of Santander of the Republic of Colombia, with its capital at San José de Cúcuta, has been very poorly endowed by nature, since it lacks means, which pass exclusively through Colombian territory, to establish commercial communication with the ocean. The commercial traffic of the Department with the rest of the world can not be effected except through the port of Maracaibo — that is to say, by passing over Venezuelan territory. The traffic from the capital, San José, to the Atlantic Ocean takes place in the

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Footnote 3 (continued).

4. The rule now contended for by the United States is the only rule in diplomatic settlements, and the usual rule in commissions such as this, as witness the authorities, decisions, and citations from the proceedings of other commissions, and of the Court of Claims set out in the former brief.

5. The former commission under the present convention held in the Murphy case that ex parte affidavits were admissible, and in fact *used them as evidence*, but considered that the ones on file in that case were intrinsically improbable, and therefore a majority of the commission declined to permit their judgment to be controlled by them. In the Reed case, afterwards decided by the same commission, they *unanimously* treated similar documents as evidence, and believed the statements contained in them, and decided the case accordingly.

6. It is manifest, therefore, that the objection now made by the agent for Chile can not properly avail to destroy the effect of all affidavits and writings as evidence. It is likewise manifest that all such papers must be considered by the Commission, and each one weighed as to its individual merits and inherent probability.

Referring to the French-American Commission, he stated that upon verifying the reference all that appears is as follows:

The affidavit of Philibert Rozier referred to in the motion of the United States assistant counsel is stricken from the record.

He argued that it did not appear officially why it was so stricken out.

He further contended that letters and telegrams sent from one official to another were literally ex parte statements, and that all writings submitted by either Government should be received in evidence, carefully weighed as to their convincing force, and permitted to influence its decision much or little, or not at all, according as that convincing force is found to be present or absent in each particular case.

A majority of the commission made an award on the evidence in question in favor of the claimant.

[1] For a very interesting and exhaustive discussion of this question we refer to an article by Ernest Nys, published in the Revue de Droit International et de Législation Comparée, 1903, 2d series, Vol. V, p. 517, stating the limitations of the doctrine as laid down by the umpire, and citing:

*Revue de Droit International et de Législation comparée*, 1901, Vol. III, 2d ser.; Magnette, *Joseph II et la liberté de l'Escaut*, 1897, pp. 17, *et seq.*, 46; Charles de Martens, *Causes Celèbres du Droit des Gens*, 2d ed., Vol. III, p. 338 *et seq.*; Henry Wheaton, *Hist. of the Progress of the Law of Nations in Europe and America*, Vol. II, p. 192; Grandgaignage, *Histoire du péage de l'Escaut*, pp. 88, 89; Ed. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, pp. 24, 25, 27, 172, 182, 219; E. Carathéodory, *Le Droit International concernant les Grands Cours d'eau*, 1861, pp. 107, 116, 117; Wheaton, *Elements of International Law*, Vol. II, p. 86; Crommelin, *De Verplichtingen van Nederland als Neutrale Mogendheid ten Opzicht der Schelde*, p. 71; *Revue de Droit International et de Législation Comparée*, 1886, Vol. XVIII, p. 159, *et seq.*; *Annuaire de l'Institut de Droit International*, Vol. VIII, p. 272; Pierre Orban, *Etude du Droit Fluvial International*, 1896, p. 140; Baron Guillaume, *L'Escaut Depuis* 1830, Vol. I, pp. 353, 400; Bonfils, *Manuel de Droit International Public*, 2d ed., No. 524; Bluntschli, *Le Droit International Codifié*, art. 769; Piédelièvre, *Précis de Droit International Public ou Droit des Gens*, Vol. II, p. 375. See also Rivier, *Principes du Droit des Gens*, Vol. I, pp. 221, 225.

following manner: From Cúcuta to the Colombian port Villamizar by rail (the frontier custom-house upon the Zulia River); from Villamizar by the navigable river Zulia to its mouth in the Catatumbo River, near Encontrados (the frontier custom-house of Venezuela); from Encontrados continuing along the Catatumbo River as far as its mouth, in Lake Maracaibo; thence by Lake Maracaibo to the city of Maracaibo. A few leagues farther down from the port of Villamizar the Zulia River crosses the frontier line of Venezuela. At the Venezuelan railroad station El Guayabo the railroad from Uracá to Encontrados touches. The Lake Maracaibo and the Catatumbo River as far as Encontrados are navigable by steamers of considerable draft, while the river Zulia from Encontrados to the port of Villamizar only permits the passage of small steamers of a slight draft and other lighter vessels.

From time immemorial the Department of Santander has used that highway for the exportation of its national products, principally coffee and hides, and for the importation from abroad of those necessities which it is not able to produce. The importance of the commercial traffic by this route is shown by the fact that the commerce duties of Colombia received in Villamizar amount to from 680,000 to 800,000 bolivars.

A very considerable portion of this commercial traffic is carried on by German firms and German capital. We are treating here of the firms of Van Dissel & Co., Brewer, Moller & Co., Beckman & Co., Steinworth & Co., and Faber & Co., of Hamburg, respectively, from Maracaibo and San José de Cúcuta, besides the German stores in Maracaibo. This last enterprise is an exclusively German house, and performs its navigation by the lake and the rivers, with proper steamers and steel lighters, and in company with another transportation company, in which the firm of Brewer, Moller & Co. have an interest of 50 per cent, while all the other German firms, which almost all have their principal houses in Hamburg, busy themselves with the exportation of coffee and other products from Santander and the importation of merchandise to said Department. The German capital in these enterprises amounts to many millions of marks. These commercial relations, existing from very remote periods, were destroyed at a blow by an executive decree of the Government of Venezuela dated September 11, 1900. The decree is of the following tenor:

> Commencing upon the day of the promulgation of this decree, the clearance of vessels which carry on river commerce along the Zulia and Catatumbo rivers is suspended in the coastwise custom-house at the port of Encontrados.

Because of this prohibition of the clearance of all vessels the commercial blockade with respect to the Department of Santander was established de facto. No vessel could thereafter pass by Encontrados either going up or coming down the river. Commerce was totally destroyed.

The Government of the German Empire has protested before the Government of Venezuela against said measure, which very seriously injured German interests. The officer at the imperial legation at Caracas, under the date of February 4, 1901, protested, as is seen by the following extract:

> Mr. Minister EDUARDO BLANCO, etc.:
> From an order received, I have the honor to notify your excellency that, according to the interpretation of the Imperial Government, the closing of the Catatumbo and Zulia rivers, because it interrupts the German commerce with Colombia, is contrary to the principles of international law, and that therefore the German Government should reserve to itself the right to hold Venezuela liable for the injuries resulting on account of said measure.

In his answer, dated February 16, 1901, the minister of foreign relations in Venezuela has upheld the legality of this measure, alleging the sovereignty

of Venezuela as an independent state, but has agreed upon the existence of the commercial blockade as such, as follows:

Upon the stopping, temporarily, of the passage of commerce upon the Zulia and Catatumbo. * * *

To this the German legation replied, under date of February 19, 1901, repeating the protest already quoted.

Upon the 4th of March, 1901, the Government of Venezuela modified said decree as follows:

River commerce is permitted upon the rivers Zulia and Catatumbo, but only in lighters or canoes, and while new fears of disturbance of the public order should not require the contrary.

But after a few days the primitive state was restored by a decree of July 29, 1901, and by it the commercial blockade was restored by the decree of July 29, 1901, and reestablished in its full extent. The decree reads as follows:

The decree of March 4, 1901, which permitted river commerce along the Zulia and Catatumbo rivers from Encontrados by lighters and canoes, is rovoked, the decree of September 11, 1900, remaining in its full force and effect.

Under date of June 14, 1902, the following decree was issued:

Until the definite reopening of the port of Encontrados the way of Urena is temporarily open for the passage of merchandise between Cúcuta and Maracaibo, and vice versa, the way of Encontrados being open only for the coastwise service.

Finally, what follows was ordered by a decree of January 13, 1903:

ARTICLE 1. The decree of July 29, 1901, by which traffic between Encontrados and Puerto Villamizar was absolutely forbidden, is revoked.

ART. 2. The decree of March 4, 1901, which permitted traffic between Puerto Villamizar and Encontrados by means of lighters and canoes only, is made effective.

The traffic by lighters and canoes, to which the foregoing article refers, shall be carried on by Guayabo, transporting by rail the merchandises which are exported.

ART. 3. Navigation of steam and sailing vessels, carrying merchandises in transit for Colombia, shall hereafter be permitted only by the ports of Maracaibo and Encontrados in accordance with the laws which are in force in the premises.

Lastly, another decree, under date of April 3, 1903, was issued, the second article of which reads as follows:

The effects of article 2 of the decree of January 15, already cited, are revoked with relation to the importation of merchandise in transit for Colombia by said route, until the causes which make said transportation undesirable may be removed.

This state has continued until the present day.

By the commercial blockade established there, which now can not be considered as totally removed, but which in any case was maintained in full force for about two years, the interests of German firms and those of German commerce have suffered serious injury, as has already been shown.

The damages consisted principally in the following: The crops of coffee bought of German houses in Cúcuta could not be exported during the time of the blockade, which lasted two years. The coffee had to undergo a long storage in Villamizar, exposed to the warm climate and extreme humidity, which occasioned a loss of a part of it and the payment of high rates of insurance. The capital invested in coffee ceased to produce interest, thus also the capital invested in German houses in Cúcuta could not be utilized later on and could not produce profit, while the general expenses continued to run, such as the salaries of employees, the rent of the commercial establishments, etc. The

imported merchandise from Europe and the United States suffered like injury, which could not be transported from Maracaibo to Santander, these latter remaining stored in Maracaibo, where they suffered deterioration in part, and later it was necessary to sell them at a loss. A part of the general expense of the business of Maracaibo was disbursed without return. The vessels and steel lighters belonging to the transportation companies of German houses, which carried the commerce to Villamizar, could not fulfill their object, and remained loaded, without being used, and were injured to some extent by the brackish water of Lake Maracaibo. All these injuries are immediate consequences of the stoppage of the commercial traffic.

Let us pass on to prove how Venezuela may be made liable for them.

(*a*) In the first place it is undeniable that a sovereign state holds absolute authority over its rivers and water courses until these touch the frontiers of other states. This principle is nevertheless limited in two senses by international law. When a river constitutes the only way of communication, indispensable for the subsistence of another nation, or part of it, its use can not be entirely prohibited. (See Heffter's International Law of Europe, Berlin, 1867, sec. 77.) Besides, the use of navigable rivers for traffic with other friendly peoples when they cross independent states can not be prohibited when their use is not offensive. After all a state can not deny to another nation the inoffensive use of routes by land or water within its territory without committing an act of hostility, and no State can exclude another from commercial communication with the market of a third without committing an offense and injury unless the latter desires and puts in force the exclusion. (See Heffter, p. 63; Puffendorf, T.N., III, 3, 6; Groot, T., 2, 13; Vattel, II, 123, 132-134.) These international maxims are the creation of close association between nations. They have been applied in treaties of distinct periods. (Treaty of peace of Paris, 1814, art. 5; the official record of the Congress of Vienna, art. 8, 117-118; art. 15 of the treaty of peace of Paris, dated March 30, 1856; art. 1 of the provision of navigation for the Danube, dated November 7, 1857; treaty between Spain and Portugal, August 13, 1835, concerning the free navigation of the Duero; treaty of reciprocity between Canada and the United States dated June 5, 1850; art. 4 of the treaty of the Republic of Argentina with other powers dated July 10, 1853; and others.)

On account of everything that has been said it is considered as an international doctrine that the navigation of rivers which flow through portions of several States together with their affluents shall be free from the point where they first become navigable to where they empty into the sea, so far as commerce is concerned — provided this latter be in itself free — should not be denied to anybody; besides, each riparian state shall exercise its authority within the limits of its fluvial domain, impeding as little as possible the liberty of navigation. (See with respect to this Phillimore, pp. 189, 191, 192, 195, 204, 207, 209, et seq; Grotius, Book II, chap. 2, sec. 12; Wheaton, Pt. II, chap. 4, sec. 11; Heffter, pp. 63, 147; Carathéodory, International Law Concerning Large Water Courses, pp. 155-158; Moore, 1718.)

As there was no war between Colombia and Venezuela the latter had no right to prohibit the foreign commerce with a Colombian port.

