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Mixed Claims Commission (Italy-Venezuela)

13 February and 7 May 1903

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

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. 643-871.

PROTOCOL OF FEBRUARY 13, 1903

Whereas certain differences have arisen between Italy and the United States of Venezuela in connection with the Italian claims against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela, and His Excellency Nobile Edmondo Mayor des Planches, Commander of the Orders of S.S. Maurice and Lazarus and the Crown of Italy, Ambassador Extraordinary and Plenipotentiary of His Majesty, the King of Italy, to the United States of America, have agreed as follows:

ARTICLE I

The Venezuelan Government declare that they recognize in principle the justice of the claims which have been preferred by His Majesty's Government on behalf of Italian subjects.

ARTICLE II

The Venezuelan Government agree to pay to the Italian Government, as a satisfaction on of the point of honor, the sum of £5,500 (five thousand five hundred pounds sterling), in cash or its equivalent, which sum is to be paid within sixty days.

ARTICLE III

The Venezuelan Government accept, recognize and will pay the amount of the Italian claims of the first rank derived from the revolutions of 1898-1900, in the sum of 2,810,255 (two million, eight hundred and ten thousand, two hundred and fifty-five) bolivars.

It is expressly agreed that the payment of the whole of the above Italian claims of the first rank will be made without being the same claims or the same sum submitted to the Mixed Commission and without any revision or objection.

ARTICLE IV

The Italian and Venezuelan Governments agree that all the remaining Italian claims, without exception, other than those dealt with in Article VII hereof, shall, unless otherwise satisfied, be referred to a Mixed Commission, to be constituted as soon as possible in the manner defined in article VI of the Protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases, will only be:

- (a) Whether the injury took place or whether the seizure was wrongful; and,
- (b) If so, what amount of compensation is due.

In other cases the claims will be referred to the Mixed Commission without reservation.

ARTICLE V

The Venezuelan Government being willing to provide a sum sufficient for the payment, within a reasonable time, of the claims specified in articles III and IV and similar claims preferred by other Governments, undertake and obligate themselves to assign to the Italian Government, commencing the first day of March, 1903, for this purpose, and to alienate to no other purpose 30 per cent. of the customs revenues of La Guaira and Puerto Cabello. In the case of failure to carry out this undertaking, and obligation, Belgian 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 customs revenues so to be assigned and as to the rights of Italy, Great Britain and Germany to a separate settlement of their claims shall be determined in default of arrangement, by the Tribunal at The Hague, to which any other power interested may appeal. Pending the decision of the Hague Tribunal the said 30 per cent of the receipt of the customs of the Ports of La Guaira and Puerto Cabello are to be paid over to the representatives of the Bank of England at Caracas.

ARTICLE VI

The Mixed Commission shall consist of one Italian member and one Venezuelan member. In each case, where they come to an agreement their decision shall be final. In cases of disagreement, the claims shall be referred to the decision of an umpire nominated by the President of the United States of America.

ARTICLE VII

The Venezuelan Government further undertake to enter into a fresh arrangement respecting the external debt of Venezuela with a view to the satisfaction of the claims of the bondholders. This arrangement shall include a definition of the sources from which the necessary payments are to be provided.

ARTICLE VIII

The Treaty of Amity, Commerce and Navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed. It is however expressly agreed between the two Governments that the interpretation to be given to the articles 4 and 26 is the following:

According to the article 4, Italians in Venezuela and Venezuelans in Italy cannot in any case receive a treatment less favorable than the natives, and according to the article 26, Italians in Venezuela and Venezuelans in Italy are entitled to receive, in every matter and especially in the matter of claims, the treatment of the most favored Nation, as it is established in the same article 26.

If there is doubt or conflict between the two articles, the article 26 will be followed.

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present Protocol.

ARTICLE IX

At once upon the signing of this Protocol, arrangements shall be made by His Majesty's Government, in concert with the Governments of Germany and Great Britain to raise the blockade of the Venezuelan ports.

His Majesty's Government will be prepared to restore the vessels of the

Venezuelan Navy which may have been seized and further to release any other vessel captured under the Venezuelan flag during the blockade.

The Government of Venezuela hereby obligate themselves and guarantee that the Italian Government shall be wholly exempted and relieved of any reclamations or claims of any kind which may be made by citizens or corporations of any other Nation, for detention or seizure or destruction of any vessel or of goods on board of them, which may have been or which may be detained, seized or destroyed, by reason of the blockade instituted and carried on by the three Allied Powers against the Republic of Venezuela.

ARTICLE X

The Treaty of Amity, Commerce and Navigation of June 19th, 1861, having been renewed and confirmed in accordance with the terms of article VIII of this Protocol His Majesty's Government declare that they will be happy to reestablish regular diplomatic relations with the Government of Venezuela.

H. W. BOWEN

E. MAYOR DES PLANCHES

WASHINGTON, D.C., *February 13, 1903.*

PROTOCOL OF MAY 7, 1903

Mr. Herbert W. Bowen as Plenipotentiary of the Government of Venezuela, and the Royal Italian Ambassador Nobile Edmondo Mayor des Planches as representative of the Royal Italian Government, in order to carry out the provisions contained in articles IV, V and others of the Venezuelan-Italian Protocol of February 13th 1903, have signed the following agreement with reference to the Mixed Commission which shall have to decide upon the Italian claims against the Government of Venezuela:

ARTICLE I

The members of the Mixed Commission who are to be appointed by the Government of Venezuela and by the Royal Italian Government shall meet at Caracas on the first of June, 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.

The umpire is to be consulted in the proceedings and decisions whenever the Venezuelan and the Italian Commissioners fail to agree, or otherwise deem it appropriate to consult him.

Whenever the umpire will be 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 Venezuelan and the Italian Commissioners may each appoint, if necessary, a secretary versed in the Spanish and in the Italian languages 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 to decide according to the principles of justice and the 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 their 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 Spanish and Italian. The awards shall be made payable in English gold or in silver at the current rate of exchange of the day at Caracas.

ARTICLE III

The claims shall be presented to the commissioners by the Royal Italian Legation at Caracas before the first day of July, 1903. A reasonable extension of this term may eventually 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 Venezuelan and of the Italian 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 Government of Venezuela and the Royal Italian Legation at Caracas, as well as oral or written arguments submitted by the agent of the Government or of the Legation.

The secretaries mentioned in Article I Section 4 of this agreement shall keep an accurate record of the proceedings of the Commission; the Protocols have to be drawn up in duplicate copies which have to be signed by the secretaries and the members of the Commission that have taken part in the proceedings. After the work of the Commission will have come to an end, a certified copy of each of these Protocols is to be handed over to the Government of Venezuela and to the Royal Italian Legation.

ARTICLE IV

Except as herein stipulated, all questions of procedure shall be left to the determination of the commissioners, and, in case of their disagreement, the umpire shall decide them; in particular, they shall be authorized to receive the declaration 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 Government of Venezuela and by the Royal Italian Government, 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.

Washington, D.C., May 7, 1903.

H. W. BOWEN [SEAL.]

E. MAYOR DES PLANCHES [SEAL.]

PERSONNEL OF ITALIAN-VENEZUELAN COMMISSION

Umpire. — Jackson H. Ralston, of Washington, D.C.

Italian Commissioner. — Ruffillo Agnoli.

Venezuelan Commissioner. — Nicomedes Zuloaga.

Italian Secretary. — Adelchi Gazzurelli.

Venezuelan Secretary. — Segundo A. Mendoza.

Umpire's Secretary. — William Giusta, of Washington, D.C.

RULES OF ITALIAN-VENEZUELAN COMMISSION

I

Meetings. — The Commission shall meet on Thursdays and Saturdays at 9 a.m. and at such other times as in its judgment may seem necessary in order to expedite its business.

II

Minutes. — The secretaries shall keep duplicate originals of the minutes of the proceedings, entered in books provided for the purpose and prepared, respectively, in Italian and Spanish, which minutes are to be presented at the opening of the subsequent meeting, and when found satisfactory shall be signed by the umpire, if present at the proceedings to which they relate, and by the remaining members of the Commission.

III

Docket. — Each secretary shall keep a docket, entering thereon the respective claims by the name of the individual claimant, giving each a number, and stating the date of presentation to the Commission, and also the date and nature of every other paper filed or transaction of the Commission or umpire relating thereto.

IV

Reply of Venezuela. — At any time before decision is rendered in a particular case the Government of Venezuela, through its agent, shall have the right to oppose the claim, presenting such proofs and allegations as it may deem proper or requesting the delay for so doing.

V

Custody of records. — The secretaries shall be charged with the custody of all records submitted to the Commission. When the labors of the Commission shall be entirely terminated, original records shall be returned to the Government depositing them. The secretaries shall also file with their respective Governments the books kept by them. All papers shall be indorsed by the secretaries with the date of filing.

At any time the Government of Venezuela or the legation of Italy, or their agents, shall be entitled to receive from the secretaries a copy, duly certified by them, of whatever document may be found in the archives of the Commission. Certified copies of documents which are of such nature that they can not conveniently be removed from the archives of the Royal Italian legation or of the Government of Venezuela may be offered in evidence, the right at all times to examine the originals being accorded to the Commission or to the opposing party.

VI

Opinions. — The opinions of the several commissioners (including the umpire) shall be transcribed in duplicate books kept severally therefor by the secretaries and carefully compared with the originals.

VII

In every other rule of procedure the Commission shall refer to the provisions of the protocol of May 7, 1903, and in case of disagreement between the commissioners as to the proper interpretation or application of said provisions the umpire shall decide.

VIII

Amendments. — The Commission reserves the right at all times to change these rules as occasion demands.

OPINIONS ON QUESTIONS OF PROCEDURE

TIME FOR SUBMITTING CLAIMS

Extension of time for submitting claims should only be granted upon cause shown. Such cause being shown an extension is granted under conditions to November 1, claims to be notified to the Commission by August 9.

RALSTON, *Umpire*:

I have carefully considered the application, under date of June 8, made by the royal Italian legation at Caracas for a reasonable delay, for the purpose of transmitting claims of Italian subjects as well as of obtaining proofs in connection therewith, such delay being requested under the protocol of May 7, by virtue of which, together with that of February 13, 1903, this tribunal is in existence, and the application in question being referred to me as umpire because of a difference of opinion arising between the Commissioners for Italy and Venezuela.

The language of the protocol is that —

The claims shall be presented to the Commissioners by the royal Italian legation at Caracas before the 1st day of July, 1903. A reasonable extension of the term may eventually be granted by the Commissioners.

According to my interpretation of the words "may eventually" the Commission is not obliged as a matter of course to grant the delay, but it should only be allowed upon a reasonable cause shown. I feel myself sustained in this opinion by the definition of the word "eventual" given in Webster's Dictionary, which is, "in an eventual manner; final; ultimate." The word "eventually" is also defined as "coming or happening as a consequence; final; ultimate; (law) dependent on events; contingent."

The reasonable cause justifying extension is stated by the royal Italian legation at Caracas to exist in the difficulty, which has continued up to the present time (though now with diminishing force), of reaching certain portions of the Republic by mail or otherwise, and further, in the fact that owing to recent disturbances many Italian merchants have gone to distant regions to avoid danger, and apparently as a consequence it has been impossible for them to yet present their claims, and will be impracticable to present them by July 1. That the application is reasonable and justifies some delay is evidenced by the fact that the Commissioner for Venezuela offers no objection to an extension of thirty-two days, and this premise being granted, it remains for me to consider what, under all the circumstances, would be a proper period.

From such information as I have been able to gather, a letter from Caracas to the most distant point in Venezuela reached at all by the post-office authorities may be sent in twenty days, and even as to such a place as Ciudad Bolívar, now in possession of the revolutionists, my information is, that by transshipment at Trinidad a letter will reach its destination in about a week.

I further consider it is to be remembered, in reaching a conclusion, that the first protocol looking to the formation of a mixed commission was signed February 13, and that the knowledge of it was sought to be disseminated by the Italian legation as thoroughly as possible some time in the month of April.

It has, therefore, seemed to me that an extension of forty days from July 1 (sufficient to enable a letter from Caracas to reach the most distant part of

Venezuela and a reply to be obtained), would, in addition to the period of four and one-half months now elapsing, from February 13 to July 1, meet all reasonable requirements.

Furthermore, however, the Commission might properly take into consideration at a later period any claim the existence of which should be made known to the Commission at any time before the termination of the additional time now proposed.

In view of the foregoing, the following order may be entered upon the minutes:

Ordered, That the period for the presentation of claims before the Italian and Venezuelan Commission be extended to and including August 9, 1903: *Provided, however*, That the royal Italian legation shall be at liberty after that date, and before November 1, 1903, to present any claim, official knowledge of the existence of which shall be brought to the Commission on or before August 9, but with relation to which, for lack of data, the royal Italian legation shall not then have been able to submit a formal claim: *And provided further*, That for cause shown, on or before said date, this order may be enlarged as of this day.

TIME EXTENDED FOR SUBMITTING CLAIMS

Further allowing an extension of time for submitting certain claims to November 1, 1903.

RALSTON, *Umpire*:

The royal Italian legation has duly submitted an application for an enlargement of the time for presenting certain claims in accordance with the reservation contained in the order of the umpire of June 18, 1903, and in support shows that thirty claims are expected to arrive from Ciudad Bolívar, but that the names of the possible claimants have not yet come to hand; and further, that although registered letters have been sent to some 37 places named, neither the original letters nor the signed receipts have been returned, indicating want of proper postal communication.

The umpire believes that liberality should be shown in the application of the clause of the protocol referring to extensions, to the end that this Commission may fulfill as far as possible the object of its formation by determining all Italian claims. At the same time he recognizes that the labors of the Commission must be brought to a speedy finality.

He will therefore sign an order enlarging as of the date of June 18 the order then made, so that the 30 claims to be submitted from Ciudad Bolívar and any from the 37 places named may be entirely presented for action by November 1.

On behalf of the Venezuelan Government the umpire is asked to interpret the order of June 18, so that all claims, the names of whose owners are at this time to be submitted to the Commission, may at once be fully presented.

The umpire recognizes the difficulty of the situation in this respect, owing to the large number of papers recently received by the royal Italian legation, and at this time prefers accepting the assurance of the legation that all claims will be presented as rapidly as the papers can possibly be arranged. He does, however, in the enlarged order, change the former one by specifically requiring all claims to be presented formally and fully, with all supporting evidence, by November 1, his personal desire, however, being that they should be completely filed by October 1.

The royal Italian legation submits the question whether the claims not presented within the period limited shall on this account be excluded from

future indemnity. So far as this Commission is concerned the answer must be that they will be excluded. It would be beyond the jurisdiction of this Commission or its umpire to make any more comprehensive ruling as to effect of the protocol upon claims not presented to it.

In view of the foregoing, the following order may be entered upon the minutes:

Ordered: That the order of June 18, 1903, relating to the presentation of claims be enlarged as of that date so as to read as follows:

Ordered, That the period for the presentation of claims before the Italian and Venezuelan Commission be extended to and including August 10, 1903: *Provided, however,* That the royal Italian legation shall be at liberty after that date and before November 1, 1903, to present formally and fully, with all supporting evidence, any claim official knowledge of the existence of which shall be brought to the Commission on or before August 10, but with relation to which, for lack of data, the royal Italian legation shall not then have been able to submit a formal claim, but with further leave to said legation to bring to the official knowledge of the Commission the names of 30 claimants at Ciudad Bolívar and whatever claimants may exist at Altagracia (de Orituco), Nutrias, Tovar (2), Betijoque, Sebruico, S. Diego, Caripe, Amparo (2), Mitón, Yaritagua, Mendoza, S. Simón, Monte Carmela, Libertad, S. José (de Sucre), Upata, Soledad, Escuque, Turmero, Rubio, Quibor, Río Caribe, Caicara, Socorro, Carajal, Jabón, Aragua (2), Paraguaipoa, Cocorote, Guasipati, Cumarebo, and Tacarigua, San Fernando de Apure, Guama, Sta. Ipire, Colonia Bolívar, and Palmira, on or before September 21, presenting their claims formally and fully, with all supporting evidence, before November 1, 1903.

RECEPTION OF EVIDENCE AND CLAIMS

(By the Umpire:)

Additional evidence in support of reclamations may be received after the time for filing claims has expired.

Where within the time limited for the filing of claims nothing more has been presented than a statement (unsupported by proof) that a claim exists, no evidence in substantiation is thereafter receivable.

A "claim" must at least be sufficient to inform the respondent of the right claimed or the wrong inflicted.

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

Regarding the question of admitting claims, lacking documents, to-day presented to the Commission by the royal Italian legation, the Italian Commissioner remarks as follows:

It would seem that there can be no doubt except as regards claims not accompanied by a statement of damages, because claims having only said statement have been admitted and even favorably considered in other commissions. A simple written or even verbal demand may have sufficient evidence of veracity to enable the Commission, which is a tribunal of absolute equity, to take it into consideration and pass upon it. In any case the declarations of a claimant constitute a proof which should be studied and weighed by the Commission. Such declaration may even assume the character of an absolute proof, if supported by the sworn statement of the claimant. In practice this principle has been admitted by this Commission in two instances of claims received. The Commission would judge, therefore, said claims when both Commissioners within the limits of the protocol of May 7, 1903, find it proper to pronounce thereon.

It can not be admitted in justice and equity that the Venezuelan Commis-

sioner should have six months from the date of presentation of claims to adduce counterproofs without the legation having an equal right in favor of the claimants.

There now remain only the Ciudad Bolívar and a few other claims in which the legation has not so far been able to produce the formal demand of the claimants nor state precisely the sum claimed. Regarding the demand of the claimant, that seems to be adequately substituted by that of the legation or consular agent who legally represents the claimants. As to the statement of the sum claimed, this does not seem essential, inasmuch as the Commission has the right to determine the amount of the award on a simple statement of the facts in the case, showing that the claimant has actually suffered damages or violence, even though no definite sum be claimed.

The Commission has considered a number of claims in which, perhaps from a sense of delicacy in regard to injury to the person, or illegal incarceration, claimants abstained from fixing their own indemnity, leaving the same to be determined by the Commission.

