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Metzger Case

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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 claimant 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.

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.

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