The principles above stated have not been limited to the territory of European states, but have found application in states and circumstances outside of Europe. It was especially the part of England at a former time to make this principle respected and to defend it energetically against Spain with respect to the traffic on the Mississippi. (Phillimore, sec. 170.) Thus also the United States of America have invoked against England the application of the principles above set forth and attained their recognition with respect to the commerce of

the St. Lawrence River, the mouth of which is situated exclusively in Canadian territory. It is true that England maintained at first an interpretation of the expression of natural right should not be given to the principles of the treaty of Vienna but that they should be considered as the conventional arrangement of an exceptional privilege granted by the contracting parties, and the enjoyment of which did not belong to a third noncontracting party. Nevertheless this attitude of England was not in harmony with her own opinion in the claim of the Mississippi (see Phillimore, sec. 170), and it was also rejected by the United States with reason and success. Secretary of State Clay, in Washington, ordered the American minister, Gallatin, under date of June 15, 1826, in London, to oppose the following to the English pretension (see Mr. Secretary Clay's letter to Mr. Gallatin, American minister in London, June 19, 1826, session 1827-28, No. 43, Am. State Papers, For. Rel., vol. 6, p. 764); that the provisions of the treaties should not be considered as of a merely conventional character, since ordinarily it would be necessary to give them a positive and natural right in order to settle differences; that the right to navigate the ocean had also been the subject of rules and divers treaties; that the provisions of Vienna and other similar ones should rather be considered as an homage which men render to the great Lawgiver of the Universe by which His works should be free from the chains that human caprice strive to put upon them. Also, among other German publicists this opinion prevails. Thus Wurm (see Five Letters upon Free River Navigation), has called the treaties abovementioned a concentration of the great principles which are gradually illuminating the reason of nations. (See also Carathéodory, pp. 139-141.) England was compelled to yield, although only after some years, by a treaty signed on June 5, 1854, by Lord Elgin, which recognized in article 4 the freedom of navigation upon the St. Lawrence River. (Treaties and Conventions between the United States and Other Powers, p. 451.) The Argentine Republic took a similar course upon another occasion by confirming by a treaty of July 18, 1853, the freedom of navigation of the Paraná and the Uruguay for the ships of all nations.

If these principles are applied to the present case, it follows that the blockade of commercial traffic upon the navigable rivers Catatumbo and Zulia, which cross the territories of Venezuela and Colombia, was an act contrary to the law of nations, and therefore illegal. As is seen from the correspondence exchanged with the German legation, Venezuela based her proceeding upon the declaration that her relations with Colombia were at that time strained and that the closing of the rivers was a necessary measure for the national safety. Nevertheless, this excuse is not admissible. There has not existed a true state of war between Colombia and Venezuela, and Venezuela herself (November 20, 1901), in answer to an inquiry of England, expressly stated that a state of war did not exist. (See the English blue book of Venezuela, No. 1, 1903, p. 55.) But neither should there have occurred, even in the case of a state of war or the probability of warlike complications, a complete commercial blockade, or say, total interruption of neutral commerce upon navigable rivers. (See Wurm, Freedom of River Navigation, p. 55, et seq.; art. 131 of the convention between the German and French Governments upon the control of the navigation of the Rhine, dated August 15, 1804; the Clayton-Bulwer treaty between the United States and England; art. 6 of the treaty between Argentina and the United States of America, England, and France, dated July 10, 1853.)

Venezuela, if she had the right to control the commerce upon the Zulia and Catatumbo, as her safety required in view of the strained relations with the neighbor Republic, could have inspected and regulated the commerce of merchants — the first in order to prevent the transporting of Venezuelan

revolutionists or Colombian troops, and the second in order to submit to register vessels suspected of transporting arms or contraband.

To exercise greater control, she could compel vessels or steel lighters to be accompanied by constabulary or troops as far as the Venezuelan frontier, and to receive them there again upon their homeward journey. The absolute blockade, or, say, the prohibition thereby resulting to the exportation of coffee, which was German property, and to the importation of German merchandise, appears to be an act not justified by the circumstances, and therefore inadmissible and illegal according to international law.

(*c*) The Government of the German Empire, because of what has been said, was entirely right in protesting to the Government of Venezuela against the commercial blockade, and to reserve to herself the right of enforcing an indemnity, since a state which, by an illegal act, injures the legal interests of foreign subjects should make reparation for the damage caused.

The Government of Venezuela has expressly recognized its liability in the protocol of peace for claims presented up to that date, and therefore also for claims arising out of the commercial blockade. Because of what precedes the German Commissioner asks of the honorable umpire that he fix the liability of Venezuela in principle for such damages as may be proved to have been suffered by subjects of the German Empire because of the commercial blockade.

ZULOAGA. *Commissioner:*

In the extreme west of the Republic of Venezuela is the lake of Maracaibo, a beautiful sheet of fresh water, entirely surrounded by Venezuelan territory. The lake communicates with the port of Maracaibo, or the Gulf of Venezuela, by a narrow channel, about 1,500 meters wide, which forms the two islands of Zapara and San Carlos. In the eastern extremity of the latter is situated the fortress of San Carlos, which guards and defends the entrance to the lake. Although it is not provided yet with modern pieces of artillery, it serves its purpose when necessary, and up to now no other ships except those which the master of the country has seen fit to allow to enter have plowed the lake. The whole of Lake Maracaibo belongs absolutely to Venezuela, and it has not occurred to any nation to throw doubt upon this.

The navigation of this lake, which is interior navigation, has never been done except by Venezuelan ships. On the northern part of it is found the city of Maracaibo, the only port of that region equipped for foreign commerce. Here only foreign ships touch, which must not have more than 10 feet draft, without running a great risk of stranding on the bar. There at the foot of the lake toward the south the river Catatumbo empties, which river belongs almost exclusively to Venezuela, since only a small portion of it belongs to Colombia. The Catatumbo has, generally speaking, in Venezuelan territory a depth of 5 feet. It has never been navigated except by Venezuelan river boats. At a distance of about 100 kilometers from its mouth in Lake Maracaibo the Catatumbo receives the waters of the Zulia, a river which rises in Colombia, in the State of Santander, which ordinarily has not more than 2 feet of water, especially in Colombia, and in summer still less. This river has never been navigated in Venezuelan territory except by Venezuelan vessels (boats or small steam launches).

The commerce which Colombia carries on upon this river has had a certain development since 1875, when the wagon road from Cúcuta to Villamizar was built, and later, during the years 1881 to 1882, when the railroad was built between the same places. Colombia has never been able to consider that she has a perfect right to carry on commerce through the Zulia and Catatumbo, since at present she has no treaty with Venezuela, and Venezuela has not

recognized that right directly or indirectly. By Law XXIII of the Code of Hacienda, Venezuela has allowed commerce in transit from Colombia, but in a precarious manner as to the latter Republic, because article 1 of that law expressly says that the passage of merchandise by the port of Maracaibo destined for Catatumbo is *permitted.*

Transitory commerce can therefore be prohibited by Venezuela at any time, as she is not obliged by any treaty to permit it. That commerce in transit Venezuela regulates in a detailed manner, and the importation of foreign merchandise through the port of Maracaibo is subject (art. 2, Law XXIII, cited) to all the formalities required and penalties established in the law of the government of customs for merchandise coming from foreign countries destined for Venezuela and to the provisions which are therein set forth. This commerce in transit is carried into the interior of Venezuela by two roads, either by the river Catatumbo, and later shipped over the railroad of Táchira, or in barges or small steam launches on the Zulia, which in reality can not properly be done except in the rainy season, when the river is sufficiently deep.

Venezuela, as a sovereign nation, regulates this commerce in transit in its territory as it sees fit; it determines the roads which must be used; it establishes the rules and prescriptions which it believes proper for its security or its interests. It is a matter exclusively its own, concerning which it has to give account to nobody. In the exercise of its right by virtue of necessities of public safety and order, well recognized and well appreciated by this Commission, the Venezuelan Government has issued a series of decrees regulating this transit, especially concerning the navigation on the Zulia. These decrees are those of September 11, 1900; March 4, 1900; July 29, 1901; June 14, 1902; January 15, 1903, and April 3, 1903. By virtue of them commerce upon the river as far as Colombia has sometimes been stopped. Other times it has been permitted by barges and canoes, but not by steam launches. This happened especially after the invasion of Rangel Garbiras with Colombian troops on the 25th of July, 1901, and because of the necessity to guard this road, so important to the defense of the territory.

Colombia at first sought to obtain from Venezuela the revocation of the decree that prohibited traffic upon the Zulia, but Venezuela answered her that she could not allow this traffic while the motives of public order which had given rise to the decree existed. After that the breaking off of diplomatic relations between Venezuela and said Republic took place, and such a serious aspect was assumed that the frontiers were guarded by armies of the respective States, and only the civil war which existed in both countries avoided, perhaps, the great calamity of a war being declared between the two sister nations. The matter of commerce in transit between the two nations is still complicated, on account of questions of boundary not yet settled, and it occupies the attention of both countries.

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route, under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela nor put in dispute her present legal status which

gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to the umpire, a precedent which would be a very singular one in the relations between the two republics, whichever way it might be decided.

But in this matter there can be no controversy. The right of Venezuela is clear, and the action of Germany appears to tend towards nothing less than to make Venezuela tributary to Columbia by virtue of supposed principles of international law concerning the navigation of rivers.

I reject, therefore, expressly and catagorically, all this argument of the German Commissioner as unfounded, and since the question of George Faber has been submitted to the umpire, I maintain that he has no jurisdiction to take cognizance of the matter in the form which the Commissioner of Germany contends, because this Commission has no power to overlook the rights of Venezuela.

Venezuela exercising her right has regulated, in the manner which it has considered proper, the commerce in its territory in its passage to Colombia. Therefore no liability of the State ensues for consequent damages which an individual might suffer by virtue of these general provisions. If some Germans have suffered material damages, perchance Venezuela and its Government have suffered greater ones in enforcing decrees which it judges necessary for the moment. When the German Empire, by virtue of its political policy, curtails amicable relations with any nation said measure of reprisal undoubtedly injures individual interests, and I do not believe that thereby it is obligated to make any reparation.

To the argument of the German Commissioner sustaining the claim of George Faber, who says that he has been injured by the decrees which have regulated the commerce in transit, it is sufficient for me to set up the right of Venezuela to enforce laws and regulations in her territory as she sees fit.

Nevertheless, in order to show to what extent the argument of the Commissioner of Germany is without foundation and to what extent the condition set up by Germany is unjustly oppressive, I am going to make some general observations.

That argument has as a foundation that, in accordance with the principles of international law, the navigation of international rivers is free, and that Venezuela in shutting off the commerce on the portion of the river flowing into the ocean (at the mouth of the river) has violated the law of nations.

In order that this reasoning might have any force it would be necessary in the first place for the river Zulia to be considered as an international river, but this river does not flow into any open sea — an essential condition in the case — but into the Catatumbo River and the Catatumbo into Lake Maracaibo exclusively the territory of Venezuela, and closed in accordance with international law to international commerce. It would be necessary, in the second place, that the river should, properly speaking, be navigable, and such a thing could never be said of a river which has a depth of 2 feet, and even less, in the dry season.

The Rhine has a depth at Bazel of from $1\frac{1}{2}$ to 3 meters, and it is only, properly

speaking, navigable from that place. The depth farther down is several meters. The Danube has, even in Donauwerth, a depth of 2 meters and 2.35 meters, and nearly 50 meters in the port of Hierro. These rivers are, properly speaking, navigable. Lastly, it would be necessary that Germany should have been navigating the Zulia with German vessels, in order to carry on commerce with Colombia, and this is not only not alleged, but is not physically possible, because a trans-Atlantic steamer could not navigate even the Catatumbo. The pretense therefore narrows itself down to holding that Venezuela is obliged to carry on with *Venezuelan vessels* the commerce in transit with Colombia upon the river Zulia because there are in Cúcuta and in Maracaibo some merchants to whom this would be convenient, and therefore Germany demands it of Venezuela, making her liable in case she does not agree to it.

The theory that navigable international rivers are free to navigation has not been admitted as a general rule of the law of nations. No nation up to now has recognized this absolute principle or this obligation as a perfect one, and in the cases where it has been agreed to by nations it has always been by virtue of special treaties by which free commerce, such as the Commissioner of Germany desires to establish, has never been admitted. Not even in the Danube does such a rule appear to have been established, since in accordance with the treaty of Vienna of 1837 the free navigation does not exist except with vessels which enter from the sea to the Danube, or if they come from the Danube to the sea. (Bluntschli, International Law codified, sec. 314; Pradier-Fodéré, vol. 2, p. 295.)