These reasons would appear sufficient to cause the admission of the claims this day presented to the Commission by the royal legation, whatever be the condition of their documentation.

But other motions, based on special circumstances, support this view.

The legation, giving undoubted proof of respect for and confidence in the integrity of local tribunals, had advised all claimants to rely upon them for the compilation of the necessary evidence. The consequence of this has been that while in other commissions many claims were received based on proof prepared in the respective consulates, this Commission has not done so. Recourse to the consulates would have facilitated in all respects, but principally in the economy of fees, and hastened the presentation of claims; whereas local tribunals, lately closed for considerable periods or but recently reestablished in others, as in the case of Ciudad Bolívar, where the revolution lasted longer than elsewhere and operated with extreme slowness, have been the cause of delays and postponements which it would hardly be fair to saddle on the claimants.

The legation has, besides, proofs of frequent nontransmission or missending of both mail and telegraphic communications, all of which not chargeable to and by no fault of claimants would have the effect of prejudicing their interests in the exercise of their legitimate rights should the Commission rigidly and with severity interpret the clauses of the protocol and precedent decisions of the umpire in this regard.

It is proper to note that if the claims presented October 31 are not admitted, giving sufficient time for the presentation of necessary proof, the legation would be compelled to withdraw them, thus leaving open many questions which it is the common wish and interest to have settled and which the Commission, according to its high mandate of peace and justice, is morally bound to solve, leaving, as far as possible, only unencumbered ground behind it.

Now, as regards more especially the proofs and counter proofs, the reciprocal faculties of the Commissioners (of which, however, the legation and the Italian Commissioner intend to make only the most moderate use as regards the time limit) are determined by Article III of the protocol and can not well be the object of any restrictions or decisions whatsoever, as the honorable umpire is pleased to note in his elaborate decision of June 18 last.

No opinion by the Venezuelan Commissioner.

RALSTON, *Umpire*:

Upon disagreement between the honorable Commissioners for Italy and

Venezuela, two questions are presented to the umpire, which may be summarized as follows:

1. May additional evidence be received on behalf of Italian claimants in cases where formal claims have been filed?

2. May evidence be received in cases where nothing more has been filed than a statement that a certain person, located at a given place (as Ciudad Bolívar), has a claim, but has been delayed in the presentation of his proof because of inadequate mail facilities or judicial delay in taking proof?

The provisions in the protocol of May 7, 1903, bearing upon the matter read as follows:

ARTICLE III. The claims shall be presented to the Commissioners by the royal Italian legation at Caracas before the first day of July, 1903. A reasonable extension of the term may eventually be granted by the Commission. The commissioners shall be bound to decide upon every claim within six months from the day of its presentation, and, in case of disagreement of the Italian and 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 royal Italian legation at Caracas and the Government of Venezuela, as well as oral or written arguments submitted by the agent of the legation or of the Government.

The umpire has already passed two orders touching the general subject: The first of June 18, extending the time for the presentation of claims to and including August 9, but permitting the royal Italian legation, after that date and before November 1, to present any claim official knowledge of the existence of which should be brought to the Commission on or before August 9, but with relation to which, for lack of data, the legation had not then been able to submit a formal claim, and further permitting an enlargement for cause shown, as of date of June 18.

Cause being shown on August 10, the umpire enlarged the time within which knowledge of the existence of claimants located in certain places could be brought to the Commission to September 21, the claims to be presented "formally and fully" before November 1, such extension again applying only after September 21 to such of the cases indicated as for lack of data the legation should not have been able to submit a "formal claim."

With regard to the first proposition submitted, the umpire is, on full consideration, disposed to believe that additional evidence may be received by the Commissioners, if not by the umpire, at any time before the final decision. The power so to do is found in the paragraph of Article III, prescribing that —

the commissioners shall be bound before reaching a decision to receive and carefully examine all evidence presented to them by the royal Italian legation at Caracas and the Government of Venezuela, etc.

No restriction as to time of presentation of evidence (save that necessarily involved in the limitation of time for the consideration of claims by the Commission) is contained in the protocol, and the umpire does not feel that he can now make any, or can so construe his prior orders as to create such limitation. The first question will therefore be answered in the affirmative.

The second question is somewhat different. The protocol limits the time for the presentation of claims, with power in the Commission to extend the period. Within the time named by the orders of extension the legation, as above stated, has presented what is termed a "promemoria," but which in the cases under consideration contains absolutely no information relative to the claim save the name of the claimant and his locality. The fundamental question

is whether this constitutes the presentation of a claim, for if it does, then, as above indicated, statements and supporting evidence may yet be received.

Webster's Dictionary defines "claim" as follows:

Claim: 1. A demand of a right or supposed right; a calling for something due or supposed to be due; an assertion of a right or fact.

2. A right to claim or demand something; a title to any debt, privilege, or other thing in possession of another; also a title to anything which another should give or concede to or confer on the claimant. "A bar to all claims upon land." Hallam.

3. The thing claimed or demanded; that (as land) to which anyone intends to establish a right; as a settler's claim, a miner's claim.

It appears to the umpire that the "pro-memorias" referred to contain none of the elements of a claim within the natural application of the definition. They are not the demand of a right or supposed right, for they do not inform us of the amount or nature of the right claimed or the wrong inflicted. They assert nothing save that the legation is informed that a certain man claims something unknown against Venezuela; in other words, that he is a claimant. Before Venezuela can be expected to answer to a claim or demand she must be informed of its nature. This information is not furnished.

But it is said that there is sufficient basis to permit the furnishing of the information at a later time. Let us see. If this position be correct, carrying it to its ultimate, the lacking data may be furnished six months off, on the last day left for the consideration of claims, and Venezuela left without opportunity for defense. It is not for a moment to be supposed that such a course would be pursued; but an interpretation which would permit it must be erroneous.

To now admit that the "pro-memorias" in question are sufficient would be to nullify the effect of the orders of June 18 and August 10, above referred to. The "pro-memorias," when analyzed, simply contain the name and address of the claimants, with an excuse for the lack of other data. By the orders referred to this information (at least as to the important thing — the name) was to have been furnished on or before August 9 and September 21, respectively. When lack of data existed by those dates for the presentation of a "formal claim," such claim could be presented before November 1. But names and places were known before the dates mentioned and were then given, but no "formal claim" was presented for "lack of data." To say to-day that these words practically mean nothing, and that what are truly to be called claims may be presented within the next six months, would expand the time for the presentation of claims far beyond the clear intent of the orders given, and infinitely beyond the practice of other commissions working under similar protocols.

The umpire gives full attention to the suggestion that the present Commission should grant all possible opportunity to claimants to present themselves, to the end that all grievances may be adjusted. He himself has been so far influenced by this feeling that he has heretofore, in fixing November 1 as the final date, given the numerous Italian claimants one month more time than that enjoyed by claimants of other nationalities. But all things must come to an end, and if claimants in Ciudad Bolívar, for instance, having enjoyed one hundred days since the taking of that city by Government troops, have failed to furnish the royal Italian legation with more than their names when, even if it were not possible to supply all needed evidence, they could easily have given it the data required by the orders heretofore referred to, their loss must now be attributed solely to their own remissness. The umpire can not accept either irregularity of mails or vacation of tribunals as a justification for such neglect on the part of individuals. Meanwhile all power he possesses, either directly

or by indirection, to extend the time for the presentation of claims has been exhausted.

The second question must therefore be answered in the negative.

BURELLI CASE

(By the Umpire:)

Claim not having been presented within the time limited by orders of the umpire, and this delay having been occasioned by default of telegraphic officials of respondent Government, claim must be dismissed, but without prejudice to diplomatic action or judicial remedies.

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

The royal Italian legation on December 23 last has presented to the Mixed Commission the unannounced claim of Giuseppe Antonio Burelli, residing at La Puerta, District of Valera, whereby, because of requisitions of merchandise and other supplies, an indemnity of 15,500 bolivars is demanded.

The writer, because of the reasons which he has the honor to mention in the course of this statement, was of opinion that the claim ought to be examined, but the honorable Venezuelan Commissioner at the session of the Commission on the 9th of the present month, declared that he could not accept it, because it was presented too late. In consequence of this difference of opinion the decision of the honorable umpire is asked.

From the documents contained in the record of the claim it is shown:

1. That Giuseppe Antonio Burelli, on August 3 last, caused to be delivered to the Venezuelan telegraphic agent of Escuque a telegram addressed to the royal Italian legation at Caracas, which ought to have received it at the latest on the following day, on account of which he would have announced the existence of his claim, the proofs of which were at that time being made before the competent judicial authority.

2. That said telegram did not reach the royal legation, through no fault of the claimant, either on August 4 or afterwards, wherefore the existence of the claim could not be announced to the Commission prior to the 9th of said month, the final date fixed for that purpose by the award of the honorable umpire of June 18.

3. That the complete documents supporting the claim for indemnity reached the royal legation on the 20th of October last past; that is to say, in due time, according to the above-mentioned award of the honorable umpire, for their transmission to the arbitral tribunal, to which in fact they were not presented prior to the 1st of November, because the announcement of the existence of the claim being wanting at the proper time the presentation of the documents in relation thereto for that reason alone was delayed.

The mere statement of these circumstances is sufficient, in the opinion of the Italian Commissioner, to justify the request of the royal legation that the Burelli claim be admitted.

There has been no negligence whatever on the part of the claimant, and it would be entirely contrary to equity that he should suffer the consequences of the irregularity of the telegraphic agent of Escuque; that is to say, of a governmental act of Venezuela, which is solely responsible for the nonarrival of the announcement and of the delayed presentation of the claim. It is true that this does not operate in every way as a bar, but the delay in its liquidation would prejudice the claimant; and our duty is to do him prompt justice, protecting him against the injurious consequences of the fault of another.

For these reasons, the writer asks the honorable umpire to decide that the claim for indemnity in question should be submitted to the examination and to the judgment of the Italian-Venezuelan Arbitral Commission now sitting at Caracas.

ZULOAGA, Commissioner :

The Venezuelan Commissioner refuses to admit to the examination of this Commission the claim of G. Antonio Burelli, and he takes this position for the following reasons:

1. The term, until the 9th of August, fixed for the legation to present its notice of these claims was a term which could not be extended, and in order to fix it all the possible eventualities were taken into account, such as the failure of the mail, of the telegraph, distance, etc.

2. The irregularities of the telegraph services ought to have been especially foreseen, since when the date was fixed there was not even a telegraph to distant places, such as Valera and Escuque, because the lines had been destroyed by the revolution.

3. Foreseeing all these irregularities, the claimant ought not to have allowed his notice to go until the last minute.

4. If the Commission should admit this claim of Burelli it would open anew the term for the presentation of claims of all of those who might allege motives more or less justified for not having presented them in time.

5. The Commission has no right to admit claims.

RALSTON, Umpire :

The above-entitled case comes before the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

It appears that the claimant, who lives at Valera, sent to the telegraphic office at Escuque on August 3, 1903, a telegram signed by him, directed to his excellency, the Italian chargé d'affaires in Caracas, notifying him of the existence of a reclamation which he expected to prove before the tribunals of the State of Trujillo, the purpose evidently being to have his name certified by the royal Italian legation to the Commission on or before August 9, 1903.

The reception of this telegram is admitted by the chief of the telegraph office at Escuque.

It so happened that the telegram was not sent, or at least never reached the legation, whose first knowledge of the existence of the claim appears to have been gained October 20, 1903, by the reception of an expediente designed to sustain it.

This expediente was not presented before the Commission prior to November 1, 1903, the legation apparently not knowing the facts with relation to the attempted telegraphing on the part of the claimant, and considering that as the claim had not been called to the attention of the Commission within the time originally specified it was too late to present the claim.

By the order of the umpire, made June 18, 1903, official knowledge of the existence of the claim should have been brought to the Commission on or before August 9 and the claim itself presented before November 1. In this case neither step was taken, through no fault, however, either of the legation or of the claimant, who did all that it was incumbent upon him to do, and if his claim is not now regularly before the Commission it is because of the failure of the officials of the Venezuelan Government to fully perform their duty.

The suggestion is made that the umpire, in the extension given for the presentation of claims, took into account the condition of the country and the necessary

delays in transmission of letters and telegrams, and that he should not now be asked to virtually reopen the time limit already set.

To the umpire this argument seems in part correct and in part erroneous. He feels that the time having absolutely passed within which claims should have been presented he has no power of setting aside this limitation. On the other hand he would regard it as highly inequitable if the claimant were to absolutely lose his rights because of the failure of Venezuelan officials to perform their official duty, and in this connection he may remark that when the chief of the telegraphic station at Escuque accepted the dispatch tendered him he impliedly promised that it should be forwarded with all due promptness, and, accepting such dispatch without reservation, Venezuela (his principal) is not at liberty thereafter to say that communication was broken or the wires down, as is suggested by the honorable Commissioner for Venezuela may have been the case. Had the station agent informed the claimant promptly on August 3 that it was impossible to transmit the telegram the claimant could readily have procured transmission by other means of the desired knowledge within the time fixed by the order of the umpire.

In view of the foregoing considerations it seems to the umpire that, pending the objection raised by the honorable Commissioner for Venezuela, he can not consider the claim. Nevertheless, any order of dismissal which he might feel obliged to sign should leave the case open for such other remedies, either diplomatic or judicial, as the claimant may select. In other words, finding himself unable to grant the relief asked by the claimant in this Commission, while the jurisdictional question is raised by the honorable Commissioner for Venezuela, he is unwilling that the claimant should lose his rights because of clear negligence of other Venezuelan officials.

There are other views of the case which might be discussed, but as their consideration would bring us to substantially the same conclusions their development is omitted.

OPINIONS OF A GENERAL NATURE

CERVETTI CASE

(By the Umpire:)

Interest on claims can only be allowed from date of presentation to the Government or to the Commission in the absence of direct contractual relations with the Government.

Unless otherwise agreed by contract, interest will be allowed at 3 per cent per annum from such presentation to December 31, 1903.¹

Under the protocols no interest can be allowed on awards.²

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

The above-mentioned claim having been submitted to the umpire in consequence of a divergence of views and appraisalment between the Commissioners in regard to the proofs of the acts which gave rise to the claim proper and the amount of the damages as well as to the question of the interest which may be awarded the claimant, the undersigned reserves the right to indicate the amount to be paid in principal to Cervetti as an equitable compensation for

¹ A like rule was adopted by the German-Venezuelan Commission (*supra*, p. 423), but in the British-Venezuelan Commission interest was only allowed to the date of the awards, nothing more being asked by the English agent.

² See to like effect Vol. IX of these Reports, p. 470.

actual damage done him, after the demonstration of the proof by the interrogatories deemed opportune on this occasion put to the claimant by the Commission.

Regarding the question of interest the undersigned contends:

1. That the adjudication of interest is in conformity with justice and equity, and impliedly comprised in the protocol.

2. That the interest in the case should run from the day on which Cervetti suffered damages to the day on which his case will be settled by the Commission, without in any wise forfeiting the interest which may eventually be conceded to claimants of any nationality, either by decision of the Mixed Commissions or by the grant of the Venezuelan Government, from the day of its award by arbitration to the day of payment.

3. That the rate of interest shall be at 5 per cent per annum.

Regarding the first point, it is held that the indemnity would not be complete and therefore not in accord with the requirements of strict equity, which alone should guide the decisions of the Commission, if interest were not allowed, excepting in cases of indirect damages and personal injuries.

The refunding to a merchant after a long time of the price only of the goods taken from him or the reimbursement to him of forced loans, also after a long time, does not constitute an equitable or integral compensation. Like to the tool in the hands of the workman, merchandise and money in the hands of the merchant constitute capital in a productive form, and may perhaps be his only resource, his only means of earning his livelihood.

The merchant must have paid interest to the hands furnishing the goods, and he from whom money has been forcibly taken or he to whom money has not been paid when due must have been compelled to procure capital on credit, and in either case the injured party must have been compelled to submit to the payment of interest, which, according to the local commercial conditions, must have exceeded 5 per cent.

What motive is there for denying in principle compensation for precise and certain damages? It is indisputable that the measure of redress should be fixed in a spirit of moderation.

In any event the protocols signed at Washington in no wise exclude the adjudication of interest, but rather determine that indemnity shall be accorded on the basis of absolute equity, and leave to the commissions a full and absolute liberty to deliberate on the sum to be by them accorded as an indemnity in each case.

The fact that the adjudication of interest must aggravate the financial situation of Venezuela is worthy to be taken into consideration, and it is with this in view that the undersigned has fixed the rate at 5 per cent, which, given the usages of the country, is very light indeed. It is further worthy of note that interest has been accorded in the majority of cases by arbiters and arbitral commissions, above all, in cases where decisions have been given in claims of long standing and those in which the payment could not be immediately made.

It should be sufficient to cite the very recent precedent of the "Commissions des Indemnités" in China. Various members of the diplomatic corps accredited to Peking, among which was the plenipotentiary of the United States, appointed to adopt rules for the government of claims in trust for their colleagues, established the principle adopted by all the interested powers, that the injured parties would be given interest at 5 per cent in civil and 7 per cent in commercial matters.¹

The President of the Swiss Republic, sitting as arbiter in the large claim of

¹ Foreign Relations, Appendix, 1901, p. 107.

Fabiani against the Venezuelan Government, awarded 5 per cent. (Moore, p. 4915.)

The United States asked and obtained from Mexico (Com., 1838-1841, Moore, History and Digest, etc., p. 1254) interest at the rate of 5 per cent and from Peru at 6 per cent. (Moore, p. 1629.)

Interest at 5 and 6 per cent were likewise conceded by the Spanish Spoliation Commission and in the Panama riot and others. (Moore, p. 1004, 1381.)

The equity of the principle which the undersigned desires to see adopted seems from the foregoing precedents to be sufficiently established, though admitting that in some cases the request for interest had not been advanced at the time when the agreement as to the government of claims had not been formulated, or for other reasons.

The mere fact that the royal Italian legation in presenting claims did not request interest does not imply a renunciation of them. The legation believed it its duty to limit itself to the presentation of claims, leaving to the Commission the full liberty of deciding as to the amount and as to the form of the compensation.

