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**RECUEIL DES SENTENCES
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Wenzel Case

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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.

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 *Mantijo* 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 *Mantijo* 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

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 Bolivar 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.

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.