To admit, as the greater part of the authorities do,

says Pradier-Fodéré,

that navigable rivers which are in communication with the open sea

(which is not so in this case)

or which separate or traverse various states are to-day open in the time of peace to the ships of all nations would be to accept hope for reality. The reality is that absolute freedom of rivers, that which is based upon the equality of all nations and which comprises all the direct tributaries of the sea, is not only not generally recognized and adopted, but it is still in dispute. (Pradier-Fodéré, vol. 2, p. 300, sec. 749.)

And Fiore, after discussing the diverse and contradictory opinions of the authors, says:

These few citations suffice to show how divergent the opinions of the authors are, who in a large part are our contemporaries, with respect to the navigation of rivers, and how little the theory can serve to regulate the practice. They recognize the right to use the navigable river for the interests of commerce, but they declare this right to be imperfect, and they accord to states through whose territory they pass the right to declare themselves proprietors of that portion of the river which has its bed in their territory and to dictate conditions to those who desire to navigate it.[1]

The theory of free navigation of rivers (which strictly can not be understood to be what has been asserted in this case) is not, therefore, recognized as a principle of international law, and, in any case, Venezuela has not recognized it with respect to Colombia, and it is proper to bear in mind here the ideas of the Hon. Mr. Duffield, umpire of this Commission, in one of his former opinions:[2]

[1] Sec. 773.
[2] *Supra*' p. 397.

International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only, and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice, or by the superior force of the particular nation or nations whose interests are involved.

In conclusion we must say that the theory of the free navigation of rivers is in no way applicable to the case under consideration, and that it is a measure of interior order of Venezuela which the latter has decreed in her territory by virtue of her sovereignty. To overlook this right is to do her an injury, and it is then not *Venezuela* who has violated the law of nations, closing the passage of the Zulia, which many motives of political well-being dictate, but *Germany* overlooking the legitimate rights of a sovereign nation. (Bluntschli, International Law Codified, art. 81 and art. 472.)

The obligation of observing justice with respect to other nations, at all times and under all circumstances, constitutes for a state one of those perfect and imperative duties which none can deny. (Calvo, Mutual Duties of States.)

The liberty of commerce has been invoked, but "the liberty of commerce is not an absolute principle; it may be subject to various restrictions." It is not possible, for example, *to seek to carry on commerce in the territory of a state against its will;* and the exercise of the right to carry on commerce necessarily presupposes the express or tacit consent of the state in whose territory one proposes to institute traffic by way of land or sea. The internal political policy of each state dictates means that must be taken. Should it open its territory freely to foreign commerce? Should it make this commerce subject to justified conditions on account of considerations of public interest, and to limitations, for example, established on account of a fiscal interest or an object of safety and health, etc.? It is impossible not to admit that every state has the right to regulate every class of commerce in accordance with its intention, and it is necessary to conclude that it is entirely free to establish every measure that it may believe conducive to this end. The territorial sovereign may prohibit the injurious branches of commerce; subject the traffic of foreigners to certain rules; *close places or provinces to foreign commerce*; impede the importation or exportation of certain merchandise; favor the national products, imposing upon foreign products different duties; raise or lower the tariff as it believes proper; determine the way of importation or exportation; map out the road which foreign products must follow into its territory, submit them to the necessity of bond; decide of the desirability to favor foreign duties by treaty, by the creation of free ports or like establishments; to accept for itself certain relations which do not affect either the right of independence or the progress of interior development of the state, etc. In its turn each state which carries on commerce itself or by means of its nationals outside of its boundaries ought to submit itself to the restrictions which that sovereign may make upon the liberty of commerce. To respect the rights of others is to assure the respect of one's own rights. *Not to trample upon the liberty of others is to give more force to one's own liberty.*

The case that is submitted to the umpire is the claim of George Faber, of Cúcuta. (In the claims of the firms in Maracaibo the claim is even more unjust, if possible, since they are individuals domiciled in Venezuela and subject to all provisions of public order.) Is it worth while for me to make an examination of the proof of the claimant Faber, when I reject the principle upon which it is based? Since the Commissioner of Germany appears to accept the truth of the facts, I shall make some passing observations concerning them.

The claim is proved by the declaration of two witnesses of Cúcuta, who say that they have seen the books of the house of Faber, and that the data upon which the claim is based is in accord with these books, and that the estimates which are made correspond, according to their understanding, to the truth. The books of merchants are evidence against them, but not in their favor. (1273, Venezuelan Code of Commerce.) This is a general principle of law, and it is natural, since it is not possible to believe that a person can make proof alone. Amongst merchants their books are of value, because each one presents his own; but in a particular case their books can not be presented in opposition to the state, and still less in opposition to a foreign state. I do not know who Faber is, and whether this proof is or is not ad hoc. Besides, the consul is not the legitimate authority in Colombia to certify to an acknowledgment. The local authorities are such, and we do not even know who these witnesses are who say they have seen the books. For my part, I consider this a claim which has been submitted absolutely without proofs, and it might be said that it is not, properly speaking, a claim in form, as it evidently is not. With respect to several items, such as one which refers to the correspondence which is said to have been withheld, I do not believe it worth while to make a further examination; but I should observe that if the road through Villamizar was closed, there were others, and therefore the fact itself upon which the claim is sought to be sustained is false.

GOETSCH, *Commissioner* (second opinion):

The German Commissioner believes that he has exhausted the question of international law in his opinion, which is in the hands of the honorable umpire, and it only remains for him to answer the opinion of the Commissioner of Venezuela, as follows: The fact that Lake Maracaibo is exclusively within Venezuelan territory in no way changes its condition as a natural continuation of the rivers Zulia and Catatumbo, the waters of which, accompanied by the vessels which float thereon, lead to the ocean. The question as to whether by international law a foreign flag is authorized to use a lake or river, when there is no question of coastwise trade, is not to be decided here. Rather there is under discussion only the question of the right to restrict neutral commerce from passing thereby to a part of Colombia which has no other means of communication.

The depths of the waters of both rivers is a matter of small importance so long as their courses shall be considered as navigable in international law, as is undoubtedly so, since small steamers navigate them as far as Port Villamizar in Colombia. This international river route which unites two independent states has been considered before as such by Venezuela, and upon it commerce and traffic from time immemorial have had a right to pass, as is seen from the report delivered to the honorable umpire, published by Venezuela, at Madrid, 1884, page 10.

It is seen, moreover, from the Yellow Book, likewise in the hands of the Hon. General Duffield (Caracas, 1900, correspondence of the legation of Colombia, pp. 3, 4, 7, 13, 14, 15, 16, 23, 25, 27, 29, 42, 51), that the least doubt

does not exist on the part of the Colombian Government with respect to the judicial question, and that it has always contended for itself the right of free river navigation.

From the right which Venezuela has to supervise and regulate commerce in transit with Colombia in the interest of her own safety, and because of her traffic, as is provided in the code of Hacienda, the right to decree the complete commercial blockade can not be deduced.

The insinuation that Germany in representing the respective claims of her subjects is partial in favor of Colombia and proposes to take the chestnuts out of the fire for that Republic should be disputed. If a measure directed in the first place against Colombia injures German interests — and it *does* injure them seriously — it is only duty which compels the German Empire, and which the constitution imposes upon the Imperial Government, to secure protection of the rights of its subjects abroad. From a note of protest upon the matter in question, addressed to the Government of Venezuela by the Imperial Legation, it will be seen, moreover, that Germany only desired to make Venezuela liable for the blockade in so far as injuries to German commerce and interest might result therefrom. It has always been a political principle of the German Empire not to interfere in differences of two foreign nations.

With respect to the objection to the jurisdiction made by the Commissioner of Venezuela, it is proper for this Commission not to annul the decrees of the Government of Venezuela which order the commercial blockade, but to submit to a determination whether Venezuela shall pay the damages which the German firms claiming because of the blockade have suffered.

These claims are of the same character as all the others. They are demands for indemnity directed against the Republic. By article III of the protocol of February 13 of the present year there were submitted to this Commission for its decision German claims against Venezuela which were not made special exceptions.

The Government of His Majesty the Emperor of Germany, long before the conclusion of the treaty in question, had called the attention of the Government of Venezuela to the injuries suffered by German interests because of the commercial blockade and to the prospective claims. The contracting parties therefore ought to have further limited in the protocol the jurisdiction of this Commission in order that the objection to the jurisdiction made by the Commissioner of Venezuela could be considered justified. The Commissioners, therefore, and the umpire, because they have not reached an agreement, have the right and are bound to determine the claims in question in order to bring within the scope of their deliberations the admissibility of the acts of the Government of Venezuela.

In order to substantiate his opinion the Commissioner of Venezuela makes reference to an opinion rendered in another case by the honorable arbitrator in accordance with which international law is not a law nor a rule which can be imposed upon a state whose opinion differs from general international law. This in itself will not be disputed, but since Germany and Venezuela have agreed to adjust the claims of the subjects of Germany by means of arbitration, it is the duty of this Commission to apply to the different cases the law of nations, such as the Commission and not Venezuela understands it to be. By the treaty Venezuela has renounced the right to decide the claims in such a manner as she understands international law. Let it be further considered that equity is to serve as a rule for the decisions of this Commission. The German claims are equitable, since the claimants have suffered serious injury, because of the governmental measure adopted exclusively in the interest of Venezuela.

The fact that Germany is not a riparian state of the rivers Zulia and Cata-

tumbo appears of little importance, since the commerce upon international rivers is open for all nations, according to the opinions of the best known jurists in international law. Besides, the German claimant firms are located in Colombia and Venezuela. All the firms in Maracaibo have branches in Cúcuta. There is question, therefore, of the rights of the inhabitants of the riparian states, since foreigners enjoy the same rights as Venezuelans and Colombians with respect to commercial law and navigation in Colombia and Venezuela. The common neutral use of the waterways which unite Venezuela and Colombia can not be denied them, a right which on the part of Colombia has been exercised since time immemorial and which Colombia has claimed for herself even after the decree of the commercial blockade.

To the final objection of the Venezuelan Commissioner, that there remained open to the firms an overland route. answer should be made that the same objection was made without success by England with respect to the United States of America, upon the opening of the St. Lawrence River. Overland communication is not a river route. By the report, a copy of which is presented herewith, it is seen, moreover, that freights overland were not open except by a decree of June 14, 1902, and they were so high that the adoption of this means of communication was equivalent to a complete stoppage.

With respect to the claim itself of G. Faber, it is seen, from the nature of the matter, that the damages suffered by German firms because of the commercial blockade could be individually proved and judicially substantiated only with difficulty. The principal proofs would consist of the books of the houses and the declarations of the claimants, and to give credit to these is a right which the supplemental convention gives to the Commission, as the honorable umpire has decided upon various occasions. The firm of Faber & Co. is a respectable German house of Cúcuta, the head of which is the consul of Germany. The items contained in its books merit entire belief, since it can not be supposed that the firm would have falsified its books for the purpose of presenting a possible future claim. The exactness of the data furnished by the firm upon which the amount of indemnity is based has been certified to by two experts, after an examination of the books. The German Commissioner, therefore, does not doubt that the facts upon which the estimation of the damage is based are true. The Venezuelan Commissioner objects that, according to the laws of Venezuela, the books of a commercial establishment are only regarded as proof when they serve to give evidence against the merchant. In accordance with the supplemental convention, Venezuelan legislation shall not be considered. Besides, by virtue of the principle of free estimation of proof, which no doubt also serves as a rule for a Venezuelan judge, it ought to be denied that in no case can the books of commercial houses be presented as means of arriving at the truth in favor of merchants. Everything depends upon the circumstances of the particular case. The judge *may* give credit to the items of the books; he *must* do so in so far as they militate against the merchant.

I. With respect to the different parts of the claim, I reject the first part, not because I consider the demand unjust, but because it is impossible to determine approximately that a portion of the labor of the employees was superfluous because of the commercial blockade.

II. What has been said with respect to item 1 is also applicable to item 5. It can not be calculated or estimated that part of the stores could not be utilized because of the blockade.

III. I consider item No. 3 well founded. The loss of interest upon money invested in crops of coffee which existed before the blockade was made effective is a true damage occasioned by the blockade, which must have resulted and

ought to have been foreseen. The blockade had as an object the damaging of the Colombian exportation to force this State to make concessions in the question of boundaries and other matters. The injury arising for this reason and occasioned to German property ought, therefore, to be repaired. As the claimant asserts, and as it is also well known, money in Venezuela and Colombia can only be procured at the rate of 12 per cent, and the loss of interest estimated at 12 per cent does not seem exaggerated.