If its silence in this regard is to be interpreted as a renunciation of interest, the legation will demand interest on all claims to be hereafter presented, as well as on those now in the hands of the Commission.

Even the silence of a claimant in this respect can not be considered as a renunciation, which latter should be explicitly stated, as otherwise it would be strongly contrary to the principles of equity and justice that interest should be accorded to a claimant asking it, while refusing it to another claimant who, through neglect or ignorance of the law, had failed to apply for it.

The question should be decided, after due examination, according to general and uniform criteria, as well in the case of Cervetti as in all the others.

If the silence of claimants with regard to interest is to be taken as a renunciation, similarly should it be considered a renunciation of indemnity when, by reason of illiteracy, or because not deemed by them necessary, a formal claim for indemnity does not accompany the testimony of witnesses as to the loss of receipts attesting forced loans or similar documents.

The Commission would most certainly depart from the principles of justice and equity, which should alone inspire it, if it were to reject all claims so presented, and the same principles and the same rules apply with equal force to the question of interest.

Regarding the second point, by the same reasons of equity, interest should run from the date on which the damage occurred to the date of the decision of the Commission or of the umpire, excepting the reserve in regard to the interest from the date of future decisions referred to above. This is the rule adopted recently in China by the "Commission des Indemnités."

The date of the presentation of the claim to the Venezuelan Government or to the Commission does not appear to the undersigned worthy of consideration, and not only because the forwarding of said claims to the legation was much delayed by the interruption in or temporary suspension of mail facilities of the Republic, but also because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that there could not result practical utility or immediate solution.

It is known that for the claims of the period 1898-1900, none had as yet been obtained from the Venezuelan Government at the beginning of the current year and previous to the action of the allied powers.

What would it have profited the claimants and the legation to have hastened the presentation of the claims? It belongs to the Commission to provide therefor, and if the assembling of this latter could not be effected before the

1st of June, 1903, this fact should not influence the selection of a date from which interest should run in favor of the claimants.

This is not a case in which to invoke the rules governing ordinary courts and permanent tribunals, whose decisions, more or less solicited, depend solely on the diligence of the interested parties. We are in a question of claims and not in a jurisdiction absolutely exceptional, in which not only we may but we should depart from the usual forms of procedure.

Regarding the third point, assuming that local law may not according to the terms of the protocol of May 7 in all that concerns the settlement of Italian claims, it is clear that the Commission in order to determine the rate of interest to be awarded to Cervetti and other Italian claimants must base itself on equity and on precedents in similar cases, as well as on the usage of the country and of local commerce.

Though the Civil Code of Venezuela fixes the legal rate of interest at 3 per cent, it is notorious that is not the usual rate throughout the Republic. Instead the conventional rate is 12 per cent, and the same is true of the rate of interest on deferred payment in commercial affairs, and in this regard it is noteworthy that the Government exacts 12 per cent from importers that are backward in the payment of import duties.

The new law of the banks of Venezuela provides that on the falling due of hypothecated credits the banks may in case of delay exact 12 per cent per annum. According to articles 5 and 27 of the above-mentioned law, 7 per cent per annum is lawfully borne by hypothecated credits and 9 per cent for credits on 'change and mutuels.

The same local Government pays, as I am informed, to the Bank of Venezuela as per contract, 9 per cent on its operations in current accounts.

The legal rate in Italy is 5 per cent in civil matters and 6 per cent in commercial affairs.

It has been seen above how in cases of arbitration interest has run from 5 per cent to 7 per cent per annum.

In asking, therefore, that in the case of Cervetti and the other claimants interest be fixed at 5 per cent, the Italian Commissioner does not doubt having adopted an equitable and moderate average and one fairly convenient to the Venezuelan Government.

ZULOAGA, Commissioner:

Respecting the principle, I have admitted that it appears proven that a damage caused by Venezuelan forces exists, but I do not find elements of conviction by which it may be estimated, the proof submitted being altogether deficient. The case has been submitted to the umpire, who is to render his decision freely thereon, based on proofs and such other evidence as he may deem proper to obtain and consider.

Respecting the second point raised by the Italian Commissioner, whether or not interest shall be allowed Cervetti, it is my opinion that interest should not be allowed, either for the past or for the future. Respecting the latter, it would appear that the Commissioner for Italy and myself are in accord that none should be granted, though it seems that he wishes to make certain reservations as to the decisions, in case, as he says, the nations interested should desire to fix the rate of interest.

This reservation is foreign to our attributes as judges and to the faculties invested in us by the treaties in virtue of which we were appointed. Judges decide, grant or adjudicate that which they believe to be just, but they have not the power to make bargains.

Article V of the protocol of February 13, 1903, determines the manner in

which Venezuela is to make the payment of claims within a reasonable time, and, as Italy accepted this mode of payment, Venezuela is within her rights, since payment is to be made to the Italian Government within the delay and in the manner agreed upon without concerning herself as to whether any particular claim is to be paid immediately or not.

It is to be observed that many delicate and laborious negotiations were had before the establishment of the 30 per cent agreed upon, in which, without doubt, the economic and political conditions of Venezuela were duly considered and appreciated by the powers agreeing upon a fixed mode of payment.

In regard to the payment of interest for time past, I am also of the opinion that it should not be granted. These claims, as appears in the case of Cervetti, do not come to the notice of the Government before the moment in which they are presented to the Commission, and now is the time to fix the amount of the damages. It does not, therefore, appear just or equitable that interest should be awarded on amounts which Venezuela did not in reality know she owed.

Many nations, among them Italy and Venezuela, have decreed that legal interest (in Venezuela, 3 per cent) does not accrue on debts for liquidated sums without a request on the debtor for same. This request is necessary, and is based on equity, as without it the debtor can not be supposed to know that interest is demanded. When it is a question of unliquidated sums it is impossible to establish the fact that interest has accrued, since the amount actually owed was not known.

This case of Cervetti appears singularly appropriate for the bringing out of this class of argumentation — for the development of its applicability. He has come before this tribunal, and the Commission has been unable to agree on an award for damages, for the want of satisfactory and convincing evidence. The case has passed to the umpire, who is equally unable to determine it, and is seeking further proof. Can it be said to be equitable, under such circumstances, to award the payment of interest by Venezuela for time past? Is it not puerile to award interest on sums which can only be approximated?

As these claims were not before brought to the knowledge of the Government of Venezuela, it seems strange to assume that interest is due on them. It is objected, however, that the royal Italian legation was prevented from presenting these claims to the Venezuelan Government by reasons of its being inconvenient, and therefore these very reasons would undoubtedly seem to prohibit the allowance of interest upon these claims.

I do not agree with the Italian Commissioner that the matter should be decided in general terms, though in fact this may be the result.

We are judges, and our proceedings should declare a judgment in each case. Naturally the decisions of the umpire will be accepted as determining the course of settlement by the Commission of future cases, but I believe, nevertheless, that we, as well as the umpire, should give special and full consideration in each case. That each case may or not be consequent on previous criteria is a question of a different nature.

Without any doubt, only well-founded reasons would determine a different procedure in any one case from that followed in others.

RALSTON, *Umpire*:

A difference of opinion arising between the Commissioners for Italy and Venezuela, this case was duly referred to the umpire.

Upon examining the record, it was the opinion of the umpire that, although the claim was probably well founded, the proof would not justify any recovery, the claimant's witnesses merely stating that the facts alleged by them were

public and notorious, but stating nothing of their own knowledge. The foregoing view being submitted by the umpire to his associates, it was determined that the claimant himself should be summoned before the Commission and examined by its members under oath. This course was taken and the claimant appeared and was examined at length on June 25.

The claim is for the enforced loan of three horses (one being returned injured, and all, as appeared on examination, dying shortly after their return because of bad treatment), and for the taking on July 29, 1902, of some fowls, household effects, gold and silver articles, and 250 pesos in coin, the acts complained of being committed by Venezuelan troops at Macuto under the command of a colonel, and by virtue of his express direction, the damage claimed being said to amount to 3,200 bolivars.

The fact of the taking, under the circumstances as stated by the claimant, has been demonstrated, and the only questions are as to the amount of damages and the interest thereon.

* * * * *

(After discussing the facts, the umpire continues:)

The taking having been without right, should interest be included in the award? If so, when should it begin and terminate, and what rate should be allowed? In the opinion of the umpire, some interest is justly due, the claimant having been deprived of the possession and use of his property and interest constituting some measure of return for such deprivation.

According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been "*mis en demeure*." Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power, and even against its express instruction. So far is this principle carried that in the United States no interest whatever is allowed upon any claim against the Government except pursuant to express contract.

In view, however, of the conduct of past mixed commissions, the umpire believes such an extreme view should not be adopted. It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan Government¹ or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the "*mis en demeure*" as to disputes between individuals.

In opposition to the foregoing it is suggested in the opinion of the honorable Commissioner for Italy that the above rule would be unjust for the reason that the forwarding of claims was much delayed by the interruption in or temporary suspension of mail facilities, and because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that no practical benefit or immediate arrangement would result therefrom.

¹ This principle was adopted in the case of the *Macedonian* against Chile by the King of the Belgians. (See 2 Moore's Arbitrations, p. 1466.)

As to the first of these suggestions, it is to be said that the present claimant has been able at all times to reach Caracas personally or by letter without and delay, and the situation of so many other claimants has been the same that no general rule should be adopted based upon the condition of postal communications.

As to the further suggestion relating to the hesitancy of the royal Italian legation to submit claims, it can not be assumed that a nation which joins in creating a mixed commission to settle claims against it would have failed to recognize its just obligations when presented.

The umpire recognizes fully the fact that it may be a hardship to individual claimants not to receive interest from the date of taking; but, believing that this hardship could have been avoided in the manner before indicated, he does not now consider that it would be just to charge Venezuela with the payment of interest for perhaps long periods of time during which that Republic was not notified that a claim was made against it.

Next considering the question of the time when interest should terminate, the umpire is clearly of the opinion that no interest should be allowed upon the award finally to be made. In this conclusion he is influenced largely by the action of the Geneva tribunal, which granted no interest upon the award, and he is controlled by the fact that the protocols by virtue of which he acts do not provide for interest upon the awards. He believes, however, that under the powers contained in the protocols interest may in every case be calculated to a fixed period within the life of the Commission, this course placing all claimants upon a like footing. In the present claim, therefore, and in others like in general character where judgments are given for the claimants, interest may be calculated as a part of the award up to and including December 31, 1903, that being the date upon which the labors of the Commission might be presumed to terminate.

We now come to the final question as to the rate of interest to be allowed.

The umpire has been referred to the fact that commissions have allowed rates varying from 3 to 7 per cent and even more in some cases, while the commercial rate at Caracas often equals 12 per cent per annum, the latter rate being exacted by the Government on certain overdue taxes or imposts. Attention has further been called to the fact that the American Commissioners allowed against the recent Chinese indemnity 5 and 7 per cent.

The practice among prior mixed commissions has been so far from uniform and so often dependent upon the language of particular treaties as not to afford any very useful guide. Commercial rates are so uncertain that, while their consideration may be useful, the umpire would not be justified in being controlled by them. Of course, high percentages demanded by a Government from a defaulting taxpayer do not afford a safe precedent. Again, as to the Chinese indemnity, the rates were intended to operate simply between the United States and the claimant, and did not operate between nations.

The umpire believes it fair to take into special consideration the rate of interest paid in Venezuela by law in the absence of contract and also the rate accepted by foreign governments upon bonds given by Venezuela to pay obligations created by former arbitral tribunals.

It appears by article 1720 of the Civil Code of Venezuela that the legal rate is 3 per cent in the absence of contract, and the umpire is further informed, that although 5 per cent has been given in some cases, the rate upon bonds given by Venezuela in payment of awards in favor of French citizens and English and Spanish subjects is the same. He thinks, therefore, that this rate should be followed in the absence of contract of the parties fixing another.

Pursuant to the foregoing opinion, judgment will be entered for 1,724

bolivars, plus interest at the rate of 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including December 31, 1903.

POSTAL TREATY CASE

The Commission, under the protocols, has no power to allow interest after the probable termination of its labors.
Claimants appearing before the Commission accept its limitations.

RALSTON, *Umpire*:

The Commissioners of Italy and Venezuela disagreeing on the question of the time for which interest should run on the above-mentioned claim, that question was duly referred to the umpire.

According to article 2, paragraph 33, of the Postal Treaty,¹ a government failing to pay charges, etc., for transportation due by it is, after six months' notice, chargeable with interest at the rate of 5 per cent per year. Interest at this rate is now asked till payment shall be made. The Venezuelan Commissioner admits interest should commence to run from July 1, 1900.

The rate and the time of commencement of interest are both fixed by the treaty, which is a contract determining absolutely the rights of the parties. However, as indicated in the Cervetti case, No. 9,² the Commission is without power to give interest to run beyond the time of the probable termination of its labors, and this principle extends, in the umpire's opinion, not alone to damage cases, but to cases arising under contracts.

It is to be borne in mind that claimants presenting themselves before this Commission appear before a body of limited powers, and are to be regarded as accepting its drawbacks in consideration of anticipated benefits. One possible drawback is the loss of interest after the termination of the Commission.

It is not the duty of the umpire to pass upon the justice of the claim for interest beyond the life of the Commission, and he does not do so, but solely upon the question of jurisdiction, and this decision, as well as the decision in the Cervetti case, is to be regarded as so limited.

SAMBIAGGIO CASE ³

(By the Umpire:)

Revolutionists are not the agents of government and a natural responsibility does not exist.

Their acts are committed to destroy government and no one should be held responsible for the acts of an enemy attempting his life.

The revolutionists (in this case) were beyond governmental control and the government can not be held responsible for injuries committed by those who have escaped its restraint.

The word "injury" occurring in the protocol imports legal injury; that is, wrong inflicted on the sufferer and wrongdoing by the party to be charged.

¹ U.S. Statutes at Large, vol. 30, p. 1691.

² *Supra*, p. 492.

³ The general subject involved in this opinion is discussed by Ch. Calvo, in *Revue de Droit International*, vol. 1 (1869), p. 417, and by Prof. L. de Bar in the same magazine, vol. 1 (second series, 1899), p. 464. See also *Annuaire de l'Institut de Droit International*, vol. 17 (1868), pp. 96-137, and Ch. Wiesse's *Le Droit Inter-*

- As rules of interpretation the umpire accepts that: (a) If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted; (b) the sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer; (c) two meanings being admissible, preference is given to that which the party proposing the clause knew at the time was held by the party accepting it; (d) doubtful stipulations should be interpreted in the least onerous sense for the party obligated; (e) conditions not expressed can not be invoked by the party who should have clearly expressed them.
- Treaties are to be interpreted generally *mutatis mutandis* as statutes and, in the absence of express language, are not given a retroactive effect.
- The "most-favored-nation" clause contained in the Italian treaty does not oblige this Commission to follow, in favor of Italian subjects, the interpretation made by other Commissions of their protocols.
- Venezuela being recognized as a regular member of the family of nations, the universally accepted rules of international law must be applied to her and no intendment can be indulged in against her.
- Under a treaty which (as in this case) authorizes the decision of questions before the Commission according to "justice" and "absolute equity," it is its duty to apply equitably to the various cases submitted the well-established principles of international law.

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

That in favor of the Italian citizen, Salvatore Sambiaggio, resident of the parish of San Joaquín, who claims 5,135.50 bolivars on account of requisitions and forced loans exacted of him by revolutionary troops, an award be made of 4,591.50 bolivars (the claimant having adduced no proof whatever of a further loss of 544 bolivars, which he claims to have suffered), plus the interest thereon from the date of the loss to the date of the award, the following considerations are submitted in support of said request.

The Commission has before it the question as to whether the Venezuelan Government is materially responsible to the claimant, Sambiaggio, and other Italians established in Venezuela, on account of damages inflicted upon them by revolutionary authorities or troops. The Italian Commissioner holds that such responsibility exists when, as in the case under consideration, the said authorities exercise a *de facto* power or when the said troops have a recognized military organization for the purpose of overthrowing the legal government, though the damage alleged may have been inflicted by detached bodies of

national Appliqué aux Guerres Civiles. The subject herein considered is also discussed herein by the American-Venezuelan Commission, p. 7, the English-Venezuelan Commission, p. 344, the German-Venezuelan Commission, p. 526, the Netherlands-Venezuelan Commission, p. 896, and p. 903' the Spanish-Venezuelan Commission, p. 923, and by this Commission in the Guastini case, p. 730.

Baron Blanc, of Italy, wrote August 17, 1894, to the minister of Italy in Brazil: "L'ingérence diplomatique ne doit pas être excessive. Le cas de dommages provenant d'actes qui, en violation du droit des gens, ont été commis par les autorités ou les agents dépendant du gouvernement contre lequel on réclame, est bien différent du cas des dommages qui ont d'autres origines, comme seraient ceux occasionnés par des opérations de guerre ordinaires, ou par des actes provenant de révolutionnaires, ou de malfaiteurs de droit commun.

"Quant aux premiers il n'y a pas doute que l'État ne doive en être tenu pour responsable; mais quant aux secondes, il manque toute base rationnelle d'une responsabilité gouvernementale, à moins que le gouvernement ou ses agents n'aient, d'une manière évidente, omis de remplir leurs propres devoirs en ce qui concerne la possibilité de prévenir le dommage dont on se plaint." So says Rev. Gen. de Droit International Public, 1897, p. 406.

troops (guerrillas), and that, on the contrary, such responsibility may be excluded when it is shown that such acts are committed by marauders who style themselves revolutionists solely that they may with impunity prosecute their nefarious calling.

This opinion is based upon the following heads:

1. The rights common to all Italians in Venezuela, and to claimants and Sambaggio in particular, under the terms of the treaty between Italy and Venezuela and of the Washington protocols.

2. The general principles of international law, special legislation, and precedent arbitral decisions in cases analogous to the one under discussion; and

3. Considerations of fact and principles of equity.

As to the first head: In the protocol of February 13, 1903 (Art. I), Venezuela recognizes in principle the justice of the claims presented by His Majesty's Government in the name of Italian subjects, and has besides admitted (Art. IV) that all claims, excepting only those of the first rank (Art. III), may be examined by a mixed commission which, with regard to damages to person or property or to unjustifiable taking, simply establish the truth of the facts and decide the amount of the award.