IV. The extension of insurance against fire upon the coffee held in Puerto Villamizar, an extension which was made necessary by the commercial blockade, ought likewise to be considered as a direct damage occasioned by the Venezuelan attitude, and therefore to be satisfied.

V. The same is true of the damage which the claimant house suffered from the storing of green coffee in Villamizar. The truth of the facts is moreover proved by the certificates of the Chamber of Commerce of Maracaibo and well-known merchants of that place. Reference is made for the present to the respective documents in the record relative to the claims of Beckman & Co., Brewer, Moller & Co., and Van Dissel & Co.

VI. What has been said under III is also true with respect to part VI and VII of the claim.

VIII. The duty of exportation upon coffee seems to me to be established with the object of burdening coffee which came from Colombia for exportation after the special reopening of the traffic upon the Zulia and Catatumbo rivers. It is clear also that if this Colombian coffee could have been exported in time, which was not possible because of the commercial blockade, it would not have had to pay the Venezuelan duty, since the duty was not established until February of the present year. I believe, therefore, that this claim can be maintained also. Nevertheless, if the honorable umpire considers it as a remote damage, I shall be obliged to agree in the rejection of the demand.

IX. The stoppage of all postal correspondence coming from and going to Cúcuta is the direct consequence of the commercial blockade, and, like it, is an illegal act. The stoppage of the mail, which is more clearly proven by the certificate of the German consul in Maracaibo under date of August 14 of the present year, is in violation of the treaty of the Universal Postal Union, to which Venezuela and Colombia are parties. The fact does not require any proof that commercial interests must have suffered serious injury because of this stoppage. I have attempted to obtain from the claimants detailed specifications of this damage and the Imperial German consul has answered me as follows:

> After having conferred with the interested parties with respect to the proof of the amount of damage occasioned by the interruption of the postal services, I take the liberty of communicating to you their opinion * * * that it is very hard, and perhaps impossible, to obtain it in any concrete form. Once of them lost one or more credits abroad, which were withdrawn because dispatches could not be sent to cover them, nor * * * could he even answer the letters of demand and warning * * * which did not reach his hands. Another, who had a branch house or friendly relations along the coast, found himself obliged to satisfy at a great loss the demands of his creditors and was hardly able thus to preserve his credit. From a third proofs and valuable documents were stolen. Under these circumstances the interested parties believe that the umpire ought to decide this point, taking into consideration all circumstances possible, the importance and extent of the commercial enterprises and each one of the commercial houses, as a civil judge does in cases of a demand for indemnity for a wanton killing or for the loss of a member of any house because of negligence. It would, for example, be nearly impossible to prove the exact value of a man's arm.

These remarks contain a great deal of truth. As a member of a tribunal

of equity I believe that I am authorized to allow to the claimant a round sum, which I estimate according to my best endeavor and understanding at 10,000 bolivars, for the illegal stoppage of the commercial correspondence contrary to the treaty of the Universal Postal Union.

Because of what has been set forth, I ask the honorable umpire that he allow the claimant the following sums, together with the usual interest, that is to say 21,724.76 bolivars, 1,200 bolivars, 10,112 bolivars, 14,211 bolivars, 5,182.23 bolivars, 16,103.38 bolivars, and 10,000 bolivars.

ZULOAGA, *Commissioner* (second opinion):

Articles 1 and 2 of Law XIV of the Code of Hacienda fixes what ports in Venezuela are opened for foreign commerce, exportation and importation, and those opened for exportation. In the western part of the Republic the port so qualified is Maracaibo. In article 10 of that law the National Executive is authorized to suppress and to remove these custom-houses already set up, which, by reason of contraband trade, or for any other causes prejudicial to the public treasury, may make it necessary in his opinion to adopt this measure.

Law XVIII regulates coastwise commerce — that is, interior maritime or coastwise commerce. This can not be carried on in conformity with article 1 of that law except in national vessels.

The interior commerce of the country along its navigable rivers is not, properly speaking, regulated; since these rivers are considered public highways, it is governed by the general laws of transportation (code of commerce).

The commerce which is carried on on Lake Maracaibo is coastwise commerce (art. 28, Law XXVIII), and therefore it can not be effected except in national vessels. The port of Encontrados is a coastwise port. (Art. 3, Law XIV.)

The rules concerning the register of vessels as national are those which appear in Law XXXIII. Foreigners (art. 24) may own national vessels, but the captain must be Venezuelan (art. 10), and for no reason can they make claims which could not be made by any Venezuelan owner and master of vessels. (Art. 24, above cited.)

The coastwise commerce of the Catatumbo is carried on in the manner and form which the Government of Venezuela considers proper, since it has its own interior commerce. There is this circumstance, that communication by the river Zulia as far as Colombia does not appear by the laws of Venezuela to be the most approved, but that of San Antonio does. The National Government, because of reasons of public order, can naturally regulate all the interior commerce, and respecting all other matters relating to the frontier the National Executive has the power which No. 14 of law 89 of the constitution gives him " to preserve the nation from every foreign attack."

The decrees which the Government has issued closing to the commerce of Colombia the way along the upper part of the Zulia are not only the exercise of its own right, but also, as has been shown many times to this Commission, a duty imposed by the circumstances. Venezuela had been fearing an invasion from Colombia, and the way of the Zulia is particularly dangerous in case of an invasion. If river commerce were permitted, the steam launches and lighters which carry on this commerce could go over to Colombia, and at a given moment might serve very efficiently for invasion, taking possession in the first place of the railroad of Táchira in Encontrados, and later threatening the lake. The Government, according to the circumstances and the gravity of the situation, has forbidden all traffic, or has only permitted it to be carried on in lighters or has permitted launches to ascend. It has tried to reconcile the interest which commerce might have with the public safety. Besides the protest

of the Government after the revolution of Rángel Garbiras, I find in the record of one of the claims a letter of Gen. Celistino Castro, chief of the volunteers, to one of the claimants, which I present with this argument, showing clearly the situation with respect to Colombia during the past months.

It is inexplicable that the measures adopted by the Government in these circumstances could give rise to the least objection, and for my part it seems still more inexplicable that the claimants should strive to prove that Venezuela was closed to commerce in transit with Colombia (which was certainly her right) when precisely the contrary appears; that is, that the Government had attempted to facilitate the passage of commerce, and that it had always done so in one way or another. The key to all this has been made plain to me at last by the study of two claims — that of the German warehouses and that of the navigation company of the lake and Catatumbo River. The claimants, because the Zulia was closed to traffic, are interested in these enterprises, and the foundation in reality has no other cause than the direct interest of these companies in the navigation of the Zulia.

In the claim of Faber, who is not domiciled in Venezuela, I have already stated the considerations which I believed pertinent. In the claim of Beckman & Co., of Maracaibo, I should further call attention to the fact that this is an individual domiciled in Venezuela, and therefore subject to its police laws and decrees of public safety.

I do not accept that distinction or difference which the Commissioner of Germany wishes to establish with respect to the *German* commerce of Cúcuta and the *German* commerce of Maracaibo, from which it would not appear that both places were German colonies. The commerce of Cúcuta is *Colombian* commerce, no matter what the nationality of some of the merchants there may be, just as the commerce of Maracaibo is *Venezuelan*. There are no colonies in this country. The injustice of the claims of Faber and Beckman submitted to the umpire is flagrant, and a further explanation is unnecessary.

Germany considered it proper in diplomatic notes to protest against the closure of traffic by the Zulia, and Venezuela answered, setting up her entire right to govern her own territory as she might consider proper. Venezuela does not need to concern herself in this Commission with a protest of powerful Germany. The greater the power of the nation may be the greater should be its justice, which is the very essence of modern civilization, and it is just this impartiality and justice which constitutes the honor of the international tribunal and elevates the mission of the umpire. Nevertheless, I must doubt that the Government of the Empire had an exact knowledge of the facts, since if they had been revealed to it in such a definite manner as they appear before this Commission, it is not to be believed that it would have assumed the attitude which it adopted.

I do not believe that I ought to concern myself in any way with the proofs presented by the claimants. If I did so briefly in my first opinion I did so only with the object of showing how strange it is that a claim should be sustained which has no foundation in law or fact. The right of Venezuela to reject these claims is too clear for me to occupy myself in discussing their amount.

There remains for me one last consideration. In his first opinion the German Commissioner insisted that these claims ought to be considered as admitted by Venezuela by virtue of article I of the protocol. This is to return to the question already decided by the umpire contrary to the opinion sustained by the German Commissioner.

The umpire agrees in opinion with the Venezuelan Commission that the fair construction of Article I, in which the Venezuelan Government " recognizes in principle the justice of claims of German subjects ' presented ' by the Imperial

German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to " those originating from the Venezuelan civil wars of 1898 to 1900 " and provides for their payment modo et forma.[1]

There are 22 records of claims for injuries already paid. Those of Faber and Beckman were not among them, and they could not have appeared before this Commission. It appears useless to continue to argue further upon a point already decided.

Faber makes, moreover, a claim for supposed damages because of the interruption of his correspondence. If Venezuela had prevented this postal correspondence with Colombia (which does not appear), it is her right (Bluntschli, Droit International Codifié, art. 500), and she need not render account to individuals, and if any sack of mail of other countries might have been lost in this territory it is a subject to be treated of by the respective postal offices. It is not the business of individuals, and I understand that there is in the treaty of the Postal Union no clause to make an office liable in case of loss. There are many causes which might occasion it.

DUFFIELD, *Umpire:*

This is one of several claims which grow out of the suspension of river traffic on the river Zulia by Executive decrees of Venezuela in 1900, 1901, and 1902. The claimant Faber is a German subject who resides and has his place of business in Cúcuta, in Colombia.

The Commissioners radically disagree as to the liability of Venezuela. The Commissioner for Venezuela first objects to the jurisdiction of the Commission or the power of the umpire to decide the question of Venezuela's right to control and, if in her judgment necessary, to suspend the navigation of the rivers in question. After explaining the discussion of this question between the two Republics, as shown by the published official diplomatic correspondence, and pointing out that the matter is additionally complicated by disputed questions of boundary in the territory tributary to these rivers, he says:

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany, and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that, according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela, nor put in dispute her present legal status which gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to

[1] *Supra*, p. 395.

the umpire — a precedent which would be a very singular one in the relations between the two Republics, whichever way it might be decided.

He also, without waiving in the least, but reiterating his objection and protest to the jurisdiction of the Commission over the claim, contends that the decree is a lawful exercise by Venezuela of sovereignty over that which is in her own territory and under her absolute dominion. He claims that under the recognized principles of international law governing such cases Venezuela has a general right to regulate and control the use of those portions of any rivers which are in her territory, even though they may come from or flow into the domain of another nation.

In addition, he contends that the laws of Venezuela confine river navigation to Venezuelan boats, and that such legislation is a lawful exercise of sovereignty by Venezuela; that neither the Zulia nor the Catatumbo has ever been navigated by German boats; that the draft of water in the Zulia River in only 2 feet, and in summer much less, until it flows into the Catatumbo, which has a normal depth of 5 feet about 100 kilometers above Lake Maracaibo; that Lake Maracaibo " is absolutely Venezuelan, and it has occurred to no nation to doubt it."

He also insists that the proofs are insufficient, because they consist of the testimony of two witnesses, of Cúcuta, who say that they have seen the books of Faber's house; " that the data on which the claim is supported agree with those books, and that the appraisals made, in their opinion, correspond with the truth; " that under article 1293 of the código civil the —

> books of merchants are evidence against them, and not in their favor, [and] that this is a general principle of law also, that a consul is not a proper authority in Colombia to legalize documents, which can be done only by the local authorities, and that no official can certify conclusions of law, and that the claim is absolutely without proof.

Taking up these objections in their inverse order, the objection to the inadmissibility of the consular certificate because of want of authority in that office to certify documents or copies thereof, is not well taken. It was decided by the Mixed Commission under the treaty of Ghent that a certificate of a British consul, or any British functionary, should be received in evidence.

It is true this was done in the formulating of rules of procedure and in specifying what the Commission would receive as evidence. It is well known to be the settled practice of consuls to certify copies of documents and private agreements.

The other objection to the admissibility and effect of the certificate, that it certifies to conclusions of law only, and not to facts, and that the only proof of the claimant consists in the testimony of two witnesses who say that they have seen the books of Faber's house, and testify to their conclusions therefrom, raises a more difficult question.

The language of the protocol commands the Commission —

> to receive and carefully examine all evidence presented to them by the Imperial German minister at Caracas and the Government of Venezuela. [And] In particular they shall be authorized to receive the declaration of claimants or their respective agents and to collect the necessary evidence.

If the word " evidence " as used in the protocol is to be interpreted in its usually accepted legal sense in law, namely, such testimony as is admissible under the rules of either the civil or common law, the objection of the Commissioner is well taken. It has been held, however, by a former justice of the Supreme Court of the United States, in the case of Pelletier (Moore, p. 1752), that the technical rules of the common law in respect to evidence were not

adapted to the proceedings before a mixed commission, and that " he would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts."

Judge J. C. Bancroft Davis said, in Caldera cases (15 C. Cls. R. 546):[1]

> In the means by which justice is to be attained the court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction.*
>
> This proposition is self-evident. * * *
>
> In its wider and universal sense it [evidence] embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 Green. Ev., sec. 1.)
>
> International tribunals are not bound by local restraints; they always exercise great latitude in such matters (Meade's case, 2 C. Cls. R., 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

In deference to these decisions, and because of the character of the conclusions of fact which the consul and the witnesses erroneously substitute for copies of the papers, and because of the provision in the protocol requiring the Commissioners to disregard objections of a technical nature, and, further, because there is no doubt in the mind of the umpire as to the truth or correctness of these conclusions, which do not involve any question of law, the umpire will accept the same as proof.

Coming now to the main objection of the Commissioner for Venezuela, first, the umpire is unable to sustain the claim that —

> the question is between Venezuela and Colombia, and if decided can only be decided by those countries alone and exclusively, and that according to the protocol Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela.

While it would be regrettable that any decision of the Commission might have a direct bearing upon an international dispute between Colombia and Venezuela, certainly if a case arose in which a German subject had been deprived of property or rights of property by an act of Venezuela the jurisdiction of this Commission over his claim would be as complete as its jurisdiction over any other claim. This Commission does not decide the dispute between Venezuela and Colombia. Incidental to its decision on the merits of the claim it may have to express its opinion on the question between them. While it is true that such opinion would probably be quoted by the State in whose favor it would happen to be, it would have no authoritative force, and be only entitled to such consideration as the logic of its reasoning might give.

As to the main objection of the Commissioner for Venezuela that her acts in closing the ports in question were fully within the attributes of her sovereignty, the Commissioner for Germany insists to the contrary. In the course of a very able discussion of the question, to which he has brought great research, he maintains:[2]

> To begin, it can not be denied that a sovereign state possesses absolute authority over its rivers and water courses as far as the boundary lines of other states. This principle is nevertheless limited in two ways in international law. When a river is the only route of communication and indispensable to the existence of another state or part of it, its use can not be entirely prohibited. (Citing Heffter, Int. Law of Europe, Berlin, 1857, p. 147.)

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[1] Dissenting opinion, p. 606.

[2] See *supra*, p. 443.

He also cites Heffter, Puffendorf, Groot, and Vattel, that a state can not deny to another nation without committing an act of hostility, and no state can prevent another from getting its commerce to the market of a third without giving offense and inflicting injury, and he claims that " these international maxims whose object is to draw nations together have been at different times embraced in treaties," a number of which he cites, and concludes:

> It must be considered as an international doctrine that the navigation of rivers passing through the territory of several states together with all their affluents, must be free from the point where they begin to be navigable to the point where they empty into the sea.[1]

The respect due the Government of Germany, which presents the claim as a proper one in case the facts alleged in support of it are proven, and the rights of the claimant in the large amount involved, together with those of others in like situation (2,401,685 marks), calls for the most careful consideration by the umpire of the respective opinions of the Commissioners, each of whom has filed responding opinions, and necessitates a discussion of their different contentions.

The general subject of the free use of rivers running to the sea has been very much discussed by writers on international law from the earliest times.

The territory of the Republic of Colombia encompasses the Republic of Venezuela on the north, west, and south. Its boundary begins at Point Peret, on the western shore of the Gulf of Maracaibo, thence running in a southerly direction along the Sierra of Periga to a little south of San José de Cúcuta, where it turns and continues in an easterly direction to the Orinoco; thence up the Orinoco, which for this distance forms the boundary between the two Republics; and thence in a generally southern direction to the northern boundary of Brazil.

The principal commercial waterways, domestic and oceanic, of Colombia are the Magdalena and its main affluent, the Cauca, which flow almost the entire length of Colombia northward to the sea, and the rivers Meta and Guaviare, rising in the oriental Cordilleras and flowing eastward until they reach the Orinoco, on the boundary line between Venezuela and Colombia, and thence by that stream through the territory of Venezuela to the sea. In addition, Colombia possesses a great extent of coast line, on both the Atlantic and Pacific oceans.

Venezuela is not so well equipped by nature for ocean commerce. Its main arteries east of the Andes Mountains and north of the numerous sierras on the boundary of Brazil are the Orinoco river and its affluent, the Apure. In the western portion of the Republic the only avenue of oceanic commerce is through the Gulf of Maracaibo, the western shore of which as far into the gulf as Calabozo Bay is Colombian territory, thence through Lake Maracaibo and the Catatumbo River, which is only navigable for vessels of 5 feet draft of water, to about 6 miles above Encontrados, at or near which point the Zulia River flows into the Catatumbo. The Zulia has normal depth of water of 2 feet, and is navigable for small steam vessels and lighters and canoes as far up as Port Villamizar.

The Catatumbo River rises in Colombia a short distance from the Venezuelan boundary. Thereafter it continues in the territory of the latter exclusively until it discharges into Lake Maracaibo. The Gulf of Maracaibo is from 250 to 300 miles east of the mouth of the Magdalena River. The western shore of the Gulf of Maracaibo, from Point Gallinas to Calabozo Bay, is Colom-

[1] *Supra*, p. 444.

bian territory. The point at which Lake Maracaibo empties into the Gulf of Maracaibo is, however, entirely within Venezuelan territory. The depth of water at this point is 10½ feet. The bar at the point where the Catatumbo River enters Lake Maracaibo has a normal depth of but 5 feet. The Catatumbo River from Lake Maracaibo to Lake Encontrados has a normal depth of not to exceed 5 feet. It is not accurate, therefore, to say that the Zulia River is indispensable to the existence of Santander, or that it is the only route of communication of Santander through the Republic of Colombia to the sea. The Magdalena River, which furnishes a route to the sea for most of the fertile part of Colombia, is navigable to Honda, a point more than a hundred miles south (inland) of the latitude of the port of Villamizar, and is navigable from Honda to the ocean for larger-draft vessels.

Normal physical conditions require freight from San José de Cúcuta and the Caribbean Sea to be carried as follows: From Cúcuta to Puerto Villamizar on the Zulia River, by Colombia Railroad, the termini of which are Puerto Villamizar and a point in Colombia on the Táchira River, opposite San Antonio. At Puerto Villamizar it must be reshipped onto small stern-wheel steamers of not more than 2 feet draft of water; or lighters, with a capacity of 400 quintals, called *bongos*, which are propelled by poling; or canoes, and carried to Encontrados. Here it is reshipped onto lake-going vessels, which carry it to Maracaibo, where it is again reshipped onto seagoing vessels.

There are two railroads which can be made use of in the carriage of freight for the territory tributary to the Zulia and Catatumbo rivers — the Táchira Railroad, which is entirely within Venezuela, with its termini at Encontrados and Uraca and La Fria; the Cúcuta Railroad, above mentioned, which is entirely in Colombia, with its termini at Cúcuta and Puerto Villamizar; also, a highway called the Urena road, leading from Colombia into Venezuela and crossing the boundary of the two Republics near Urena, in Venezuela.

The effect of the several decrees of Venezuela, translations of which are appended, was as follows:

The decree of September 11, 1900, suspended all river traffic above Encontrados, whether bound up or down; that of March 4, 1901, modified this suspension so as to permit "commerce to be carried on on the rivers Zulia and Catatumbo," but only by means of lighters and canoes, so long as new fears of public troubles do not exist to the contrary, "but did not permit the use of steam vessels;" that of July 29, 1901, "revoked the decree of the 4th of March, 1901, and revived the decree of September 11, 1900," suspending all river traffic above Encontrados. This condition of affairs continued until the decree of June 14, 1902, which "temporarily permitted transportation of merchandise over the Urena road between Cúcuta and Maracaibo, and vice versa, the Encontrados way being left open for river trade only."

The decree of January 15, 1903, however, by —

Article I, revoked the absolute prohibition of traffic between Encontrados and Puerto Villamizar prescribed by the decree of July 29, 1901;

Article II, revived the permission of traffic by means of lighters (bongos) and canoes, but limited it to the El Guayabo, whence it must be by rail;

Article III, permitted steam and sailing vessels to carry merchandise en route for Colombia only between Maracaibo and Encontrados.

Finally, the decree of April 3, 1903, by —

Article II, abrogated the provisions of Article II of the decree of January 15, 1903, in respect to the importation of merchandise en route for Colombia "until the objections to said importations are removed." This decree has not at any time been modified and is still in force. The present situation, therefore, only permits navigation of steam and sailing vessels en route for Colombia between

Maracaibo and Encontrados (Art. III of decree of January 15, 1903) and the transportation of merchandise over the Urena road between Cúcuta and Maracaibo (decree of June 14, 1902).

There had been in the year 1899 much discussion between the two Republics as to their respective rights on the Orinoco River. It terminated without reaching any satisfactory understanding, and is still unadjusted. The situation of the Orinoco River, however, is materially different from the Catatumbo and Zulia. The former river rises in Brazil and forms the boundary line between Venezuela and Colombia, as above stated, and thence runs entirely in Venezuelan territory, to the sea. The two Republics, as to that portion of it which forms their boundaries, about 200 miles in length, are coriparian proprietors, a relation they do not at any point sustain as to either the Catatumbo or Zulia rivers.

The Catatumbo, so far as it is navigable, is entirely within the boundaries of Venezuela after the confluence of the Zulia with it.

On account of these and other differences in the situation and the physical conditions of the two rivers and those of the Orinoco, this decision is not intended to, and must not be considered as even intimating any opinion in respect to the Orinoco River.

We are met on the threshold of the discussion with the fact that no direct oceanic navigation was interrupted. Physical limitations deprive Colombia of the enjoyment of direct oceanic traffic through Venezuelan territory. No seagoing vessels can thus pass into Colombian territory. All must stop at Maracaibo, where all ocean freight must be reshipped. The case, therefore, is not one in which a foreigner is deprived by the act of Venezuela of the use of waters to which nature has given him direct access. That right Venezuela has not attempted to restrict. She permits him to carry his goods in the vessel in which they entered her territory as far as nature permits him. But the claimant insists that because of the nature of his business he suffers damage because goods are not permitted to be twice reshipped in the territory of Venezuela and thus transported into Colombia. Obviously this is a very different matter. First, it of necessity involves the use of land of Venezuela not incidental to navigation merely, but for the transshipment, carriage, and handling of freight on her shores. Second, it extends the claim of free navigation of rivers to a new case, for which I have found no precedent.

It is one thing for a foreigner to claim, " I have a right to navigation for my vessels wherever natural conditions permit, and Venezuela can not restrict it." But it is quite another thing to claim, " I have a right to send my goods over the inland waters of Venezuela, reshipping them into smaller and smaller vessels as often as the lessening depth of water may require." The question seems to be one of regulating commerce, rather than restricting internal navigation. It also appears that the laws of Venezuela with reference to internal navigation over its rivers and lakes require a nationalization of the vessels engaged therein. They also define interior maritime commerce of coast or river trade to be that which is established between ports and points on the banks of the rivers or shores of Venezuela in national boats with foreign merchandise which has paid duty, or fruits or other productions of the country. Another provision of law requires captains of vessels engaged in this trade to be Venezuelan citizens.

That these provisions were within the proper exercise of Venezuela's sovereignty can not be doubted. It results, therefore, that in the lawful exercise of such sovereignty she has excluded from her internal commerce boats of other nationalities and required even the boats of Venezuelan nationality to be commanded by Venezuelans.

For a considerable period before the decree of September 11, 1900, was issued there were internal political disturbances in the territory tributary to the Catatumbo and Zulia rivers. The relations between Venezuela and Colombia were at the same time seriously strained, and the former complained that revolutionist plans and movements found moral and material support on Colombian territory, which afforded a secure base of operations for them.