What is the meaning, the true reason, of these two dispositions, and more particularly of the first?

The meaning, the true reason, is that the Venezuelan Government recognized at Washington its responsibility for acts of revolutionists resulting in damages to Italian subjects; otherwise it would have formulated a special reservation.

Was it, indeed, at all necessary that the Venezuelan Government recognize damages inflicted by its authorities or agents?

Certainly not. The Government has never thought to deny such responsibility, and to specially insist thereon in the first clause of the Washington protocol, one which animates the whole, in order to reassert a principle which has never been questioned, would have been puerile. The justice of Italian claims for indemnity on account of acts of the revolutionists is what was sought to be established — a justice which Italy has always *in principle* upheld and which the Venezuelan Government has always *in principle* denied.

The consequences of this divergence in ideas are what were sought to be eliminated. There has never been any question as to the other point.

The first article of the protocol of February 13. and the above-quoted portion of the third not having, therefore, been created with a view to claims for damages inflicted by the Government or its agents, and it being unreasonable to suppose that they were called into being for no specific and well-defined purpose it follows that they must undoubtedly refer to claims styled "revolutionary".

The Commissioner for Venezuela urges, however, that had these claims been in view, explicit mention of them would have been made; to which the Commissioner for Italy observes, as before, that even though special reference to them has not been made, it is equally true that no reservation or exclusion was stipulated in regard thereto, and insists that his interpretation of the articles mentioned is the only logical one that may be given.

In this connection it is worthy of note that the German-Venezuelan protocol drawn up for similar causes, under identical conditions and having the same scope as ours, contemplates claims originating in the existing "civil war" in Venezuela, and the French-Venezuelan treaty of the 19th of February, 1902, relative to claims of French citizens against the Venezuelan Republic, considers "damages suffered from the fact of insurrectional events."

The "civil war" in Venezuela, in which the revolutionary troops have

never been recognized as belligerents, and "the insurrectional events" are nothing more nor less than the revolution, and the damages inflicted by it on German and French subjects will be passed upon by the respective Commissions; indeed, the French-Venezuelan Commission has already decided that such losses must be indemnified.

Under the international treaty of July 19, 1861, Italy is guaranteed the treatment accorded the most favored nation. A broad interpretation has been given by Article VIII of the protocol of February last to articles 4 and 26 of the said treaty, according to which Italians in Venezuela and Venezuelans in Italy shall in all matters, and particularly in the matter of claims, enjoy the rights accorded by the abovementioned clause. Now, as has been stated, the French-Venezuelan Mixed Commission has recognized the principle of the responsibility of the local government for damages caused French subjects by the revolutionists, according to the provisions of the treaty of Paris of 1902. The Italians have therefore right to similar consideration.

The Washington protocol contains (Art. VIII), however, another important clause, that which provides that the Italian-Venezuelan treaty may not in any case be invoked as against the provisions of the protocol. It may, however, be invoked in favor of the treaty, since it contains no provision contrary thereto, and the Commissioner for Italy accordingly so invokes in favor of the claimant Sambiaggio, as he will for other claimants whose cases are analogous to the one under consideration, the clause relative to the most favored nation.

But why was it agreed at Washington that the Italian-Venezuelan treaty could not be invoked against the provisions of the protocol?

A careful study of these two diplomatic documents will clearly show an intention that article 4 of the treaty should not be invoked as against the protocol, according to which treaty only damages inflicted by the constituted authorities of the country could have given rise to claims for indemnity. What other motive could there have been (and we must assume there was a motive) for the stipulation of Article VIII of the protocol?

It was evidently the intention that all, absolutely all, the claims arising from civil war in Venezuela should be examined and adjudicated *ex bono et æquo* by the Commission; and if such was the intention, it could not have been contemplated that those arising from revolutionary acts should be thrown out on the raising of a technical objection such as was advanced by the Commissioner for Venezuela in the present case of Sambiaggio, an exception which, even if founded in equity, should not, under the terms of the protocol, be admitted.

The protection and security of person and property which the Venezuelan Government explicitly guarantees by article 4 of the treaty of 1861 to Italians residing in Venezuela would be a mockery did it not include indemnity for injuries inflicted on Italian subjects by the frequent revolutions, against the abuses of which so far no adequate steps have been taken, either preventive or repressive. From the sole fact that Venezuela does not sufficiently and for long periods protect the persons and property of Italians resident in her territory, and has failed of fulfilling the obligations imposed on her by article 4 of the treaty of 1861, there arises the right to claim compensation for damages. (Bluntschli, art. 462.)

This is no new and exceptional theory. The very recent decision of the French-Venezuelan Commission has already been referred to, but there are many others. Mr. Robert Bunch, the English minister at Bogotá and umpire in the claims of the United States *v.* Colombia in the case of the steamer *Montijo*,¹ stated in his decision that:

¹ Moore, p. 1444.

It was, in the opinion of the undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the Government of the union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.

Protection is promised to those whom the Government has consented to admit to its territory, and means must be found to render said protection effective. If the Government fails therein, even though it be through no fault of its own, it must make the only reparation in its power — i.e., it must indemnify the injured party.¹

The United States demanded and obtained by arbitral decision of March 1895, an indemnity for the seizure of the North American vessels *Hero*, *San Fernando*, and *Nutrias*, for the unlawful arrest of United States citizens, and for other damages inflicted by the legal Government and by revolutionists. (Moore, Hist. and Dig. of International Arbitrations, etc., pp. 1723, 1724.) The same theory was sustained by the United States *v.* Peru, which on that occasion obtained an indemnity of \$19,000 in favor of an American citizen, Dr. Charles Easton, for material damages and maltreatment inflicted on him by a body of partisans of a rebel chieftain seeking to overthrow the constitutional Government of Peru. (Moore, pp. 1629, 1630.)

In the case of the "Panama riot and other claims" was recognized the "liability, arising out of its privilege and obligation, to preserve peace and good order along the transit route," of the Government of New Granada, now the State of Colombia, which, in that decision, was obliged to pay an indemnity for the damages inflicted by revolutionists. (Moore, pp. 1361 et seq.)

Fiore, a noted authority on international law and a writer of most liberal views (chap. 4, sec. 660), says:

A state may be declared responsible for acts committed on its territory, even by private individuals, if injury to a state or to strangers results therefrom.

and in section 666, same chapter, he says:

Let us assume that a government has failed to take proper steps to obviate certain disturbances. * * * In these and similar cases justice and equity require that the state be held to an account and compelled to pay the damages.

In a treatise by the same author (chap. 4, sec. 672) is found this maxim, which deserves the special attention of the Commission, as it synthetizes all the present argumentation:

The question of the responsibility of a state is, therefore, a complex one, and requires for its solution not only the principles of law but an investigation of the facts and an appreciation of the circumstances.

If, therefore, in this matter international law does not establish fixed maxims, but follows different and at times contradictory decisions, it is because such questions, when submitted, were solved according to equity.

Now, the Commissioner for Italy believes he is justified in asserting in all confidence that in the case of the Venezuelan revolutions equity demands that the interests of the claimants injured by revolutions be not neglected.

Grave indeed would be the responsibility assumed by the Commission if it

¹ The exact language of the umpire in this case was as follows:

If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. 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.

decided to the contrary, especially from the point of view of the discouragement of immigration to Venezuela.

Was it not from considerations of equity that France, on the occasion of the massacre at Aigues-Mortes of a number of Italian operatives by French citizens, indemnified the families of the murdered, and that Italy, under similar conditions, indemnified resident French merchants who had suffered damages from an outburst of popular indignation aroused by the above-mentioned massacre?

And was it not perhaps the same decisions in equity that inspired existing laws in Germany and other European states, according to which municipalities are held to the indemnification of peaceful citizens in cases of mob violence and revolutions?

But, setting aside all reference to the foregoing precedents, it surely would not be just to establish an absolute parallel between the treatment that may be demanded in favor of foreigners in cases of mob violence and revolutions in countries where the administrative and military organization is complete and where acts of rebellion against constituted authority are an exception and may be considered as unfortunate accidents, and that which may be invoked in others where revolution is a frequent and persistent political phenomenon.

From a condition of fact essentially different arises a situation which has peculiar and distinctive characteristics, and upon this is based the question of responsibility, and thence the obligation to grant indemnity.

Requisitions and forced loans exacted from foreigners by the military or administrative authority *à main armée*, and often with threat, are not merely abuses, but constitute crimes which the Government of Venezuela is of its own motion and by the requirements of its internal laws bound to visit upon the offenders without awaiting report or denunciation from the injured parties. This it has not as yet done, except in rare instances, and then more from a policy of political order than from any desire to punish the perpetrators of illegal acts.

It is true there have been frequent confiscations of property from revolutionary leaders, but it is not shown that the product of such confiscation has ever been applied to the indemnification of the injured citizens or foreigners.

If this is always the attitude of the Government of Venezuela, it is because such requisitions and forced loans are by it considered as political acts incident to general condition of the country, and being morally responsible for the consequences, it should be held to a material responsibility therefor.

That such is the light in which such acts are viewed by the Government is shown by the amnesty granted to those revolutionists who lay down their arms and become reconciled, without any provisions whatever for the restitution of property unlawfully taken by them. It is true that restitution is not made to natives more than to foreigners, but this does not invalidate the principle of right, and it is logical that these latter should invoke diplomatic intervention which, as well as the protection of local laws, they have an undoubted right to claim. The one in no wise excludes the other, and in this they are on a parity with Venezuelans residing in Italy or other foreign country.

It is not sought to place in doubt the sincere desire of the Venezuelan Government to maintain political order; but judging from the results it must be admitted that the means employed by it for so doing are, to say the least, inefficient, and from this its responsibility is deduced as a logical sequence, and this is the better established in cases where revolutionists have taken property from and maltreated foreigners within the observation of Government authorities or troops who encouraged them thereto.

The Commissioner for Italy can not possibly distinguish in any manner

between damages caused by the acts of successful revolutionists and of those who failed in their attempt.

Success is an accident, and in no respect argues the worth of the cause fought for, the only moral element which could possibly justify a difference in the treatment of those who had been injured by a successful party and those who had been despoiled by an unsuccessful one.

It would be necessary to prove that the revolution broke out in defense of a high humanitarian principle or in vindication of a great political or social idea in order to prove the presence of this moral element.

The struggle between those in power and those seeking to overthrow it has no monopoly of this characteristic, and triumph depends generally upon the force of arms, the skill and foresight of commanders, as well as on other accidental circumstances.

It would, besides, furnish to foreigners a strong incentive for violating the laws of neutrality to make the distinction above mentioned, as in such a case it would be to their interest to side with one or the other faction, and to render more apparent the absurdity of the distinction they would be inclined to side with their despoilers, since with the success of these latter would lie their own chance for securing future compensation for their losses.

And even admitting the principle of such distinction, would we not thereby enter into a very labyrinth of difficulties in cases of sufficient frequency where this or that group of contestants passes from the side of the revolutionists to that of the Government, and vice versa? For example, in which category should be classed the damages caused by General Hernandez, who initiated the last successful revolution, then withdrew therefrom, and now is again reconciled with it?

The Government should be stimulated in the adoption of energetic means whereby to establish order in all the provinces of the Republic now in the hands of the revolutionists, and to maintain peace in the future by holding to the principle of its responsibility in case of claims for damages caused by this same revolution.

It should likewise be considered that on each success of the revolutionists there is established a government *de facto*, which collects taxes and imposes duties and in various other ways harasses both natives and foreigners.

During the last political crisis there have been several provincial governments which have exercised several, if not all, of the functions of a legal government, and as the sums collected by them can not be demanded from them it is to the Government we must look for redress, as it is the only body with which diplomatic relations may be held with regard thereto. It would be unjust that the property of foreigners should be converted without adequate compensation, to the profit of the country, and there would be danger in conceding that future revolutions might with impunity exist at the expense of foreigners.

These latter may not take part in local politics, and if the principle that they are entitled to compensation for damages inflicted by revolutionists be rejected they will be in a worse position than the natives, as they will have no means of or right to armed defense, and at the same time no one will be held responsible for damages suffered by them from revolutionists.

It has already been remarked that several localities of the Republic are in the hands of the revolutionists. Let it once be known in those localities that it has been decided that the damages inflicted on foreigners there can not be made subject to indemnity and in what a critical position will not those foreigners be placed? What possible guaranty will there be for them against further aggressions?

The political situation in Venezuela has certain special characteristics

which the Commission should duly consider in judging of the consequences from the point of view of the claimants and of the compensation. The Commission is not specially called to decide questions of international law, except as it may do so incidentally. Its principal duty is the consideration of facts from the standpoint of moderation and absolute equity, and to compensate in a reasonable degree the Italians who have been injured from the abnormal political situation of the country, planting itself on the provisions of the Washington protocol, which do not distinguish between damages caused by revolutionists, whether triumphant or not, and those caused by the Government, and holding in view the fact that the Venezuelan plenipotentiary has recognized in principle and without reservation or discrimination the justice of claims which the Commission is called upon to decide.

Resting upon these considerations of law, and especially of fact, the Italian Commissioner insists that the claim of Salvatore Sambiaggio be admitted and the Venezuelan Government be held responsible in the sum of 4,591.50 bolivars, with the interest accruing thereon.

P.S. — The Italian Commissioner asks in addition that there be taken in consideration and decided the later claim for damages in the sum of 171.63 bolivars, this day presented by the royal Italian legation, to whom the claimant Sambiaggio transmitted it after having forwarded the claim already submitted to the Commission.

ZULOAGA, *Commissioner* :

It is a generally accepted principle of international law that strangers can not expect, in any country, better treatment than is accorded the nationals. Were this otherwise foreign immigration, instead of being a source of prosperity and grandeur, might become, to quote from Nesselrode's celebrated note, a true lash for the natives.

A foreigner who takes up his domicile in a country can not expect more than the justice of that country, more than the laws of that country, more security than it offers, or more than its civilization and well-being will afford him; in a word, more than the political organization of the place in which he lives will give him. This order of ideas is so founded on the condition of society and on absolute equity that to insist thereon seems superfluous.

The foreigner who comes to this part of America knows and implicitly accepts the fact that here at times society is politically perturbed, just as he knows that its soil is subject to upheavals which may engulf its inhabitants; just as he knows that fever lurks in every bush and pool of its exuberant nature. But if these are its drawbacks, there are also its compensations and advantages. Here life is easier than it is in the great European aggregations, and here fortune is more readily achieved. It would be absurd to pretend that all societies offer equal security and benefits, and hence to expect from each the same grade of civilization.

If this is true, it must be equally true that each government, as such, should be responsible for its acts, in that it constitutes a juridical entity, endowed with rights and duties.

The principle of the responsibility of governments is not otherwise founded, in the opinion of law writers, than on the rule of civil law that each individual is responsible for the acts of himself and his subordinates. (Authorities, articles 1116 of the Venezuelan and 1151 of the Italian code.) In private life the matter of responsibility is easily determined; but not so with the state. The motives which impel the action of the latter are many and various; and when, from whatsoever cause, political society is deeply stirred, it may be necessary for the state to adopt extraordinary, though entirely rational, measures for the

reestablishment of order and safety. Numerous are the reasons for a state's action in such case, and the canons of civil law can not apply to it save in a restricted sense.

These premises once established, it seems to me quite possible to appreciate the true meaning of Article III of the Washington protocol. Venezuela holds (art. 9 of the law of 1873, Seijas, Vol. I, p. 57), that the nation can not be considered responsible for damages, injuries, or expropriations not committed by the constituted authorities operating in a *public capacity*. The responsibility of the Government is therefore limited by and dependent on proof that the acts for which indemnity is claimed have been committed by the authorities while in the discharge of their public functions.

The protocol seems to have desired to avoid these discussions, and the Government admits, in principle, its responsibility; but only in so far as its agents are concerned; not for the acts of individuals — i.e., revolutionists — as that would be an extension of responsibility not contemplated by law, which is not supposable in a public treaty, or juridically deducible, as, according to the fundamental rule of interpretation, every exceptional clause is to be taken *restrictively*.

Governments, according to the authorities, are not responsible for the acts of individuals in rebellion, precisely because they are in rebellion. (Seijas, Vol. I, p. 50.) A government would be responsible, in the concrete, where it had been negligent in the protection of individuals; but in such case the responsibility would arise from the fact that the government, by its conduct, had laid itself open to the charge of complicity in the injury. The acts of revolutionists are outside of the government.

It is not sufficient for a state to prove that it has been injured by individuals residing in another state to entitle it to hold this latter responsible and exact indemnity from it. It is necessary to prove that the prejudicial act is morally chargeable to the state, which ought to or could have prevented it, and has voluntarily neglected to do so. (Fiore, Vol. I, p. 582. sec. 673, Rule g.)

These are the principles which I find applicable to revolutionists when their political character is clearly demonstrable, as in the case of regular forces who follow a definite political purpose. In regard to guerillas, the question appears to me even more simple. These are, generally speaking, men who take advantage of the disturbed state of the country to commit depredations. They are often individuals who seek to satisfy passion or to wreak a personal or local vengeance. Others, again, are simply robbers who operate as such under the guise of revolutionists. We have had in this Commission the case of a band of robbers operating on the road to La Guaira, and calling themselves revolutionists. To hold the state responsible for the acts of such individuals would be impossible, as they would naturally come under the jurisdiction of criminal courts, in common with bandits of any country.

Regarding violations of private property, there exists in the law of 1873 (see Seijas, Vol. I, p. 57) the following provisions:

ART. XI. All persons who unofficially order contributions or forced loans or any act of plunder whatsoever, shall equally with the perpetrators, be held personally and directly responsible to the injured parties.

For cases occurring in war coming before the Commission there has been no amnesty, so that the question is not presented. But in my opinion, even supposing a case in which amnesty has covered everything (which has not been the case), the Government would not be responsible if in its judgment such action had been dictated by motives of high public policy.