In this state of affairs the various decrees complained of were promulgated. It is evident that their purpose was to control the passage of vessels, especially steamers, to and fro between Colombia and Venezuela. The language of some of the decrees intimate fears of hostile forces entering Venezuela in that way. In July, 1901, Gen. Rángel Garbiras had begun his insurrection, which at one time seemed threatening, from Colombia. A part of his forces came into Venezuela by way of the Zulia and Catatumbo rivers. It may be reasonably presumed that this was the cause of the decree of July 29, 1901, revoking the permission given in that of March 4, 1901.

The concrete question, therefore, in the case is whether, under these physical and political conditions, Venezuela had the right to suspend the traffic on these rivers by the closing of these ports. She was in full possession of them and they were actually under her sovereignty. This distinguishes the case from that of the Orinoco Asphalt Company, just decided.[1]

As has been shown above, there is no substantial contradiction of authorities as to the rights of a state to regulate, and, if necessary to the peace, safety, and convenience of her own citizens, to prohibit temporarily navigation on rivers which flow to the sea. What is necessary to peace, safety, and convenience of her own citizens she must judge, and it seems to the umpire quite clear that in any case calling for an exercise of that judgment her decision is final. That a case for the exercise of this discretion did exist at the dates of the various decrees complained of is obvious, and in the opinion of the umpire the decision of Venezuela in the premises can not be reviewed by this Commission or any other tribunal. Being of the opinion that the closing of the ports of the Catatumbo and Zulia rivers under the circumstances which existed at the time was a lawful exercise of sovereignty by the Republic of Venezuela, the claim is disallowed.

A complete examination of the question leads back to the differing theories of the true source of natural law. It would extend this opinion to too great a length to discuss them, but a brief statement of them is pertinent.

Some philosophers, while admitting that human ideas of right spring solely from revelation, do not agree that natural law is but the consequence of revelation of divine or moral law. (Statel. Rechts philosophie, V. I.)

Others derive their idea of natural law from the most abstract theories of reason, without taking into account the continual changes of social relations, which, being the practical basis of that law, necessarily exert an influence on the idea itself. (Grotius-Kant.)

While others, still, putting aside both the abstract and objective idea of a Supreme Being, discuss the source of natural law in the supreme and absolute faculty of the abstraction they call *esprit du monde.* (Hegel.) They construct the moral and material world by the dialectic process of an abstract idea, and define the state as the realization of God in the world. The consequence is the complete absorption of the citizen in the state and the individual in the "pantheistic chaos of universal reason," which, on the other hand, has no conscience of its own. Still another school recognizes natural law as the science which

[1] See *supra*, p. 424.

exhibits the first principles of right founded in the nature of man and conceived by reason. (Ahrens.)

But when the crucial question comes, from what authority natural law is derived, each publicist seeks to solve it in his own way.

The theory of Grotius was that on the establishment of separate property which he conceived grew by agreement out of an original community of goods, there were reserved for the public benefit certain of the preexisting natural rights, and that one of these was the passage over territory, whether by land or by water, and whether in the form of navigation of rivers for commercial purposes, or of an army over neutral ground, which he held to be an innocent use, the concession of which it was not competent to a nation to refuse.

It is on this doctrine that some writers on international law uphold the principle of the freedom of river navigation.

Gronovius and Barbeyrac, in their notes to Grotius, consider the right of levying dues for permission to navigate rivers. This would seem to imply the right to prohibit navigation. It has been decided by the Supreme Court of the United States in the lottery cases that the right to regulate commerce includes the right to prohibit.

Bluntschli (par. 314) broadly states that water courses which flow into the sea, and navigable rivers which are in communication with an independent sea, are open to the commerce of all nations, but he restricts the right to the time of peace.

Calvo holds that where a river traverses more than one territory the right of navigation and of commerce on it is common to all who *inhabit its banks*, but when it is wholly within the territory of a single state it is considered as within the exclusive sovereignty of that state, He limits the exercise of that sovereignty to fiscal regulations, but seems to subordinate the right of property to that of navigation.

Fiore (758-768) agrees in the main with Calvo, that in the case of a river flowing through one state only, that state may close the river if it chooses.

It is difficult to sustain the distinction of a navigable river running into the sea.

Heffter, paragraph 77, says that each of the proprietors of a river flowing through several states, the same as the sole proprietor of a river, can, stricti jure, regulate the proper use of the waters, and restrict it to the inhabitants of the country and exclude others. But, on the other hand, he agrees with Grotius, Puffendorf, and Vattel, at least in principle, that the privilege of innocent use should not be refused absolutely to any nation and its subjects in the interest of universal commerce.

Wheaton (Elements of International Law, pt. 2, ch. 4, par. 11, Lawrence's ed.) declares that the right of navigation, for commercial purposes, of a river which flows through the territories of different states, is common to all the nations inhabiting *the different parts of its banks*. But this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the *safety and convenience* of the state affected by it, and can only be effectively secured by mutual convention regulating the mode of its exercise, citing Grotius, Vattel, and Puffendorf.

Halleck says (vol. 1, p. 147, chap. 6, sec. 23) that the right of navigation for commercial purposes is common to *all the nations inhabiting the banks of* a navigable river, subject to such provisions as are necessary to secure the *safety and convenience* of the several states affected.

De Martens, Précis, paragraph 84, recognizes, as a general rule, that the exclusive right of each nation to its territory authorizes a country to close its entry to strangers, but that it is wrong to refuse them innocent passage. It is

for the state to judge what passage is innocent. But he seems to think that the geographical position of another state may give it a right *to* demand, and in case of need to *force, a passage* for its commerce.

Woolsey, paragraph 62, says:

> When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation.

Phillimore, in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says (pt. 1, Par. CLXX):

> It seems difficult to deny that Great Britain may have grounded her refusal on strict law; but it is at least equally difficult to deny that by so doing she put in force an extreme and hard law,

not consistent with her conduct with respect to the Mississippi.

Klüber, paragraph 76, considers that the independence of the states is to be particularly noted in the free and exclusive usage of the right over water courses — at least in the territory of the state in which the water course flows into the sea, navigable rivers, channels, and lakes are situate. * * *

And that —

> a state can not be accused of injustice *if it forbids all passage of foreign vessels on its water courses*,

flowing to the sea, rivers, channels, or lakes in its territory.

Twiss, Volume I, section 145, page 233, second edition, declares that —

> a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream whilst it is passing through its territory.

It is to be observed that distinctions are drawn by some of the above text writers, some declaring that the right of innocent use is confined to time of peace; others that only the inhabitants of those countries through which the river passes have the right of innocent use, while still others sustain the right without any limitation, save the right of the state to make necessary and proper regulations in respect to the use of the stream within its boundaries.

The theory of Grotius, mentioned above, has been said to be the " root of such legal authority as is now possessed by the principle of the freedom of river navigation." (Hall's Treatise on International Law, p. 137.) It does not appear to have been adopted by the best annotators on international law. Hall says: " It can no longer be accepted as an argumentative starting point." (Hall's Treatise on International Law, p. 139.)

Phillimore speaks of it as a "fiction which this great man believed," and says:

> But as the basis of this opinion clearly was, and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail. (Phillimore's Com. on International Law, p. 190, Sec. CLVII.)

The other theory, also of Grotius, was because the use of rivers belonged to the class of things " *utilitatis innoxiæ*," the value of streams being in no way whatever diminished to the proprietors by this innocent use of them by others, inasmuch as the use of them is inexhaustible. (Vattel, Bk. I, chap. 23.)

This right of mere passage by one nation over the domain of another, whether it be an arm of the sea, or lake or river, or even the land, is considered by him as one of strict law, and not of comity. It is said on the other hand that it is

not founded on any sound or satisfactory reason, and is at variance with that of almost all other jurists. (Phillimore, *ubi sup.*)

The same view was taken by Grotius, but the great weight of authority since Vattel is that the state through which a river flows is to be the sole judge of the right of foreigners to the use of such river. (Wheaton's International Law, Vol. I, p. 229, cited from Wharton, Vol. I, sec. 30, p. 97.)

Still another ground is asserted as a basis for this free use of rivers, viz., that conceding the proprietary rights of the state over that portion of the river within its boundaries, nevertheless these should be subordinated to the general interests of mankind, as the proprietary rights of individuals in organized communities are governed by the requirements of the general good. It is pertinently remarked by an eminent jurist that this —

involved the broad assertion that the opening of all waterways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends to which the rights of the individual are sacrificed by civil communities, are to the latter. (Hall, p. 139.)

Most of the advocates of the innocent use of rivers base their claim upon the grounds that the inhabitants of lands traversed by another portion of the stream have a special right of use of the other portions because such use is highly advantageous to them. If the proprietary right of the state to the portion of the river within its boundaries be conceded, as it must be generally, there can be no logical defense of this position. It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use *as a right.* The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals can not create legal rights for them, or infringe the existing rights of others. (Hall, p. 149.)

It seems difficult upon principle to support the right to the free use of rivers as a right stricti juris. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates. They define this right of use as an "imperfect right." The term is an anomaly. The fallacy is thus aptly stated by a learned authority on international law:

A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. (Hall, p. 140.)

Woolsey terms it "only a moral or imperfect right to navigation."

However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists, spoken generally, seem to agree in holding that the *right* can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made "*must be the sole judge* as to whether it is innocent or injurious in its character." (Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International Law, Hesty's Law of Nations, Wolff's Institutes, Vattel.)

From this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce the weight of authority sustains the right of Venezuela to make the decrees complained of. But in the opinion of the umpire there are other considerations which control the decision in this case.

If the case before the umpire turned upon this general question of inter-

national law, the umpire is inclined to the opinion that he would be compelled to sustain the right of Venezuela to the complete control of navigation of the Catatumbo and Zulia rivers. In his opinion it is not necessary to decide the case on this ground. As has been shown above, there is no contradiction of authority as to the right of Venezuela to regulate, and, if necessary to the peace, safety, or convenience of her own citizens, to prohibit altogether navigation on these rivers. It is also equally without doubt that her judgment in the premises can not be reviewed by this Commission or any other tribunal. That a case for the exercise of discretion did exist is obvious.

The other claimants who ask damages for the closing of these ports are all residents of and doing business in Maracaibo, in Venezuela. There was suggestion in the discussion of the case that there might be different rule as between a Venezuelan resident and a resident of Colombia, but in the opinion of the umpire, given a common German nationality, there is no such difference.

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## PLANTAGEN GESELLSCHAFT CASE

Evidential value of letters and unauthenticated receipts.[1] Valentiner case affirmed.[2]

DUFFIELD, *Umpire:*

This claim is for 387,143.39 marks, and is founded on the alleged injuries to the haciendas of the claimants during the last civil wars. It appears that these haciendas were in the neighborhood of active military operations and the scene of considerable fighting. Part I of the claim in the amount of 369,968 marks and Part II in the amount of 7,354 marks are almost entirely made up of claims for consequential damages — loss of crops already planted, prevention of planting of other crops, inability to protect the growing crops from birds which destroyed them because of the impossibility of working and the frequent drafting of the laborers.

The Commissioners disagree as to the liability of Venezuela for these damages, and the case is governed by the decision of the umpire in the case of Hugo Valentiner No. 12 (see p. 403).

The Commissioner for Germany, however, is of the opinion that there are certain "direct injuries proven, and although their value is not fixed, he leaves it to the umpire for reasons of equity to grant to the claimant an indemnification amounting in round figures to 20,000 bolivars." In the opinion of the umpire there is proof of very considerable injuries to the property of the claimant, for which the umpire would certainly have allowed him damages if he adduced any proof as to the amount of values. In the absence, however, of such proof, notwithstanding the hardship of the case, the umpire sees no legal or legitimate way of arriving at the sum of 20,000 bolivars. There is the testimony, however, of two witnesses, Oropeza and another, as to the destruction of 231,230 4-year-old coffee plants, a fair valuation of which, in the opinion of the umpire, is 20,000 bolivars, and this sum will be allowed the claimant.

Of Part III of the claim, 9.820.45 marks, the Commissioner for Venezuela allows 1,472 marks for property taken from a driver of the claimant company on the January 4, 1903, but denies the liability of Venezuela for the remainder of the part. His reasons therefor are as follows:

That the item of 5,504 marks is only proven by the letter or statement of

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[1] See *supra*, p. 438, and note.
[2] *Supra*, p. 403.

the manager of the hacienda, and that the prices which the claimant places on the animals which he says were lost are in general double their value. The Commissioner for Germany insists that the proof is sufficient, and fixes the value of the property taken upon the basis allowed by the Commission in the claim of Steinworth & Co., No. 55, and other claims, at 3,744 marks.

While the proofs as to these items are very meager, the umpire concurs in the opinion of the Commissioner for Germany and awards the claimant on account thereof 3,744 marks.

That the items for injuries from February 7, 1902, to January 31, 1903, 2,563.90 marks, are not proven, because the receipts purporting to be therefor are not authenticated. He also criticises them because they are stamped with the seal of the Jefatura Civil of Carayaca. In view of the fact that the evidence fully establishes the occupation of the hacienda by both Government forces and revolutionists, and the taking of property therefrom, the umpire is unable to agree with the Commissioner for Venezuela and disregard these receipts as evidence, and the claim will be allowed for the sums named in the receipts, which is the amount claimed.

The entire claim, therefore, is allowed at the sum of 30,098 bolivars, which includes interest up to December 31, 1903.

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## THE GREAT VENEZUELAN RAILROAD CASE

An agreement between the Government and the railroad company to the effect that if the railroad will carry troops and munitions of war the Government will see that the railroad is indemnified for all damages resulting therefrom is absolutely void, as it is against public policy, and because the railroad company as a quasi public corporation is bound to carry all persons and freight, not in themselves obnoxious, which may be presented to it.

Kummerow case[1] affirmed.

Only legal rate of interest as provided by Venezuelan laws will be allowed on claims.

Government of Venezuela not liable for damages caused by guerrillas.

No damages allowed for suspension of traffic over railroad during period of active operations in the field through which the railroad passed because this was justified as a military necessity.

DUFFIELD, *Umpire:*

This claim is for the aggregate sum of 931,186.50 bolivars. It is made up of four claims, each of which is again divided into items, and some of those items into parts, as hereinafter particularly stated:

| | *Bolivars* | *Bolivars* |
|---|---|---|
| Claim I is for | | 190.250.86 |
| Embraced in — | | |
| Item 1 for | 142,615.00 | |
| Item 2 for | 47,635.86 | |
| Claim II is for | | 40,594.77 |
| Embraced in — | | |
| Item 1 for | 37,181.50 | |
| Item 2 for | 3,413.27 | |
| Claim III is for | | 225,991.63 |
| Embraced in — | | |
| Item 1 for | 213,199.65 | |
| Item 2 for | 12,791.98 | |

[1] *Supra*, p. 369.

| | | |
|---|---|---|
| Claim IV is for | | 790,346.60 |
| Embraced in — | | |
| Item 1 for | 789,500.53 | |
| Item 2 for | 846.07 | |
| Aggregating | | 931,186.50 |

CLAIM I

Item 1 of this claim, 142,615 bolivars, is divided into two parts. The first part is for 6,215 bolivars, for damages for injuries caused by the derailment near Cagua of a special night train from Maracay to Cagua, on December 19, 1901. The second part is for 136,400 bolivars, for damages for the suspension of all traffic on the railroad from December 23, 1901, to January 9, 1902, by an order of the department of public works (ministerio de obras publicas) of December 23, 1901, published in the Official Gazette of the 26th of December, 1901, No. 2481.

Item 2, 47,635.86 bolivars, is for interest to July, 1903, at 12 per cent per annum on item 1.

CLAIM II

Item 1, 37,181.50 bolivars, is composed of parts "*a*" and "*b*." Part "*a*," 10,181.50 bolivars, is for damages and injuries owing to the transportation by the railroad of troops and munitions of war. Part "*b*," 27,000 bolivars, is for damages and injuries to the steam tramway from Guigue and to the steamer *Lake Valencia* between December 30, 1901, and October 1, 1902.

Item 2, 3,413.27 bolivars, is for interest at 12 per cent per annum to July, 1903, on item 1.

CLAIM III

Item 1, 213,199.65 bolivars, is composed of parts "*a*" and "*b*." Part "*a*" is for 169,767.40 bolivars for damages and injuries to the railroad owing to transportation of troops and munitions of war and for the enforced suspension and interruption of traffic from October 1 to December 1, 1902. Part "*b*" is for 43,432.25 bolivars for damages and injuries to the road owing to transportation of troops and for the enforced suspension and interruption of traffic to the end of 1902.

Item 2, 12,791.98 bolivars, is for interest at 12 per cent per annum to July, 1903, on item 1.

CLAIM IV

Item 1, 789,500.53 bolivars, is made up of two parts. The first part, 537,632.90 bolivars, is for fares and freight in 1899 and the balance due on the order of the board of public works (ministerio de obras publicas), dated July 12, 1900, on the Bank of Venezuela. In the statement of the claim there is no division of this part showing how much of it is fares and freights and how much balance due on the order. The second part, 251,867.63 bolivars, is interest on the above part.

Item 2, 12,791.98 bolivars, is composed of two parts. The first part, 557.45 bolivars, is for fares of the government of the Federal district, charged to the National Government under the authority of its note of October 7, 1901. The second part, 288.62 bolivars, is for interest on the said first part.

The Commissioners agree upon the allowance of claim IV at the sum of 575,056 bolivars, which includes interest to the 31st of December, 1903. (Vide acts of the sixteenth session, July 27.) Upon all of the other items they disagree

The first opinion of the Commissioner for Venezuela was completed before

that of the Commissioner for Germany, and is referred to therein. It is not disputed that the official of the railroad company in charge at Maracay refused the request of General Bello, commandant at arms at that place, for a train to Cagua on the night of the 19th of December, 1901, at 9.30, and General Bello was only able to obtain it by force a little after 2 o'clock on the morning of the 20th. Even then —

> neither the engineer nor the company rendered any assistance to the chief of the Government, who was starting out for no less a purpose than to destroy the revol u-tion at its root and to capture its principal military chief.

Prior to this the company, on the 16th of the same month, through its managing director, sent to the minister of public works a letter in which he stated that he had received an anonymous letter — published in full in the Official Gazette of the 26th of December, 1901, No. 8421 — containing, among other things, the following:

> The transportation over the railroad belonging to your company may bring many injuries upon your line and may be the cause of many misfortunes.

THE PARTIES INTERESTED

In the correspondence between the railroad and the Government at this time, which is found in the Official Gazette of the 26th and 28th of December, 1901, and January 13, 1902, the managing director of the railroad company writes that he has received an anonymous letter threatening his company with injuries in case it transported any troops or material of war for the Government, and requests the minister of public works to forward the note to the President of the Republic in order that he might order the stoppage of transportation of war material and troops over the line, or, if that was impossible, to satisfactorily guarantee the company reparation for all the injuries and losses that might come to it because of such transportation. To this note the minister of public works replied, criticising the managing director for taking so much notice of an anonymous letter and that the time of conflict, which in his imagination had begun, or which he knew from his knowledge of affairs was about to begin, should seem to him a propitious time to collect from the Government sums which former administrations owed, administrations the company had not refused to serve with transportation without guaranties, and of which the present Government had paid up to August, 1901, nearly 400,000 bolivars and had always paid the railroad its own obligations.

On the 22d of December, 1901, the managing director of the railroad declined to fill an order for the transportation of a detachment of troops. In connection with this refusal the managing director sent to the minister of public works a letter, from one Rodriguez, calling himself " chief of greater state, of division ' Caracas,' " in which he threatened damage to the railroad if they carried troops or munitions of war for the Government.

On the 23d of December the prefect of police, and subsequently the governor of the district at Caracas, stopped a train and ordered the suspension of all trains. To the complaint of the managing director for this action the minister of public works replied, stating there was no revolution at the time of the director's first letter, and commenting upon the director's knowledge of what afterwards happened, and saying that the Government finds it necessary to order that if it can not get service from the railroad the railroad shall not give it to others, and that on account of his conduct the Government considered the managing director hostile to the interests of public peace.

After considerable acrimonious correspondence, and a request by the Government to the Berlin directors of the railroad to substitute another managing

director, because the Government considered the present one to have taken a hostile attitude, even before the revolution, to which the Berlin directors did not accede, saying they did not believe the managing director was a revolutionist, and asking proof of his illegal conduct, the parties entered into an agreement on the 9th day of January, 1902. The agreement was executed by the minister of public works on the part of the Government and the managing director on the part of the railroad. In it the company "acknowledges the obligation of transporting troops and material of war for the Government," and the Government obliges itself in cases of war to indemnify the railroad for the losses which it may suffer because of such transportation, including pensions to Venezuelans, according to Venezuelan law, and to foreigners in a gross sum equal to nine years' salary, and agrees to order the opening of traffic on the railroad.

The conclusion which the Commissioner for Venezuela wishes should be deduced from these facts is not clearly stated in his opinion, but as he says, "for these reasons I disallow the entire claim I, 142,615 bolivars," it is fair to infer that he is of the opinion that this conduct on the part of the managing director absolved the Government from all liability for the derailment of the train from Maracay to Cagua and for the suspension of traffic.

The Commissioner for Germany is, however, of the opinion that there is no evidence of the charge that the railroad or its managing director were in any wise connected or in complicity with the revolutionists, and he somewhat warmly resents this imputation against the company. While he does not expressly make the claim, it is fairly inferable that he bases the right of the company to damages for the suspension of traffic upon the agreement of the Government to guarantee the company as above stated. This agreement, he says, was made through the exchange of diplomatic notes, the imperial legation reserving to the railroad the right to collect for injuries and losses owing to the suspension of traffic. The actual agreement, however, makes no reference to either diplomatic notes or to a reservation of a right to collect for injuries and losses owing to the suspension of traffic.

The umpire is unable to concur in the opinion of either of the Commissioners. In his opinion there is not sufficient proof to establish any complicity of the managing director with the revolutionists, although his peculiar if not inexplicable conduct in the transaction might naturally lead the Government to suspect it. On the other hand, the umpire is clearly of the opinion that the contract between the minister of public works and the railroad, in which the minister attempts to bind the Government for all the injuries which the railroad may suffer because of its performance of a lawful act, if not duty, in transporting troops and material of war to enable the Government to put down a rebellion, is utterly invalid — first, because it is contrary to public policy and conflicts with the highest law of any nation, the safety of its people; and, second, because it is the duty of a railroad company which exercises public functions, and it a quasi public corporation, to carry all freight and passengers not in themselves obnoxious which may be offered for transportation. Moreover, the company was bound by its express agreement to carry troops and munitions of war in the article of its concession which stipulated the rates of fares and freights to be paid. It is utterly inconsistent with the constitutional powers of a government and with the most sacred rights of its people to hold that a railroad company may, upon the mere basis of threats of persons, anonymous or not, to commit unlawful acts, decline to perform a lawful act. Revolutions are unlawful — are positively illegal; their object is to break down the de jure and de facto government and to destroy the existing system of law; their leaders and followers are by the laws of all civilized nations guilty of the

highest crime known to the law, treason, and until success, therefore, anyone who aids or abets a revolution is a violator of the law and any citizen who omits or fails to assist the government violates his duty as a citizen. And while a corporation has no political status, one created by a government with special and quasi public privileges owes the legal duty to that government to exercise its franchise in the latter's behalf and for its assistance.

For these reasons the railroad company, in the opinion of the umpire, can base no claim upon its agreement.

The liability of Venezuela, therefore, for the suspension of traffic in 1901 must depend upon general principles of law. There can be no reasonable doubt that it is the right of a government, in situations of danger or organized rebellion and revolution, to take such measures as it may deem proper to prevent the passage of persons, either for travel or business, from one point to another in the localities where there are armed and organized troops of insurrectionists, and to this end it certainly has the power and the right to suspend traffic upon any line of transportation; but this right is coupled with a corresponding duty, which is to make proper compensation to the company in cases other than those where the territory traversed by the railroad is the theater of active warlike operations between armed forces.

The Commissioner for Venezuela does not specifically claim that Venezuela had the right to suspend traffic over the railroad because the latter had lent itself to, if not associated itself with, the revolutionary movement of Matos, but he distinctly claims that the railroad had so associated itself, and that therefore, inasmuch as the railroad was carrying goods for the revolutionists, and also persons who were enabled by such facilities of travel to assist the revolutionists and do great harm to the Government, it was in the power of the latter, for which it refused to carry troops or munitions of war —

> to order that if no service could be given it, as the requirements of public safety and order demanded and in accordance with its contract with the company, neither could there be any service for individuals or enemies of public peace.

Reduced to a legal proposition, his position is, that because of the unauthorized refusal of the company to exercise its functions at the demand of the Government the latter could abrogate its contract with the company pro tanto and suspend the exercise of its franchise. In effect this is to claim that the company had put itself in the position in which an alien enemy is regarded in international law, and thereby had lost, at least temporarily, the right of enjoyment of its otherwise lawful privileges.