It is erroneous to assert that Venezuela covers with the shield of amnesty

the acts of violence committed by revolutionists against individuals. Only political amnesty has been granted, following the policy usual in such cases and it is generally so stated in the decrees issued.

The honorable Commissioner for Italy invokes in support of his argument Article I of the Washington treaty. I do not believe that this article has any such meaning, and even less before a tribunal of jurists called upon to decide questions of absolute equity. This article refers only to claims already presented by Italy, and this article of the treaty, given the condition under which it was signed by Venezuela, was simply a means of ending the blockade. Venezuela was compelled to subscribe to the payment of claims the justice of which she denied, and even to admit that they were just. *Quod scripsi, scripsi*. True, but even Italy, by the mouth of one of her greatest geniuses, has taught the world how much value may attach to a confession wrung by force, and his "*E pur si muove*" is to-day in the mouths of Venezuelans. Article I of the Washington treaty has, I repeat it, no meaning which may strengthen the claims last presented, as it can not be conceived that that which is unknown may be declared just.

The interpretation given by the honorable Commissioner for Italy to the third article of the Washington protocol would give a marked preference in favor of Italian subjects over the claims of the subjects of other countries who are equally entitled to a share in the 30 per cent set apart for the settlement of all claims. If such radical difference had in fact existed the other nations would not have failed to note it.

Article 462 of Bluntschli's Codification of International Law, invoked by the honorable Commissioner for Italy in support of his contention that as Venezuela had not fulfilled her obligation toward Italy the latter nation could claim indemnity for damages, is in my opinion, wrongfully appealed to. It is not true that Venezuela has violated its treaty obligations with the former country. Article 4 of said treaty does not and could not offer to Italians more protection than is afforded Venezuelans, and as in case of revolution or internecine war the Italians only have a right to be indemnified for injuries inflicted upon them by the constituted authorities on the same terms as those granted by existing law to Nationals, Italy can not say that Venezuela has treated Italians less favorably than her own citizens. Article 4 claims no more than this, and it can not be pretended that more protection is due Italians than is accorded Venezuelans. This article anticipates the case of Italians injured in internecine war, and provides that they shall be treated the same as Venezuelans. As the Washington treaty confers an advantage on Italians over Venezuelans in that it creates this Commission, before which they may appear without the necessity of previously having recourse to the tribunals of the country, and provides for the payment of their claims in gold out of the 30 per cent, the protocol takes care to state that the treaty of 1861 may not be invoked. This is the only object of the article referred to, and nowhere in it does it appear that there was any wish to consider the question of the responsibility for the acts of revolutionists. Neither does it appear, so far as I can see, that the "most-favored-nation" clause of the treaty of 1861 gives Italy the right to claim damages for such acts. It does not appear that any such agreement was made with any power, and if any reference is made therein to claims for damages arising in insurrectionary events, it is without doubt to such as are caused by the acts of the Government or governmental authorities.

To take as precedents the decisions of a mixed commission as though they were the clauses of a treaty is an error. A mixed commission gives its decision in each case and with especial reference to all its circumstances. If, therefore, such decisions were regarded as having the force and effect of a treaty, giving

to Italy the right to an advantage equal to the decision in any one identical case, it would be necessary to accord to the decisions in favor of Venezuela corresponding advantages. That is to say, decisions in favor of Venezuela in other commissions would be invoked by her in her favor and against Italy in this Commission. This would lead to the absurdity of submitting this tribunal to the decisions of all the mixed commissions.

The "most-favored-nation" clause referred to by the honorable Commissioner for Italy is absolutely inapplicable in this Commission and has no relevancy.

The decisions of this Commission are not governed by any rule other than that established by Article II of the Washington protocol; that is to say, they will be based on absolute equity, without regard to objections of a technical nature or the provisions of local legislation. This absolute equity is what is understood by the Commissioners to be such, and in the event of their disagreeing the decision of the umpire will be final.

Equity seems to me to be nothing more than the natural application of those rules of reason and justice which nations recognize as surest and which international law recommends in cases submitted for consideration. This is a tribunal of full and absolute jurisdiction and one which has no need to occupy itself with the decisions of other mixed commissions, which may or may not rest on equity, according to the principles governing and applicable only in each case. Furthermore, this tribunal may not be held subject to the precedent of an anterior decision, but is obliged to apply the principles of equity in each case, and if, for an unforeseen cause, a decision has been, in our judgment, incorrect, it is our duty not to perpetuate the error so committed. This is the rule of action of every tribunal.

The cases which the honorable Commissioner for Italy cites in support of his contention (the vessels *Montijo v. Colombia*, *Hero* and *San Fernando v. Venezuela*, and *Easton v. Peru*) do not seem to me to serve as precedents. In the two first, which refer to the seizure of vessels, there is a mingling of juridical questions which complicate and obscure the cases and render them quite distinct in principle from a simple case of injury to the property of a foreigner domiciled in this country. In the case of *Easton v. Peru* that country agreed with the United States to pay the sum awarded, but Moore assigns no ground for such agreement.

Fiore, the authority quoted by the honorable Commissioner for Italy, holds in his writings opinions which, when taken in sequence, support the position taken by me in this case. As quoted, the extracts cited do not correctly render the opinions of that learned writer, who maintains that a state may be held responsible if its system of laws is so grossly imperfect as to be evidently unfit for proper administration. The laws of Venezuela — penal, civil, and of procedure — have been inspired by those of Italy, and in so far as concerns the general order of their principles there is but little disparity between them. It would be difficult for Italy, according to equity and the principles laid down by Fiore, to cast imputations of inefficiency in Venezuela in this respect. The responsibility of a government is in proportion to its ability to avoid an evil. A government sufficiently powerful in all its attributes to prevent the occurrence of evil, but by negligence permitting it, is doubtless more accountable for the preservation of order than one not so endowed. It is on this basis that Fiore determines the responsibility of a government to be in direct ratio to its ability to foresee and avoid danger.

A few final considerations and I have done.

This Commission has not, in my opinion, the right to enter into a general discussion as to the merits of the policy of the Venezuelan Government. That

would be an act of intervention into its national life not warranted by the principles of international law. Venezuela is a sovereign state, recognized as such by all civilized nations, and is not accountable to any foreign power concerning the motives of its political action.

We here are simply acting as judges in the settlement of claims for damages, according to the merits and circumstances of each individual case — nothing more — and I repel the observations of the honorable Commissioner respecting the general policy and administration of the affairs of this country. Venezuela is a member of the family of nations according to the principles of international law, and admitted as such without question. I can not therefore see that there is any necessity for the discussion of this matter. Venezuela, though occupying a very modest position among the civilized powers, may say, in spite of her recent political misfortunes, that her people have a right to consideration as a cultured people for whom there is a brilliant and promising future. Her history is inferior to that of none of the South American states. To four of them her armies have given independence and furnished statesmen. From her soil have sprung Americans who may well be called eminent. Her institutions, though not as yet fully developed, as they surely will be in time, are most generous and liberal and progressive. She enjoys to the fullest degree liberty of conscience, of religion, of thought, and of education. On her shores the stranger enjoys the same measure of civil rights as does the native. Surely a country in which such conditions exist is entitled to consideration and esteem, and should not be judged by the standard of accidental occasions of political perturbations in which damage to property is suffered. Were so ignoble a criterion to be adopted in our estimate of nations, more than one now held in high regard in Europe would appear far otherwise.

Force of circumstances has drawn us into a general discussion of national responsibility for revolutionary acts, but the truth is that such principles are not needed except as the circumstances of each particular case may require.

This should be the procedure of judges, more especially of judges sitting in equity.

In accordance with the ideas expressed by me in the foregoing, I feel constrained to reject and deny the claim of Salvatore Sambiaggio.

ZULOAGA, *Commissioner* (supplementary opinion):

The government is not responsible to individuals for damages caused by factions, revolutions, or mobs in any manner against the constituted authority. It is true that the government should confer protection and security, but only in so far as is permitted by the means at its disposal and according as the circumstances may be verified. So many and so various are the causes which may render a government more or less culpable that it would be impossible to formulate a general idea on the subject. Moreover, so complicated are the circumstances that the solution of this problem in a perturbed state of society is a question of political tact which few statesmen are capable of settling.

There are times when the use of extreme energy and implacable repression may be a great error, serving only to feed the fires of the insurrection.

Revolutions are not here, more than elsewhere, always occasioned by the faults or errors of the government or by a simple spirit of uprising among the revolted. They obey multiple causes, and not infrequently there is in the political horizon of a people a condensation of revolutionary clouds that the patriotism of the best citizens of the government or of the opposition is unable to prevent, so deeply is the reason hidden in political or economical causes.

Europe itself, so proud of the internal peace which its states have succeeded in preserving during the latter half of the past century, sees with alarm, in

spite of the strength of the organization of its governments, the swelling of the socialistic forces and the affiliation therewith of the working masses.

Governments are constituted to *afford* protection, not to *guarantee* it, and it is out of the question that this tribunal should assume to investigate the causes of injury from the general standpoint of interior policy, without running the risk of undertaking to judge not merely the cases of claims for damages submitted to it, but also the very government and country itself, which would be an act of interference wholly unwarranted by the principles recognized by all countries.

It has, however, been maintained by various governments and authorities that in certain particular cases and under certain circumstances thereof a state might properly be charged with responsibility for damages to an individual, in the event of its being demonstrated that the state had been wholly negligent in furnishing the protection which could be reasonably expected from it. In accordance with this theory the government is not responsible for lack of protection not resulting from a culpable neglect so great as to equal an act of its own against private property.

Whosoever, therefore, makes claim against the state in such case must establish two things —

1. That he has actually suffered the damage alleged.
2. That the state is in a certain manner responsible, through its negligence, for the damage committed.

This is the doctrine laid down by Fiore: ¹

It is not sufficient for a state to prove that it has suffered a damage from the acts of individuals residing in another state to charge the latter with responsibility and exact a reparation. It must be proved that the prejudicial act is morally imputable to the said state, or that it could or should have prevented the injury and was voluntarily negligent of its duty in not having done so.

This is nothing more than the application of common law that the burden of proof rests on the plaintiff.

In the application of these principles of indirect responsibility it is necessary to take into account that the government of a country in a state of war meets with graver difficulties and problems than it does in a state of peace; that the means at its command and its especial attention are preferably directed to the reestablishment of order, and that its responsibility is in direct ratio to its ability for so doing.

Speaking of neutrality, Fiore says: ²

The inability of a neutral state to prevent the violation of the laws of neutrality *always* excludes the liability of the government, and consequently the right of the belligerent to consider the neutral state responsible for said violation.

Now, if this rule is so clearly expressed in regard to neutrality, in which the obligations of neutral governments are in a certain way direct, what shall we say when it is a case coming within the internal life of a state?

This principle of the responsibility of a state by reason of its negligence is moderated, however, by that which holds that foreigners can not in any territory expect to receive more than is accorded the nationals, and according to the law of Venezuela the state is not responsible for the acts of revolutionists.

Setting aside all discussion as to principles of international law, to which we were brought by the necessity of understanding the meaning of certain statements in the Washington protocol, and keeping strictly within the principle of absolute equity, I would ask, Is it equitable that foreigners domiciled in

¹ See Vol. I, sec. 673, p. 582.

² See sec. 1569.

Venezuela should expect to escape the political condition of the country, and obtain, as an advantage over the natives, not only payment for damages inflicted on them by the Government, but for those caused by the rebels the Government was combatting, and against whom it was expending all its energies, blood, and treasure? Is it equitable that, as between a Venezuelan and a foreigner, the former should say, "My home is in mourning for cherished members of my family who have perished in defense of the state; I myself am ruined from the enforced neglect of my business: I have been the victim of the enemy," while the foreigner may say, "I have lost nothing by the war; I am as safe as in times of peace; not only does the government (which I do not defend) pay me for the losses which it has inflicted on me but for those occasioned by its enemies as well."

I believe that in equity such claims should be rejected.

RALSTON, *Umpire*:¹

The Commissioners for Italy and Venezuela differing as to the right of recovery in the above-mentioned case, the same was duly referred to the umpire for decision under the protocol.

The claimant, Salvatore Sambiaggio, a resident of San Joaquín Parish, State of Carabobo, demands the sum of 5,133.52 bolivars for forced advances made to, property taken by, and damages suffered from revolutionary forces under command of Colonel Guevara on or about July 27, 1902, with the additional amount of 171.63 bolivars for costs and interests.

The immediate and most important question presented is as to the liability of the existing government for losses and damages suffered at the hands of revolutionists who failed of success.

Let us treat the matter first from the standpoint of abstract right, reserving examination of precedents, the treaties between the two countries, and the question whether there be anything to exempt Venezuela from the operation of such general rule as may be found to exist.

We may premise that the case now under consideration is not one where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists; but simply where there exists open, flagrant, bloody, and determined war.

The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.

But, speaking broadly, are revolutionists and government so related that as between them a general exception should exist to the foregoing apparently axiomatic principle?

The interest of a government, like that of an individual, lies in its preservation. The presumed interests of revolutionists lie in the destruction of the existing government and the substitution of another of different personnel or controlled by different principles.

To say that a government is (as it naturally must be) responsible for the acts it commits in an attempt (for instance) to maintain its own existence, and to require it at the same moment to pay for the powder and ball expended and

¹ For a French translation see Descamps-Renault, *Recueil international des traités du XX^{ème} siècle*, 1903, p. 808.

the soldiers engaged, in an attempt to destroy its life, is a proposition difficult to maintain, and yet it is to this point we arrive in the last analysis if governments are to compensate wrongs done by their would-be slayers when engaged in attempts to destroy them.

A further consideration may be added. Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition. When we bear in mind that for six months previous to the taking complained of in the present case a bloody and determined revolution demanding the entire resources of the Government to quell it had been raging throughout the larger part of Venezuela, it can not be determined generally that there was such neglect on the part of the Government as to charge it with the offenses of the revolutionists whose acts are now in question.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because —

1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.

3. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraint.

Let us now discuss the decisions of courts and commissions relative to the question at issue.

The case of *Prats v. The United States* was presented before the American and Mexican Mixed Commission of 1868, and was for the destruction of a brig by the Confederate forces during the American civil war.

Nonresponsibility on the part of the United States [said Mr. Wadsworth, speaking for the Commission], for injuries by the Confederate enemy within the territories of that Government to aliens did not result from the recognition of the belligerency of the rebel enemy by the stranger's sovereign. *It resulted from the fact of belligerency itself* and whether recognized or not by other governments. * * * The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, transient or dwelling? We have no difficulty in answering that question in the negative.

* * * * *

The principle of nonresponsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted. (Moore's Digest, Vol. 3, pp. 2886-2892.)

As will appear by reference to Moore, Volume 3, page 2900, the same Commission followed this rule in various cases like in principle.

The United States was not held liable to foreigners for contracts entered into between them and the Confederate States during the civil war. (Moore, Vol. 3, pp. 2900-2901.)

A somewhat like principle was invoked when the American and Mexican Claims Commission of 1868 refused to hold Mexico responsible for the acts of the Maximilian government which was striving to accomplish its overthrow. (Moore, Vol. 3, p. 2902.)

The case of Daniel N. Pope was presented before the American and Mexican Claims Commission of 1859 for damages inflicted by a sudden insurrectionary movement which was soon quelled by the authorities. Mexico was not held responsible. (Moore, Vol. 3, p. 2972.)

So losses inflicted upon a foreigner by a government not recognized as de facto were not recompensed. (*Schultz v. Mexico*, American and Mexican Claims Commission of 1868, Moore, Vol. 3, p. 2973.)

In the Cummings case, before the same Commission, the umpire, Sir Edward Thornton, held that if the parties inflicting the damage were rebels, the Government was not responsible for the loss. (Moore, Vol. 3, p. 2977.)

In the case of Walsh, for imprisonment by rebels, the same umpire held that the Mexican Government could not be held liable. (Moore, Vol. 3, p. 2978.)

Like principles to these laid down in the foregoing cases were followed in the cases of Wyman and Silva. (Moore, Vol. 3, pp. 2978, 2979.)

The case of Divine (Moore, Vol. 3, p. 2980) is notable in that the American agent contended that Mexico should be held responsible as she had pardoned the revolutionist and had conferred high office upon him; but the umpire held that

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,

and dismissed the claim.

Still other commissions have followed the same rule. In the case of McGrady et al. v. Spain (Spanish and American Commission of 1871), a claim merely setting up wrongs and injuries committed by insurgents was dismissed. (Moore, Vol. 3, p. 2981. See to like effect *Zaldivar v. Spain*, Moore, Vol. 3, p. 2982.)

Before the American and British Claims Commission of 1871 was heard the oft-cited case of Hanna, for destruction of cotton by the Confederate forces during the American civil war. After thorough discussion, the Commission unanimously held —

that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control and which acts they had no power to prevent. (Moore, Vol. 3, p. 2982.)

The same principle was followed in the cases of Laurie and others (Moore, Vol. 3, p. 2987) and Stewart (p. 2989).

The last Commission to consider the point under discussion and decide thereon was the Spanish Treaty Claims Commission, formed by act of the American Congress dated March 2, 1901.¹

The treaty of December 10, 1898, between the United States and Spain² provided that "The United States will adjudicate and settle the claims of its citizens against Spain and relinquished in this article," and to render effective this provision the Commission was constituted.

The article referred to released all claims that had arisen in favor of the nationals of either country against the other "since the beginning of the late insurrection in Cuba."

¹ Stats. at L., vol. 31, p. 1011.

² Art. 7, Stats. at L., vol. 30, p. 1754.

After the most thorough discussion of the question now before the umpire and the most ample consideration by the Commission it was decided by a majority — the minority apparently not dissenting from the statement of principle, but regarding it as abstract or qualified by certain treaty stipulations or other matters not in point here — that —¹

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense, which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States, and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities, by the exercise of due diligence, might have prevented the damages done, Spain will be held liable in that case.

We may now consider the opinion of public men and international law writers.

Without discussing in detail the expressions of American Secretaries of State, in the opinion of the umpire they are correctly summarized in the head notes of section 223 of Wharton's Digest of International Law, as follows:

A sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control or whom the claimant government had recognized as belligerents.

Says Hall, in his work on International Law, page 231:

When a government is temporarily unable to control the acts of private persons within its dominions, owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control. When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control, and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state.

In a note to the foregoing he remarks that during the American civil war the British Government refused to procure compensation for injuries inflicted by the United States forces on British subjects, remitting them to American courts for such remedies as were open to American citizens.

While the exact point at issue is not discussed by Bluntschli, he approaches it when he says (see sec. 380, bis):

Par contre, les États ne sont tenus d'accorder d'indemnités pour les pertes ou les dommages subis par les étrangers aussi bien que par les nationaux à la suite de troubles intérieurs ou de guerre civile.

¹ Opinion No. 8.

The British minister at Bogotá, on August 23, 1887, wrote, with relation to claims for destruction of property at Panama in 1887, as follows:

From the information obtained by Her Majesty's Government it is clear that the destruction of Colon was entirely due to the action of the insurgents who had declared themselves against the Government, and who, having succeeded in obtaining for a short period complete possession of and mastery over that town, proceeded to set fire to it in several places; nor does it appear to be open to question that at the time when these events occurred the Colombian Government was entirely powerless to prevent, although they eventually succeeded in quelling, the rebellion.

In these circumstances there is not, in the opinion of Her Majesty's Government, sufficient ground for contending that the destruction of Colon was so directly due to any default on the part of the Colombian Government as to justify a demand for compensation on behalf of those British subjects who, like yourself, have unfortunately incurred losses through the fire. (U.S. Senate Doc. 264, 57th Cong., 1st sess., p. 163.)

Whether the assumptions of fact contained in the foregoing are correct or not the statements of law may be accepted as a summary of the British position.

We may appropriately quote Escriche, who describes a fortuitous case for which no responsibility exists, as follows:

Caso fortuito es el suceso inopinado, ó la fuerza mayor, que no se puede preveer ni resistir. Tales son las inundaciones, torrentes, naufragios, incendios, rayos, violencias, *sediciones populares*, ruinas de edificios causadas por alguna desgracia imprevista, y otros acontecimientos semejantes.

According to Seijas, Volume III, page 538:

El gobierno inglés, como el ruso, el francés, el italiano y el español, han proclamado y sostenido la irresponsabilidad del estado por perjuicios ocasionados á extranjeros por tropas revolucionarias, y aún por las constitucionales, quando el daño no ha sido voluntario y deliberadamente causado.

While M. Despagnet does not more than touch the subject in his "Droit International Public," he says (p. 353):

Mais les étrangers peuvent souffrir un préjudice à la suite d'une guerre, d'une révolution, ou d'une émeute éclatant dans le pays où ils se trouvent; il est universellement admis aujourd'hui que la protection diplomatique ou consulaire ne peut être invoquée en pareil cas, parce qu'il s'agit d'un accident de force majeure, dont les étrangers courent le risque absolument comme les nationaux du pays. Ce serait, d'ailleurs, trop restreindre la liberté d'action des belligérants ou du gouvernement qui combat les insurgés que de les obliger à respecter les biens et les personnes des étrangers, alors surtout qu'il est souvent impossible de les distinguer dans une lutte violente.

Calvo remarks (sec. 86) that:

Les étrangers établis dans un pays en proie à la guerre civile et auxquels cet état de choses a occasionné des préjudices n'ont eux-mêmes aucun droit à des indemnités, à moins qu'il ne soit positivement établi que le gouvernement territorial avait le moyen de les protéger et qu'il a négligé d'en user pour les mettre à l'abri de tout dommage. Ces principes ont dans plus d'une circonstance été reconnus explicitement par les gouvernements d'Europe et d'Amérique.

To support the above statement he cites Grotius, book 2, chapter 25, section 8; Vattel, book 2, chapter 4, section 56; Wheaton, Part I, chapter 2, section 7; Kent, Volume I, sections 23 et seq.; Twiss, section 21; Rutherford, Institutes, book 2, chapter 9; Puffendorf, book 8, chapter 6, section 14; Bynkerschoek, book 2, chapter 3; Wildman, Volume I, pages 51, 57, 58; Halleck, chapter 3, section 20; Martens, sections 79-82; Lawrence, Part I, chapter 2, section 7;

Pinheiro Ferreira, Volume II, pages 5 et seq.; Lawrence's Wheaton, note 16; Dana's Wheaton, note 15; Hall, pages 27-30.

In the work of J. Tchernoff, entitled "Protection des Nationaux Résidant à l'Étranger," page 337, the question is touched upon as follows:

On se trouve en présence d'insurgés qui ne sont pas reconnus. Ils commettent des actes qui d'une part sont accomplis en violation des lois de la guerre, et d'autre part sont de nature à causer des dominages aux sujets neutres. On ne peut parler de la responsabilité internationale des insurgés puisqu'ils n'existent pas pour le droit international public. Nous savons, nous venons de dire pourquoi, on ne peut rendre responsable de leurs actes le gouvernement légal.

Certain cases have been or might be cited contrary, or presumed to be contrary, to the enunciations of principle already indulged in by the umpire. They should be enumerated.

The first mentioned by the honorable Commissioner for Italy is the *Montijo* case, cited in 2 Moore, pages 1421 et seq. In this case the steamer *Montijo* was taken possession of by State revolutionists. After a short career they surrendered to the regularly constituted authorities of the State, which, according to the opinion of Umpire Sir Robert Bunce, granted them amnesty and stipulated as one of the conditions of peace that the State would pay for the use of the vessel. This contract, the umpire held, bound the Colombian Government. He went further, and in addition held that the Government had failed to perform its duty in that it had not recovered the *Montijo* and returned her to her owners, following with some general observations as to the duties of governments, which, however well meant, were not necessary to the decision of the case and not discussed by the parties. That the final result was correct is not doubted.

The next citation made by the honorable arbitrator for Italy is of the Venezuela Steam Transportation Company against Venezuela. Unfortunately, the grounds of the decision are not stated in the award. We learn from the agent's report (p. 11) that among the contentions of the United States were the following:

1. That the seizure, detention and employment of the three steamers of complainant and the imprisonment of its officers * * * was —

(a) An invasion of the rights of the complainant in derogation of principles of international law; (b) was contrary to equity and justice; (c) and was in violation of the special privileges conferred by Venezuela upon the complainant under provisions of the act of Congress of May 14, 1869.

2. That by reason of the invasion of these rights and privileges Venezuela was internationally liable and is bound to indemnify complainant pecuniarily to the extent of the damage proven.

Considering the multiplicity of contentions advanced on behalf of the United States and the absence of reasoning in the decision, it is impossible to say on what principle the case was decided, although it is fair to remark that it might be inferred from the dissenting opinion of Commissioner Andrade that the case affords support for the theory of the honorable Commissioner for Italy.

Reference is next made to the case of Easton and others, supported by the United States, against Peru. As appears by the report in Moore, page 1629, the injuries complained of were inflicted by revolutionists, and a claim therefor presented before the United States and Peruvian Claims Commission. The question of Peru's liability for acts of revolutionists seems not to have been discussed, the Commissioners simply disagreeing as to the amount of the award, and the case going to the umpire, whose opinion is not given. Whether there were or not circumstances withdrawing the case from the usual rule does not appear.

The honorable arbitrator for Italy next cites the Panama riot claims (2 Moore pp. 1361 et seq.); but it seems clear that the citation is not in point, these claims having grown out of an assault in which the police themselves took part, and the Government being held liable for failure of its officers to do their duty, nothing approaching the present revolutionary question appearing.

The opinion of the honorable Commissioner for Italy invites attention to Bluntschli, article 462, and Fiore, sections 645, 651, and 657.

Bluntschli, in the article indicated, lays down conditions which would justify forcible interference by one state in the affairs of another; but the present situation does not seem to be such as to make his words applicable.

The positions taken by Fiore may be regarded as being in direct accord with the theory of the present decision. Furthermore, we may accept, as, in fact, has already been accepted, in principle, the words of Fiore (sec. 656), when he says:

Non é facile stabilire regole astratte per determinare quando la mancanza di diligenza per parte di un governo nel calcolare le conseguenze possibili e prevedibili del proprio sistema di leggi e di procedure, posse costituire una omissione volontaria, o tale da rendere lo Stato responsabile. Tutto dipende dal rapporto tra il dovere astratto dello Stato e le circostanze di fatto, e tra il pericolo del danno e la prevedibilità.

La diligenza colla quale un governo deve provvedere a che siano rispettati i doveri internazionali dovrà certamente essere maggiore quando per la forza degli avvenimenti siano posti in giuoco molti interessi, quando la società internazionale sia agitata, quando il pericolo che accadano fatti a danno di un Stato amico, sia maggiore. Di maniera che la solerzia colla quale dev' essere tenuto un governo é in ragione diretta delle circostanze che rendono più o meno imminente ed il danno che si può provvedere ché i terzi possono soffrire; la sua responsabilità effettiva poi in ragione diretta del dovere di essere solerte dei mezzi dei quali poteva disporre, e dei quali sei servito per allontanare il pericolo. (See Fiore, *Droit Int. Privé*, Antoine's ed., sec. 671.)

There is, however, the broad difference hereinafter pointed out between indulgence in a settled presumption, on the one hand, and an investigation of the facts and appreciation of the circumstances in each case.

It is suggested, in the opinion of the honorable Commissioner for Italy, among other things, first, that the Italian protocols implicitly recognize the obligation of Venezuela to pay for injuries committed by revolutionary troops; and, second, that under a proper reading of Article VIII of the protocol of February 13, bearing in mind that France and Venezuela, by the protocol of February 19, 1902, had expressly recognized damages arising from "insurrectionary events," and that the German protocol refers to claims resulting from the present Venezuelan civil war, Italy, under the "most favored nation" clause appearing in such article of her protocol, is entitled to be paid for injuries inflicted upon her subjects, and of the nature above indicated.

To fully understand these contentions a recital of the facts with relation to the diplomatic situation between Italy and Venezuela seems essential.

By article 4 of the treaty between the two nations, dated June 19, 1861, it was provided, among other things, as follows:

ART. 4. The citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property, and shall have in this respect the same rights and privileges accorded to the nationals, and shall be subject to the conditions imposed on the latter. * * *

In cases of revolution or internecine war the citizens and subjects of the contracting parties shall have the right, in the territory of the other, to be indemnified for loss or damage to person or property inflicted by the constituted authority in the same measure as would, under similar circumstances, be granted nationals according to the laws which are or may be in vigor.

Article 26 provides:

It is agreed between the high contracting parties that in addition to the foregoing stipulations the diplomatic and consular agents, all citizens, vessels, and merchandise of each state, respectively, shall enjoy the full right in the other to the franchises, privileges, or immunities accorded the most favored nations, gratuitously if the concession has been gratuitous, and on similar terms if the concession was a conditional one.

Discussions, the nature of which will be alluded to hereafter, arising between the two countries, by Article VIII of the protocol of February 12, 1903, it was provided as follows:

ART. VIII. The treaty of amity, commerce, and navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed. It is, however, expressly agreed between the two governments that the interpretation to be given to articles 4 and 26 is the following:

"According to article 4, Italians in Venezuela and Venezuelans in Italy can not in any case receive a treatment less favorable than the natives, and according to article 26, Italians in Venezuela and Venezuelans in Italy are entitled to receive in every matter, and especially in the matter of claims, the treatment of the most favored nation, as is established in the same article 26."

If there is any doubt or conflict between the two articles, the article 26 will be followed.

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

Article IV of the present protocol reads as follows:

ART. IV. The Italian and Venezuelan Governments agree that all the remaining Italian claims, without exception, other than those dealt with in Article VII hereof, shall, unless otherwise satisfied, be referred to a Mixed Commission, to be constituted as soon as possible in the manner defined in Article VI of the protocol, and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be:

- (a) Whether the injury took place or whether the seizure was wrongful; and,
- (b) If so, what amount of compensation is due.

In other cases the claims will be referred to the Mixed Commission without reservation.

It is evident that the protocol last mentioned does not directly recognize any obligation on the part of Venezuela to pay for injuries inflicted by revolutionary troops, and the first question is whether it does so by implication. It seems clear that under the treaty of 1861 revolutionary claims could not have been entertained, for the obligation recognized by Italy and Venezuela reciprocally was to indemnify for the loss or damage inflicted by the constituted authority of the country, and then only in the same measure as nationals would be.

Consequent upon the revolutionary events of 1896 to 1900, injuries inflicted upon Italian citizens were the subject of the diplomatic discussion between the countries. A careful examination of the correspondence shows that it did not relate to the questions of liability or nonliability for the acts of revolutionists, but rather to the power of Venezuela under its decree of February 14, 1873, republished January 24, 1901, to remit Italians and other foreigners to the local authorities for relief. Bearing in mind the fact that the only treaty obligations then existing were to indemnify against injury by the constituted authorities of the country we can readily understand why it was that in the

diplomatic correspondence, as stated, no reference whatever exists to the question of liability for damages from acts of unsuccessful revolutionists, and none of the Italian claims submitted to the Venezuelan foreign office were for such injuries.

The article does not in itself refer to any specific classes of acts, and a natural and logical interpretation would be that it charged Venezuela with the fullest responsibility for the acts of her authorities of whatever nature, legal or otherwise, or other acts for which she might be responsible from the standpoint of international law, not for the acts of those over whom she had no control. This interpretation would not necessarily render the words meaningless or superfluous when we remember that at the time they were written there existed in full force the law of February 14, 1873, which provided only a limited responsibility, as follows:

ART. 9. En ningún caso podrá pretender que la Nación ni los Estados indemnicen daños, perjuicios, ó expropiaciones, que no se hubieron ejecutado per autoridades legítimas, obrando en su carácter público.

Article 14 of the constitution of Venezuela of April, 1901, contains the foregoing provision, but with the words applying it "tanto los nacionales como los extranjeros," while article 13 provides:

ART. 13. Los extranjeros gozan de todos los derechos civiles que gozan los nacionales. Por tanto, la Nación no tiene ni reconoce á favor de los extranjeros ningunas otras obligaciones ni responsabilidad que las que á favor de los nacionales se hayan establecido en igual caso en la constitución y en las leyes.

Venezuela, in addition, denied in principle the right of a foreigner to present any claims save before her own forums, and permitted that only for a limited time. About these points alone the discussion between the two Governments turned. It is therefore inconceivable that Venezuela by the protocol should have admitted liability for a large class of claims never contended for by Italy, her admission so naturally relating to a liability denied by both laws and constitution.

An interpretation which would extend the liability of Venezuela under her admission to acts of revolutionists would enlarge its limits to include any liability, no matter how generally denied by internationalists, and whether the damages were the result of private wrongs or unexpected brigandage, were committed by a power invading Venezuela or were the effect of an accident in the international sense as applied to war; in every case must Venezuela pay — a conclusion manifestly impossible. In the umpire's opinion, there must properly be the premise always understood that the claim is of a nature to create liability under international law — in other words, it must be for a legal injury. (See Webster's Dictionary, title Injury.)

Let us accept for a moment the interpretation insisted upon by Italy and see the result. Venezuela would be bound not alone for her own acts, but generally for all acts — bound for the acts of those seeking to destroy constituted government as well as to defend it; bound for every claim of damage the royal Italian legation might see fit to present. She would be held to have abandoned the usual position of a contracting party and to have consented to place herself within the judgment of those claiming against her, leaving only the amount of the claim to be determined. The Commission would no longer determine whether the (legal) injury took place, for all claimed offenses, no matter by whom committed, would constitute injuries in the eyes of the Commission. To indulge in such supposition is to imagine that the representative of Venezuela had abandoned reason when the protocol was signed, and an interpre-

tation according common sense to both parties signing a contract should always be sought.

Let us for a moment analyze the language of the protocol in view of the facts. Venezuela had for a long time by her constitution and laws denied her liability for certain classes of acts, and denied that she was responsible anywhere save in her own courts.

By the protocol she admitted liability for injury to persons and property and wrongful seizure of the latter, and remitted to a mixed commission the questions (a) whether the injury took place, and (b), if so, what amount of compensation is due. In aid of the sense we may presume that the word "injury," when last used, includes injury to person and property and wrongful seizures.

It has already been pointed out that "injury" imports a damage inflicted against law. It involves a wrong inflicted on the sufferer and of necessity wrongdoing by the party to be charged, as otherwise it could not be called "wrongful" as against him. Applying this doctrine, which the umpire believes to be unassailable, by what process of ratiocination can he imply to Venezuela the wrongful intent lodged in the bosoms of those who were at enmity with her and seeking to destroy her established Government? And if he may not do so, how can he charge Venezuela with the commission of acts of which she is innocent? And how, under such circumstances, can he find that an injury has been committed with which, by the law of nations, she should be so charged?

If it be argued that she has admitted liability for the acts of another, and therefore she should pay, is it not to be remarked that a promise to pay for the acts of one's enemy engaged in an attempt upon one's own life is so far contrary to the usual practice of mankind that it is only to be believed upon the most direct and express evidence, and beyond all dispute this evidence is lacking.

But even if the case were not clear, as it seems to be, applying the usual rules of law, and bearing in mind the tendencies of human nature, what are we taught as the canons of interpretation in such cases?

Woolsey's International Law, section 113, gives as one of the most important rules of interpretation:

2. If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted. For in securing a benefit he ought to express himself clearly. The sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer.

Wharton's Digest, section 133, expresses a like idea in these terms:

If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by party accepting it.

In the same sense says Pradier-Fodéré (section 1188):

Les auteurs modernes reconnaissent que * * * les stipulations douteuses doivent être interprétées dans le sens le moins onéreux pour la partie obligée.

Vattel expresses himself (sec. 264, Tome II) as follows:

Si celui qui pouvait et devait s'expliquer nettement et pleinement ne l'a pas fait, tant pis pour lui; il ne peut être reçu à apporter subséquemment des restrictions qu'il n'a pas exprimées.

Summing up the foregoing, the umpire thinks that if it had been the contract between Italy and Venezuela, understood and consented to by both, that the latter should be held for the acts of revolutionists — something in derogation of the general principles of international law — this agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.