Whether this position could be successfully maintained if the facts warranted its premises is doubtful, but in the opinion of the umpire the testimony does not make out such a case. There is some evidence tending to show support of the revolutionists by individual employees of the company, but the umpire concurs in the view of the Commissioner for Germany that so far as the company and its principal management were concerned there is not sufficient evidence against them. The testimony shows that in the few cases in which such individual action is shown such individuals were immediately and definitely discharged from the service of the company, or only reemployed when the Government withdrew its objection. He can not, however, assent to the proposition of the Commissioner for Germany that because the Government then was not constitutionally organized, but only provisionally exercising the power into which it had come by force of arms, it did not have in the premises the legal rights of a constitutional government. In the opinion of the umpire, it was a de jure as well as a de facto government. In deciding this claim, therefore, the company must be acquitted from any such charge, and the question of the liability

of Venezuela for the damages for the suspension of traffic must be determined without regard to such charge.

The same considerations lead to the conclusion also that the liability of Venezuela for injuries to and seizures of property of the railroad company by revolutionists must be determined in the same way. The claimant charges that the injuries to its property were in consequence of its transportation of troops and munitions of war for the Government. In the opinion of the umpire, however, this claim is not substantiated by the testimony. The mere fact that revolutionists destroyed the railroad at various points connected with active military operations raises no presumption that such injuries were in retaliation of or punishment for the lawful exercise of the company's powers in carrying Government troops and munitions of war. The irresistible presumption is that the revolutionists would destroy the railroad wherever and whenever they thought such destruction would place obstacles in the way of the successful military operations of the Government. The liability of Venezuela, therefore, must depend upon the general principles of international law, as modified by her admission in the protocol of liability for wrongful acts of revolutionists. Under them the umpire is of opinion that the case of the company differs in no respect from that of any private individual in like predicament, and under the former decisions of the umpire Venezuela is liable.

Coming to the consideration of the claim upon its merits, it will be more convenient to take up the items separately and in the order in which they are presented.

Part 1 of item 1 of claim I is for 6,215 bolivars for damages caused by the derailment of the train taken by General Bello from Maracay to Cagua on the night of the 19th of December. It appears from the proofs that the engineer, Sanchez, refused to recognize the authority of General Bello, because the regulations of the company did not authorize an assistant engineer to send out special trains, and because the instructions of the Government limited the authority to ask for special trains to the civil and military chiefs of the districts of La Victoria and Valencia. Further, because the railroad was not equipped for night service and stations are not occupied, and the signal service and track service were entirely suspended during these hours. In addition, the Cagua station on the day in question had notified the Maracay station that the railroad would probably be destroyed by revolutionists. It appears, however, that President Alcántara subsequently approved the request of General Bello, and in such an emergency as this appears to have been it is doubtful if the ordinary regulations of the company applied. The proofs tend to show that the rails and ties were taken up by revolutionists.

In view of all the circumstances, the umpire is of opinion that the claimant is entitled to recover upon the ground that General Bello, having taken control of the train under the circumstances, having knowledge of all the facts above stated as to the condition of the road for night service, and the notice from Maracay of a probable raid on the road, made the trip at his peril, and did not exercise the necessary amount of care that he should. It is true that there is a dispute as to the time of the trip and the rate of speed, but under the circumstances under which the trip was made the speed of the train should not have been greater than would allow the stoppage of the train in the distance which the headlight of the engine would show an obstruction or break in the road.

As the Commissioner for Venezuela makes no objection as to the amount of the item, it is therefore allowed at the amount claimed.

Part 2 of item 1 of claim I is for the suspension of all traffic on the railroad from the 23d of December, 1901, to the 8th of January, 1902, inclusive, at

8,000 bolivars per day (136,000 bolivars), and for the suspension of train 6 on January 9 from Los Teques to Caracas, 400 bolivars.

This 8,000 bolivars per day is arrived at by taking the average of the operating expenses of the road per day in the years 1897 to 1901, 4,858 bolivars, less 9 tons of coal per day, at 60 bolivars per ton, 540 bolivars, making 4,318 bolivars. Adding thereto the interest at 3 per cent per annum on the capital of the company (which is 75,000,000 bolivars, less 36,000,000 bolivars of 5 per cent bonds of the Venezuelan loan of 1896 given in exchange for the 7 per cent guaranty of the Government of Venezuela, leaving capital of 39,000,000 bolivars), 3,250 bolivars per day, plus the proportional deduction of value for wear and tear on locomotives and cars, superstructure of the line, viaducts of iron, buildings, shops, water tanks, and other constructions, 1,179 bolivars, aggregating 9,347 bolivars per day.

The claimant submits a statement of traffic receipts for the month of January, 1901, which averages 7,848 bolivars, and takes for a basis of its claim the sum of 8,000 bolivars per day instead of the above sum of 9,347 bolivars per day. It also submits a statement of operating and other expenses from 1897 to 1901, both inclusive, from which the daily operating expenses of the company appear to be 4,858 bolivars. But it does not appear that the claimant gives any credit for these expenses as against its traffic receipts.

It is evident that the basis of computation in the *expediente* by which the per diem loss of 9,347 bolivars is reached is not sustainable. It is arrived at by taking the total operating expenses of the road, less the consumption of coal, and adding thereto interest at 5 per cent on the amount of capital of the company, less the 36,000,000 bolivars in Venezuelan bonds, and again adding depreciation in value of physical property. For some reason, which is unexplained, while the total receipts of the month of January, 1901, are given, the operating expenses for that month are not given, but the average daily operating expenses for the years 1897 to 1901, inclusive, are given. A representative of the company, at the suggestion of the Commissioner for Germany, appeared before the Commission to explain the *expediente*. As a result of his examination by the umpire the Commission requested a statement of the operating expenses of January, 1901. This has been furnished and it shows a daily net profit of receipts over operating expenses of 3,463.60 bolivars. But included in the operating expenses is an item for new structures and permanent betterments of the property in the amount of 6,020.55 bolivars. Ordinarily an expenditure of this character is not considered a proper charge to operating expenses. In view, however, of the circumstances in the case, and the belief of the umpire that on account of the unsettled state of the country in January, 1902, the receipts of the road would not have equalled those of the corresponding month of 1901, the umpire accepts the figures submitted by the company as to operating expenses. Upon this basis, the correctness of which can not be questioned, the company's loss during the 17 days' suspension was 58,881.20 bolivars, to which add for the suspension of train 6, on January 9, 1901, 400 bolivars, and we have for part 2 of claim I, 59,281.20 bolivars, upon which interest is to be computed at 3 per cent per annum up to and including December 31, 1903.

Item 2 of claim I is for interest on item 1, calculated at 12 per cent per annum, compounding with half-yearly rests, amounting to 47,635.86 bolivars. The legal rate of interest in Venezuela is 3 per cent per annum. This item is disallowed.

Part *a* of item 1 of claim II, 10,181.50 bolivars, for damages and injuries owing to transportation of troops and munitions of war, is made up of various items of detention of traffic and injuries to the road, from July 22, 1902, to

September 25, 1902, of which the Commissioner for Germany is of opinion that the items specified in his opinion for 8 bolivars, 658.50 bolivars, and 95 bolivars, aggregating 751.50 bolivars, should be disallowed. An additional item or pages 2 and 3 of the statement of claim II, 250 bolivars, is for damages by guerrillas, for which the umpire is of opinion the Government of Venezuela is not liable. With these deductions part *a* amounts to 9,170 bolivars.

Part *b* of item 1 of claim II, 27,000 bolivars, is for suspension of traffic and damages and injuries to the steam tramway from Guigue and for the steamer on Lake Valencia, in October, 1901, and July, 1902. The proofs establish the facts, and as no objection to the fairness of the amounts charged is made by the Commissioner for Venezuela the item will be allowed at the sum claimed. Item 1 is therefore allowed at 36,170 bolivars, with interest to be computed as above stated.

Item 2 of claim II is for interest on item 1 calculated at 1 per cent per month with a three months' rest, and is disallowed.

The sum of 141,184.15 bolivars, being a portion of part *a* of item 1 of claim III, is claimed for indemnification for the interruption and enforced suspension of traffic between the 1st of October, 1902, and the 7th of November, 1902.

The Commissioner for Venezuela is of opinion that the entire amount of this claim should be disallowed, as the suspension was a necessary part of the military operations when the army of the revolution occupied the villages of Maracay and Cagua and the forces of the Government with the President in the field were in Victoria engaged in a campaign which ended with the battle fought at Victoria. The suspension of traffic was by order of the President, in command of the armies in the field, and his minister of war.

The following, summarized from the opinion of the Commissioner for Venezuela, is believed to be a correct statement of the situation:

During this period the revolutionists of General Matos occupied, with an army of from 12,000 to 15,000 men, the villages of Maracay, Cagua, etc., and President Castro occupied La Victoria. The plan of the Matos leaders was to move upon La Victoria from Maracay on the west and Cagua on the west and south, and also on the east from the neighborhood of Los Teques. The topography of the country is such, by reason of hills and mountains running from the north and south to the valley of the river Aragua, that the line of least resistance and of most rapid communication would be in that valley. The Great Venezuelan Railroad runs through this valley generally parallel with the river. In the attempted execution of the plan above mentioned the forces of the revolutionists approaching from the east engaged the forces of President Castro at Los Teques, while the forces of the revolutionists approaching from Maracay and Cagua engaged the President's forces in final battle at La Victoria, in which the President was completely successful. The control of operation of the railroad, therefore, would be of the most vital importance to the success of President Castro.

The umpire agrees with the Commissioner for Venezuela that the suspension of traffic over the railroad during the period of these active operations in the field was a military necessity, and that the Government was justified in directing it.

That portion of part *a* of item 1 of claim III, 28,583.25 bolivars, for damages and injuries to the railroad owing to the transportation of troops and munitions of war and the enforced suspension and interruption of traffic at various dates in the months of September, October, November, and December, 1902, is allowed by the Commissioner for Germany with the exception of 53 bolivars.

No specific objection is made by the Commissioner for Venezuela to any detail of these items, although he claims that Venezuela is not liable and

generally that the amounts are greatly exaggerated. In the absence of any proof contradicting that put in on behalf of the claimant and the lack of any showing on the part of Venezuela against these amounts, the umpire is compelled to accept the claimant's proof. For these reasons he concurs in the allowance made by the Commissioner for Germany at the sum of 28,530.25 bolivars.

Part *b* of item 1 of claim III, 43,432.25 bolivars, is for damages and injuries similar to those in part *a*, in the months of April, 1900, and April, October, November, and December, 1902, and suspension of traffic of the steam tramway to Guigue and the steamboat on Lake Valencia. The Commissioner for Germany allows this part, except the charge for April, 1900, 7,800 bolivars. In this conclusion the umpire concurs, and part *b* of item 1 of claim III is allowed at the sum of 35,632.25 bolivars.

Item 2 of claim III for 12,791.88 bolivars, is for interest on item 1 at 12 per cent per annum from the 1st of January, 1903, to the 30th of June, 1903, and is disallowed.

Claim IV, 780,500.53 bolivars, as already stated, has been allowed by the Commissioners at the sum of 575,056 bolivars, in which the umpire concurs, and it will be so awarded.

The entire claim, therefore, is decided as follows:

Item 2 of claim I, item 2 of claim II, and item 2 of claim III, being for interest on items 1 of claims I, II, and III, respectively, are disallowed.

That part of part *a*, item 1 of claim III, on account of suspension of traffic from October 1 to December 1, 1902, amounting to 141,184.15 bolivars, is also disallowed.

Parts 1 and 2 of item 1 of claim I are allowed in the sum of 65,496.20 bolivars.

Item 1 of claim II is allowed in the sum of 36,170 bolivars.

That portion of part *a* of item 1 of claim III, on account of injuries to railroad, is allowed at 28,530.25 bolivars.

Part *b* of item 1 of claim III is allowed at the sum of 35,632.25 bolivars.

Making the aggregate amount of the allowances by the umpire 165,828.70 bolivars, to which is added for interest from June 15 to December 31, 1903, on the last-named sum, 2,694.71 bolivars, aggregating 168,523.41 bolivars. To this must be added the amount of claim IV, allowed by the Commissioners at the sum of 575,056 bolivars, which, however, includes interest to December 31, 1903, making the total allowance on the entire claim, including interest to December 31, 1903, of 743,579.41 bolivars.