As above indicated, it is strongly urged, in connection with Article VIII of the protocol, that because of the presence of the "most-favored-nation" clause the umpire should give to Italy all the advantages which might be claimed by Germany and France by virtue of the protocols made with those powers.

At first glance the suggestion would appear to be well founded; but a careful study of the article will, in the umpire's opinion, prove the argument erroneous.

At the time the protocol was signed relations between Italy and Venezuela were so far broken that, as shown by the language of the article, it was necessary to "renew and confirm" the old treaty.¹

Italy then asked and obtained a special interpretation of the treaty of 1861 with her. If this interpretation is to be given a retroactive effect, and if it is to be considered as applying in favor of Italy, all the provisions of other protocols recently signed, then a resort to such instruments is necessary in every case to learn the furthest bounds of the powers of this Commission. Unless both elements concur we need not refer to them.

Has, therefore, this new interpretation of articles 4 and 26 of the old treaty any retroactive effect? If it has not, the rights of Italian subjects and the duties of the Venezuelan Government are fixed by treaty or international laws as of the date of the occurrence complained of, but modified by such provisions of the protocol as do not form part of the treaty of 1861 as now interpreted.

Treaties are to be interpreted, generally, *mutatis mutandis*, as are statutes (Wharton's Digest, sec. 133), and on many occasions the Supreme Court of the United States has held that in the absence of express language statutes will not be held to be retroactive. In one of the most recent cases brought before that tribunal it was held that —

a statute should not be construed to act retroactively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. (*City R. Co. v. Citizens' Street R. Co.*, 166 U.S., 557.)

The case now before us, as above indicated, is substantially that of a treaty "renewed and confirmed," with a new interpretation as to claims, but not in terms relating back to past conditions or justifying the umpire in believing that new obligations as to past events had been called into existence by its signing.

This belief is borne out by the fact that the signers of the protocol did not think that this renewed treaty related back, for if they had done so they would not have concluded the article with the words:

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

If the treaty, as newly interpreted, had, in the signers' opinion, related back, these words would have been unnecessary, for, giving full force to the interpretation as relating to an earlier date, there would have been nothing for Italy to fear. If the treaty uninterpreted could have been invoked, save for the presence of the words in the protocol, there was reason to believe that its Article IV, above cited, would have defeated many Italian claims.

Article VIII, though found within a temporary protocol, is in fact part of a renewed treaty and relates necessarily to the treatment to be accorded citizens

¹ It will be noted that the permanent court of arbitration at The Hague, sitting in the Venezuelan case, found that the blockade resulted in war between Great Britain, Germany, and Italy on the one hand and Venezuela on the other. (Vol. IX, of these Reports, p. 105.)

and subjects by general and permanent rules between nations, and not to momentary rules of decision controlling the disposition of claims arising out of past events. Rules for the settlement of prior disputes, which die with the Commission acting under them, accord nothing partaking of "favored-nation" treatment; for, to illustrate, suppose Venezuela had said in a protocol with Switzerland ten years ago that to settle by arbitration a dispute affecting a single individual she had admitted her liability for the acts of robbers, could that admission now be invoked by Italy as against Venezuela? Is the case stronger or the rule different because France, for instance, has now a hundred or more claimants? Must the umpire examine the records of every past commission to be sure that Italy is receiving "favored-nation" treatment before him?

If the idea presented by the honorable Commissioner for Italy were to prevail, would not inextricable confusion result? Must the umpire of the Italian-Venezuelan Commission withhold his decision on a particular case until another commission decide it, and follow the views then expressed? If he decide a certain proposition against Italy, and any other commission thereafter give a more favorable decision, must he, in subsequent cases, abandon his opinions despite his solemn declaration at the formation of this Commission, or must he insist upon them, notwithstanding that the Commission primarily charged with the interpretation of the other protocol be of a different opinion?

The umpire concludes that the interpretation of the old treaty in Article VIII of the protocol has no retroactive effect and no reference to the pending arbitrations.

The umpire has discussed the foregoing as if the French and German protocols might give superior rights to those granted to Italy, but expresses no opinion on this point.

It is strongly insisted on behalf of the claimant that whatever may be the general rule of international law with respect to the nonliability of governments for the acts of revolutionists, this rule does not find a proper field of operation in Venezuela, the country being subject to frequent revolutions.

It is true that an exception such as is indicated has on various occasions been maintained by the United States and several European nations in their dealings with certain Central and South American states. But the exception can not be said to have become a settled feature of international law, not having been accepted by the nations against which it was enforced, and being repudiated by some international writers (Calvo, sec. 1278) and perhaps squarely accepted by none.

Attorney-General Cushing, a lawyer of deserved eminence in international affairs, remarked nearly fifty years ago (2 Moore, p. 1631):

Great Britain, France, and the United States had each occasionally assumed in behalf of their subjects or citizens in those countries (South American) rights of interference which neither of them would tolerate at home — in some cases from necessity, in others with questionable discretion or justification. In some cases such interference had greatly aggravated the evils of misgovernment. Considerations of expediency concurred with all sound ideas of public law to indicate the propriety of a return to more reserve in this matter as between the Spanish-American republics and the United States, and of abstaining from applying to them any rule of public law which the United States would not admit in respect of itself.

To take the position, as is asked, that Venezuela is in the regard under discussion an exception to the general rule we must have the right to decide, and must actually decide, that Venezuela does not occupy the same position among nations as is occupied by nations contracting with her. Is this justifiable?

For about seventy years Venezuela has been a regular member of the family

of nations. Treaties have been signed with her on a basis of absolute equality. Her envoys have been received by all the nations of the earth with the respect due their rank.

The umpire entered upon the exercise of his functions with the equal consent of Italy and Venezuela and by virtue of protocols signed by them in the same sovereign capacity. To one as to the other he owes respect and consideration.

Can he therefore find as a judicial fact, even inferentially (the protocol not authorizing it in express terms), that one is civilized, orderly, and subject only to the rules of international law, while the other is revolutionary, nerveless, and of ill report among nations, and moving on a lower international plane?

It is his deliberate opinion that as between two nations through whose joint action he exercises his functions he can indulge in no presumption which could be regarded as lowering to either. He is bound to assume equality of position and equality of right.

The umpire is the more confirmed in this opinion because of the fact that at the time of the happening of many of the offenses committed by revolutionists upon which claims against Mexico before the several commissions were founded, Mexico was experiencing internal disorders and revolutions certainly not less marked than those from which Venezuela had suffered within the past five years. Nevertheless Mexico was not charged with responsibility.

While the umpire considers the rule of action above indicated as that which must control him, he does not ignore the fact that the existence of the protocol implies that Venezuela may have failed in her duties in the light of international law in certain instances, and that as to such cases his powers as an umpire may be called into play. But in his mind there is a broad difference between indulgence in a general presumption of inferior status and the acceptance of proof of wrongdoing in particular instances.

The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved.

It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

It is further urged that absolute equity should control the decisions of the Commission and that equitably sufferers from the acts of revolutionists should be recompensed. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason.

In the view of the umpire, the true interpretation of the protocol requires the present tribunal, disregarding technicalities, to apply equitably to the various cases submitted the well-established principles of justice, not permitting sympathy for suffering to bring about a disregard for law.

The umpire will close the discussion by quoting upon this point from Mèrignhac's *Traité d'Arbitrage*, section 305:

Cet usage est assez fréquent entre particuliers (permitting to the arbitrator absolute liberty of decision). Grotius en parlait déjà et ne voyait aucune bonne raison de le prohiber au regard des parties ayant une confiance absolue en l'arbitre (conf. art. 1019 du code de procédure civile français). Dans ce cas aucune règle ne s'impose, en principe, à l'arbitre international, et il est libre de statuer "suivant sa conscience personnelle." Nous estimons, cependant, qu'on ne saurait trop lui recommander de se conformer, toutes les fois qu'il le pourra, aux solutions du droit

international, mitigé, le cas échéant, par l'équité, comme nous l'avons dit. En agissant autrement il risquerait souvent de faire fausse route, car, si grandes que soient son autorité et son expérience personnelles, elles ne peuvent évidemment aboutir à des déductions aussi sûres que celles qui ont été approuvées par une longue pratique internationale et l'usage constant des peuples civilisés. Il faut ranger dans la classe des compromis, laissant toute liberté à l'arbitre, ceux qui lui permettent de juger suivant la justice et l'équité; cette formule vague aboutit en effet à lui laisser une liberté absolue.

Governed by what he regards as the clear teachings of international law, the umpire will sign a judgment dismissing the case.

In conclusion, the umpire desires to express his appreciation of the industry and learning displayed on behalf of Italy and Venezuela in the preparation of the case.

MAZZEI CASE

Venezuela ultimately receiving property originally taken by revolutionists, equitably should pay therefor.

RALSTON, Umpire:

The honorable Commissioners for Italy and Venezuela disagreeing as to the above-entitled claim, it was referred to the umpire.

The facts of the claim are somewhat obscure in certain particulars, because the appropriate dates are not always given, but the following is believed to be a correct statement:

On November 16, 1899, Generals Leopoldo and Victor Bautista, of the Government forces, took from the claimant a horse and some other animals, which the claimant valued at 16,000 bolivars, but which are not valued in the testimony, or their number given, save that the claimant refers to "two superior jacks" and the witnesses to "burros" or "animals." The horse taken was returned.

On January 18, 1900, revolutionary forces took merchandise and animals. We may dismiss further mention of this taking, as it comes within the rule laid down in the *Sambiaggio* case.¹

On October 12, 1901, factional forces under command of General Briceño and Col. Nicolás Geres took 30 mules valued at 624 bolivars each, or a total of 18,720 bolivars. These forces being shortly thereafter defeated, the mules were taken possession of by the Government and not returned to the claimant.

With regard to the taking of November 16, 1899, the number of animals taken does not clearly appear. The umpire is limited to the smallest number given, the "two superior jacks." The valuation of 250 bolivars, in the absence of specific evidence, may be placed upon them.

As to the taking of October 12, 1901, while the claimant was in the first place a sufferer at the hands of the revolutionists, nevertheless, the property taken finally fell into the hands of the Government and was retained by it. Having, therefore, received the benefit of the claimant's animals, the umpire believes it entirely equitable that the Government should pay therefor.

A judgment will therefore be entered for the sum of 18,970 bolivars plus interest from the date of the presentation of the claim to December 31, 1903.

¹ *Supra*, p. 499.

DE ZEO CASE

A claim founded upon supposed wrongful acts attributed to minor public officers should be clear and definite in its statements and proof and show unavailing appeal to superior authority to justify recovery against a State.¹

RALSTON, *Umpire*:

The honorable Commissioners for Italy and Venezuela differing in opinion, the above cause was duly referred to the umpire for decision.

The claimant, in person or through his witnesses, states that in the middle of the year 1885 he was a merchant residing in Mucuchies, Province of the Andes, and had built up a flourishing business, with large investment of capital; that there were due him credits payable generally at the end of the then present year or the beginning of the following; that his prosperity excited the envy of the local authorities, and on the return of Gen. Rosendo Medina to resume the position of president of the State, he, the claimant, became the object of furious and persistent persecutions by the authorities of Mucuchies, being finally compelled to flee, abandoning everything; that he was never able to return home, but after an absence of a year and a half he returned as near as Medina; that thereafter he brought suit in the local courts to recover debts due him, but the "expedientes" were "extracted" and his debtors were warned, under threats, not to pay him; that he did not finally bring suit because of these facts (although a superior court in 1886 adjudged that his testimonial proof was sufficient), since suit had to be brought in the locality where the acts complained of had been committed, and the same authorities were still in power and inspired with animosity against him and he could not procure an attorney.

The testimony of a number of witnesses was taken and it sustained, in a general way, the above allegations, fixing his damages from every cause, including indirect damage resulting from loss of business down to 1896, at 140,000 bolivars.

If we may presume that the complaint of the claimant embodies a just ground of recovery, it is to be noted that neither he nor his witnesses state the nature of the persecutions to which he was subjected (except the "extraction" of "expedientes," by whom taken not being stated), by whom these persecutions were inflicted (save as they are said to have been by unnamed local authorities), the threats leveled against him, causing flight, the value of the stock he lost, the value of his yearly business, the amount of outstanding credits he was compelled to sacrifice, the value of his lands and improvements, the damage experienced from their forced sale, the place where he spent his absence of a year and a half from the neighborhood, the nature of the threats against his debtors, and the amount of his injury by reason of the threats against them. The witnesses who swear to the amount of his loss (four in number) show no personal knowledge as to any details and make no statement as to them, but simply give their belief that 140,000 bolivars would be "equitable" or "just." The claimant does not state, furthermore, that he ever made any complaint to the superior officers of the Government. In the utter absence of detail it becomes impossible for the umpire to say that he was subjected to any such persecutions, the legal conditions otherwise permitting recovery, as would justify a Mixed Commission in considering the claim, or, if it did so, would enable it to determine even approximately the damage inflicted.²

¹ See Poggioli case, with note, *infra*, p. 669; and Sanchez case, *infra*, p. 754.

² See to like effect Sanchez case, *infra*, p. 754.

Again, the belief of a witness that a certain estimate of loss would be "equitable" or "just" can rarely be of value to the Commission, which needs definite statements of facts to act upon, and will then judge as to the proper conclusion, which may or may not be that of the witness. Judgments must be founded upon facts furnished by the witnesses.

The claimant excuses himself, as appears above, for not having brought suit for the damages inflicted upon him by the alleged fact that the authorities committing the wrong were still in office and inspired with animosity against him, and, as may be inferred, it would have been impossible for him to obtain justice. Again, we are not informed as to what control they had over the judiciary. The umpire is therefore unable to judge of the validity of this excuse, which, according to authorities hereinafter cited, should have been proven in the clearest possible manner.

The umpire will close by referring briefly to some authorities bearing upon the question at issue, and the tendency of which would be, from a legal standpoint, to deny in part or altogether, the responsibility of Venezuela before this tribunal, even if otherwise the case had been made out.

In the case of *Johnson v. Mexico* (3 Moore, p. 3032), before the Mexican Claims Commission of 1857, referring to a charge that the Government of Mexico had tolerated and even set on foot disorders affecting the claimant's business, it is said:

So grave a charge against the government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation, and proved by evidence of the clearest character.

In case of *Bensley* before the same Commission (3 Moore, p. 3018), a boy having been seized by the governor of a State, it was said:

For the damages resulting from this unauthorized act he was individually responsible to the claimant, and it does not appear that ample redress might not have been obtained by a resort to the judicial tribunals of the country. Had the courts of Mexico been closed to the claimant and justice denied him, that might have constituted a ground for a claim of indemnity against the Government of Mexico. No such case, however, is presented. No appeal was made by the claimant to the courts, and no denial of justice had been proved. Under these circumstances the board can not regard the Government of Mexico as liable to a claim for indemnity on account of the wanton or malicious trespass of the person holding the office of governor of one of the States constituting the confederacy.¹

The Cahill case (3 Moore, 3066), before the United States and Spanish Commission, may also be referred to. The claimant asked payment for damages suffered by him while conducting a drug store at Cardenas, Cuba, and the breaking up of his business. He attributed his misfortunes to the machinations of a rival druggist, who was also an official, a "subdelegate of pharmacy." Among other things he complained of various acts of the authorities touching matters such as the hanging out of a flag, threats, disrespectful remarks, etc. The arbitrators held that claimant had no title to recover and dismissed the claim.

¹ Calvo says (sec. 1263): "Dans l'intérieur des limites juridictionnelles les agents de l'autorité de toute classe sont personnellement seuls responsables dans la mesure établie par le droit public interne de chaque État. Lorsqu'ils manquent à leurs devoirs, excèdent leurs attributions, ou violent la loi, ils créent, selon les circonstances, à ceux dont ils ont lésé les droits, un recours légal par les voies administratives ou judiciaires; mais à l'égard des tiers, nationaux ou étrangers, la responsabilité du gouvernement qui les a institués, reste purement morale, et ne saurait devenir directe et effective qu'en cas de complicité ou de déni de justice manifeste."

From the foregoing it appears that the claim must be dismissed, but without prejudice to any right the claimant may have to present his claim in Venezuela courts or elsewhere against persons guilty of any legal wrong so far as he is concerned.

BOFFOLO CASE

(By the Umpire:)

A state possesses the general right of expulsion; but —

Expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected.¹

The state exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and, an insufficient reason or none being advanced, accepts the consequences.

The only reasons advanced in the present case being contrary to the Venezuelan constitution, and Venezuela being a country not of despotic power, but of fixed laws, the umpire can not accept them as sufficient.

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

The right to expel foreigners is fully held by every State and is deduced from its very sovereignty. All international law writers agree upon this, and the European nations use it amply. In the case of expulsion submitted by England and Belgium to the arbitration of the French jurisconsult, Desjardins, he affirms the right fully. Even Italy has not refused to recognize it in regard to Venezuela, having practiced it extensively.

Venezuela, by the constitution of 1893, established as subject to expulsion foreigners having no domicile and notoriously prejudicial to the public order.

The question as to domicile of foreigners is determined in Venezuela by the provisions of the decree of February 14, 1873, and applying these provisions to the case of Boffolo it appears that he had no domicile in Venezuela. He had not been in the country two years; neither did he have a business properly so called. It appears that he had ostensibly, as a manner of living at the time of the expulsion, a connection with Roversi, according to contract of 1899, whose character demonstrated its precariousness, and in addition a small sheet published Sundays, which seemed little more than an advertisement for Roversi.

Boffolo had no domicile in the country, and the fact of his having been notoriously prejudicial to public order is a question that the Government is fully competent to determine, since to it is confided the power to expel without appeal or revision.

From the very statements made by the claimant the evil life and character of the subject may be easily recognized. In the first place, his affirmations to the minister of foreign affairs contain many things notoriously false; in the second place, the only copy of his little periodical we have had in it an attack on the authorities of the country; and in an article he recommends to the workmen to read and patronize *El Obrero*, a periodical of strong socialistic and dangerous tendencies, and which was circulating at about this time, and which really caused considerable prejudice to capital and machinery by its propaganda. No other number of the sheet is known to us.

¹ See also Paquet case, Vol. IX of these Reports, p. 323, and Maal case, *infra*, p. 730.

The right to expel exercised against Boffolo seems to me to have been clearly within the constitution. But there arises another question: Was the constitution in vigor at the time? It was, but with certain restrictions rendered necessary by the reestablishment of public order. And the expulsion of a foreigner who was disturbing this work seems to me to be within these restrictions.

It is to be noted that if it be true that foreigners enjoy the same civil rights as the natives, this refers solely to those foreigners who are domiciled. (See art. 12 of the constitution of 1893.)

The proceedings employed in the expulsion appear to me fully justified, though the claimant has presented us with his version of the case. But supposing that what he says is true, it is in no wise different from that followed by European nations generally.

With regard to the amount claimed, this seems to me to be ridiculous; and as is seen in the record, and as has been fully established by the Commission, this man had nothing, and his mode of living was not of a good character.

AGNOLI, *Commissioner* :

The Commissioner for Italy deems it neither necessary nor useful to dwell upon the arguments used by his learned colleague of Venezuela to prove that the Republic has the right to expel from Venezuelan territory foreigners not domiciled in the country and who are prejudicial to public order. It is not desired to contest this right nor that of Venezuela to arrest and condemn an Italian, if only the arrest and condemnation be justified, and with the reservation of the right to claim and exact reparation in each case of an abuse of these rights. An equal right is accorded to Venezuela by Italy.

The question turns upon another point. Let us consider whether the act of expulsion (which is at times legal) was justified in the case of Boffolo. Doctor Zuloaga has quoted from the constitution of 1893 and the decree of February 14, 1873 (which he should not have done in view of the provisions of article II of the protocol of May 7, 1903, which imposes in a precise and peremptory manner upon the Commission the duty of deciding claims according to the principles of equity and without regard to the provisions of local legislation), and after having recalled that said constitution authorizes the expulsion of foreigners not domiciled, and informed us that a domicile is only to be acquired by a two years' residence and establishment in business, now asserts that neither of these conditions had been complied with in the case of the claimant — an assertion believed by the writer to be purely gratuitous.

As a matter of fact, the legation has produced the testimony of three well-known persons, from which it appears that Boffolo established himself in Caracas in 1898. On the other hand, it is of record that he was expelled in April, 1900. Now, unless Doctor Zuloaga prove that Boffolo arrived here subsequent to April, 1898, his statement that the claimant had not had two years' residence in the country at the time of his expulsion must be held to be unfounded, and in all cases of doubt the decision should be in favor of the claimant.

The assertion that the claimant was not actually in business appears likewise unfounded. It is shown by documents submitted to the Commission that he was the depositary of a stock of goods belonging to merchants established here, the Messrs. J. Roversi and V. Alberti, and that said goods were opened to the public under the name of Commercial Sample House, the claimant thus acting as middleman between producers or importers and consumers for the goods thus intrusted to him. If for the lack of means he was not able to do business on his own account (and it is known he was in very modest circumstances), he can not therefore be excluded from consideration as a merchant.

He was, in addition, proprietor and director of a periodical appropriately called "Il Commercio." He had taken a house under a three years' lease, and was occupying part of it as a dwelling and storeroom, besides subrenting the remainder. It is stated, and from a letter of the brother of the claimant included in the record of the case it appears, that some rooms had been occupied by improper characters, and from this unsupported circumstance the Venezuelan Commissioner has forged a weapon against the absent claimant and paints him to the Commission as a man of evil life and fame. These unfavorable aspects are not established by the evidence, but, assuming that they were, the mere fact of his having rented rooms to fast women can hardly be urged as reason for expulsion.

The claimant was not and never had been a go-between; and even if he had been, which the testimony clearly disproves, he would not have thereby become "prejudicial to public order," the condition required by the constitution to justify expulsion.

Further, the declaration of the brother of the claimant, by a principle of fundamental law, may not be taken in part, and, taken as a whole, it shows the animus of the expulsion, for by it we learn that the claimant had demanded payment of rent legitimately due him from a woman who was known to everyone as the favorite of —. Now, if the Commissioner for Venezuela desires to avail himself of the above statement, he must take it in its entirety.

The Commissioner for Italy can not, however, admit that the claimant was expelled because of his alleged immoral conduct. It is clear that the expulsion was decreed because of the denunciation of an official whose name has not and will not come to light, or, by a still more probable hypothesis, considering the dates of the 1st and 4th of April, 1900, was caused by the publication of an article in No. 49 of the periodical above mentioned, in which was a somewhat severe criticism of the action of a Caracas magistrate, with an entirely incidental allusion to the President of the Republic, and wholly free from a political or disturbing character. In either case the measure adopted was unjustifiable.

Free expression of thought, either in print or in speech, is guaranteed in Venezuela to both natives and foreigners; to Italians in particular, on account of the treaty in force. In case of calumny or abuse the guilty person may be proceeded against and condemned, but in no case imprisoned without sentence of the proper tribunal, much less expelled.

The article published by Boffolo does not certainly constitute an infringement of public or private right, and he was not placed on trial therefor. Even less could it be considered as subversive of or prejudicial to public order, justifying expulsion. The claimant had neither social prestige nor political following sufficient to give him a character dangerous to the peace of the Government. He was but an humble citizen, who concerned himself in no wise with local politics.

The writer has already called the attention of the Commissioner for Venezuela to the fact that, according to the opinion prevalent among writers of international law, governments are held to furnish to legations representing the nations to whom the expelled belong the reasons for such expulsion, which was not done by Venezuela in the case of Boffolo, though requested to do so. Had these been satisfactory and of a character to establish that the claimant had engaged in political controversy against constituted authority, the representative of the royal Government would have been satisfied, and there would to-day be one claim the less. The Government had therefore not only the legal obligation but also the duty imposed by international courtesy to declare the reasons for the sudden and violent expulsion of the claimant. If it did not do so, we are justified in believing that such reasons did not exist.

In view of all the foregoing, there seems to be ample reason for the umpire to award with entire conscientiousness to the claimant the modest indemnity of 5,000 bolivars, as requested by the Commissioner for Italy, but before concluding this statement he desires to call the attention of the umpire to another circumstance, which is that though the claim of Boffolo has been pending before the Commission two weeks, during which time the subject has been more than once called up, the Venezuelan Government has not so far produced anything justifying the damaging and arbitrary course it pursued in regard to the claimant.

The voluntary and prompt exhibition of such proofs as the Commission would consider indisputable would seem to be due from the Republic, on the hardly acceptable supposition that such existed. Should they hereafter be produced, the writer reserves the right to examine and estimate them, as, coming so late, he can hardly anticipate them.

In any case he must hold that neither the umpire nor the Commissioner for Venezuela could attach much importance to them in the event of their not resulting from documents bearing a date anterior to that of the expulsion, and that Doctor Zuloaga would regard proof collected within the last few days with the same measure of distrust with which he has received evidence submitted by Italians in support of their contentions, and with the intention of combating claims against Venezuela which the Venezuelan Government, through its plenipotentiary at Washington, Mr. Bowen, had, for some unknown reason, considered just.

RALSTON, *Umpire*:

The above case has been referred to the umpire on disagreement between the honorable Commissioners for Italy and Venezuela.

It appears that Gennaro Boffolo, an Italian subject, reached Venezuela in June, 1898, and in the spring of 1900 was a householder in Caracas and the publisher of an Italian weekly newspaper entitled "Il Commercio Italo-Venezuelano." In the issue of April 1, 1900, appeared an article somewhat critical of the local minor judiciary, and also referring, but in an unimportant manner, to the President. Another article recommended the reading of *El Obrero*, a socialistic paper. Three days later (April 4) the *Gaceta Oficial* contained a decree directing Boffolo's expulsion, in the following terms:

Considerando: Que de las averiguaciones practicadas por las autoridades respectivas del Distrito Federal, aparece formalmente que el súbdito italiano Gennaro Boffolo, es á todas luces, perjudicial á los intereses nacionales, decreta:

ART. 1º. El súbdito italiano de nombre Gennaro Boffolo será expulsado del territorio venezolano, embarcándose en el puerto de La Guaira en el término de la distancia.

ART. 2º. El ministro de relaciones interiores queda encargado de la ejecución del presente decreto.

Immediately thereafter, or perhaps simultaneously, Boffolo was, as it is said, "summarily" arrested, transported by third-class ticket to Curaçao, but, through the intervention of the royal Italian legation, allowed to return about a month later.

It is further said, but no proof is offered, that during his absence his house was invaded and plundered, and articles taken belonging to others, the value of which he was compelled to reimburse, and that the claimant was subjected to police persecution, threatened with another arrest, and finally left Venezuela.

That a general power to expel foreigners, at least for cause, exists in govern-

ments can not be doubted.¹ (See *Hollander case* in U.S. Foreign Relations for 1895, p. 775, and also see p. 801, same volume, citations to be found in sec. 206, vol. 2, Wharton's International Law Digest, and other citations herein-after given.)

But it will be borne in mind that there may be a broad difference between the right to exercise a power and the rightful exercise of that power. Let us illustrate. In the *Hollander case* (cited above) the Government of Guatemala contended:

The Government was not under obligation to allow him more or less time to get out of the country, nor to accommodate him in any way. All the practices of jurisprudence, supposing them to be certain and indisputable, fall down before a law clear that comes immediately from the sovereignty of a nation.

To this Secretary Olney very forcibly replied:

The logical result of that proposition is, that whatever a state by legal formula wills to do, it may do; and that international obligations are annulled, not infringed, by legalized administrative action in contravention of those obligations.* * * I construe the language used to mean that, as a rule of international law, the right of expulsion is absolute and inherent in the sovereignty of a State, and that no other State can question the exercise of this right nor the manner of exercising it. * * * The modern theory and the practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State, and that when expulsion is resorted to as an extreme police measure, it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled.

We may cite Rolin-Jaequemyns, who reported on the subject to the Institute of International Law in 1888 (*Revue de Droit International*, Vol. XX, p. 498), and after admitting the right of expulsion said:

* * * En sa qualité d'être humain il a le droit de ne pas être l'objet de rigueurs inutiles et de ne pas être injustement lésé dans ses intérêts. En sa qualité de citoyen d'un autre État il peut réclamer contre ces rigueurs ou ces spoliations la protection de son souverain. * * *

* * * Il est dès lors légitime que l'État auquel appartient l'expulsé soit recevable à demander communication du motif spécial de l'expulsion, et cette communication ne peut lui être refusée.

L'acte même de l'expulsion doit d'ailleurs être restreint à son objet direct, essentiel, qui est de débarrasser le sol national d'un hôte nuisible. Le droit de souveraineté nationale n'exige ni ne permet davantage. * * * Mais cette contrainte ne devra pas prendre un caractère gratuitement vexatoire.

He continues:

5° Même en l'absence de traités, l'État auquel appartient l'expulsé a le droit de demander à connaître les motifs de l'expulsion, et la communication de ces motifs ne peut lui être refusée.

In one of the latest works discussing the subject, "Protection des Nationaux Résidant à l'Étranger" (p. 450), M. Tchernoff shows himself so little friendly to the right of expulsion that he remarks:

¹ *Nociones de Derecho Internacional*, by Miguel Cruchaga T. (of Santiago de Chile), says (sec. 177): "Puede el Estado expulsar á los extranjeros por consideraciones de orden público; pero entendemos que este derecho no debe ejercitarse sino con mucha parsimonia y en casos muy especialísimos. El derecho en sí mismo, sin embargo, no puede negarse, puesto que el Estado también lo tiene, según el Derecho Público, con respecto á sus propios súbditos por via de grave pena."

Peu de personnes de nos jours soutiennent que le droit d'expulser les étrangers soit une attribution normale de l'État exerçant sa fonction civilisatrice.

Calvo (Dictionnaire du Droit International), title, "Expulsion," says:

But when a government expels a foreigner without cause and in a harsh, inconsiderate manner (avec des formes blessantes), the State of which the foreigner is a citizen has a right to base a claim upon this violation of international law and to demand adequate satisfaction.

See also Bluntschli, *Droit International Codifié*:

ART. 383. Chaque État est autorisé à expulser pour motifs d'ordre public les étrangers qui résident temporairement sur son territoire. S'ils y ont établi un domicile fixe, ils ont le droit à la protection des lois au même titre que les nationaux.

1. Le droit d'expulser les étrangers n'est pas un droit absolu de l'État; l'admettre serait de nouveau porter atteinte au principe de la liberté des relations internationales. L'État n'est le maître absolu ni du territoire ni des habitants du pays. L'ancienne théorie se fondant sur le principe du moyen âge que l'État est propriétaire du territoire, en avait abusivement déduit l'idée de la souveraineté illimitée de l'État. On reconnaît cependant presque partout à l'État la faculté d'expulser les étrangers par simple mesure administrative et sans que les personnes atteintes par cette mesure puissent recourir aux tribunaux.

ART. 384. Lorsqu'un gouvernement interdit sans motif l'entrée du territoire à un étranger dûment légitimé, ou l'expulse sans cause et avec des formes blessantes, l'État dont cet étranger est citoyen a le droit de réclamer contre cette violation du droit international, et de demander au besoin satisfaction.

1. L'État peut aussi être atteint dans la personne des ressortissants qu'il a mission de protéger. L'expulsion arbitraire peut amener des représentations diplomatiques; la partie lésée a toujours le droit de demander aide et protection à son consul ou de provoquer l'intervention de l'envoyé de son pays.

In the recent Ben Tillet affair between England and Belgium, the arbitrator, M. Arthur Desjardins, of France, in his sentence examined thoroughly the reasons for the expulsion of Tillet (as we shall do hereafter in this case), and also as to the treatment accorded him in connection therewith, and maintained the right of Belgium to expel under the circumstances, and, as well, justified the manner in which Tillet was treated by Belgium. (*Journal du Droit International Privé*, Vol. 26 (1899), p. 203.)

Hall says (*International Law*, p. 224):

In such cases (expulsion of individual foreigners residing in a state) the propriety of the conduct of the expelling government must be judged with reference to the circumstances of the moment.

Says Professor von Bar (*Journ. Droit Intern. Privé*, Vol. XIII, p. 6):

La conscience juridique universelle proteste contre l'usage arbitraire du droit d'expulsion. * * *

Il nous paraît que l'État qui ouvre libéralement aux étrangers l'accès de son territoire ne doit pas pouvoir leur retirer à son gré le droit de séjour. (1) En ce sens Heffter, *Voelkerrecht*, sec. 62; "Aucun État ne peut écarter de son sol les ressortissants d'un autre État, dont la nationalité est dûment constatée, ni les expulser après leur avoir fait accueil, sans avoir pour le faire de bonnes raisons, qu'il est tenu de communiquer au gouvernement dont ils relèvent." * * *

Dans tous les cas il est d'une nécessité indispensable d'apporter aux mesures de rigueur qui peuvent être prises contre les étrangers un double tempérament. L'un est de pure forme: L'État qui recourt à l'expulsion doit invoquer des motifs de nature à la justifier. L'autre touche au fond: L'expulsion doit être conforme aux traditions et aux principes du droit des gens. * * *

Une peine insignifiante prononcée contre l'étranger à raison d'une injure, d'une contravention de police, ne suffirait pas à justifier une mesure d'exclusion. Pour

que l'infraction qu'il a commise puisse entraîner son expulsion, il faut qu'elle soit telle que, dans l'hypothèse où elle aurait été consommée sur le territoire, elle eût exposé le coupable à une perte assez longue de sa liberté, et à la privation au moins temporaire de certains droits. * * *

Encore faudrait-il, de toute façon, pour que ce fait puisse donner lieu à une expulsion, qu'il soit prouvé, ou tout au moins rendu vraisemblable au plus haut degré, qu'il contient les éléments d'une violation grave et réelle de la loi, ou bien d'une tentative pour la commettre, ou encore d'un acte condamnable, appliqué à sa préparation. * * *

Bluntschli pose en principe, dans son § 384, que l'expulsion arbitraire et non-motivée d'un étranger peut être le point de départ de réclamations diplomatiques de la part de l'État dont il est le national. Ce point est au-dessus de toute controverse. * * *

Woolsey says (International Law, sec. 63, p. 85):

6. No state in peace can exclude the properly documented subjects of another friendly state, or send them away after they have been once admitted, without definite reasons, which must be submitted to the foreign government concerned.

In the opinion of the umpire it may be fairly deduced from the foregoing that —

1. A state possesses the general right of expulsion; but

2. Expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected.

Must explanation of reasons and justification of conduct be made to an arbitral tribunal when the occasion arises? The question is answered in Moore's Digest.

Orazio de Attellis, a naturalized American citizen, entered Mexico in 1833, and on June 24, 1835, the President issued an order for his expulsion on the ground that he had —

occupied himself again (he had been expelled before becoming an American citizen) in the publication of a periodical in which some productions appear which tend to ridicule the nation and to plunge it into anarchy.

What the productions were and what was their offensive feature was not disclosed. The claimant was so expelled under circumstances of especial hardship. The American Commissioners contended that the expulsion was causeless, inspired by enmity, in violation of rights secured to inhabitants of the Republic by the constitution and contrary to treaty relations.

The umpire (p. 3334) gave judgment in favor of the claimant.

In the case of *Zerman v. Mexico*, before the American and Mexican Commission of 1868, Sir Edward Thornton (p. 3348) said:

The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion it was at least *under the obligation of proving* charges before this Commission. Its mere assertion, however, or that of the United States consul, in a dispatch to his Government, that the claimant was employed by the imperialist authorities, does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion.

The umpire awarded the claimant \$1,000.

It appears, therefore, that the Commission may inquire into the reasons and circumstances of the expulsion.

Let us apply the principles above laid down to the case before us.

Boffolo was expelled, as the claimant Government contends (and nothing else is before the Commission), because he published a certain article supposed to reflect upon the local judiciary and referring in some purely incidental way to the President, and, as stated, recommended a socialistic paper. It is not the province of the umpire to pass upon Boffolo's taste or justice in so doing. He is, however, obliged to examine somewhat, first, as to whether in so doing he offended the laws of Venezuela, and second, whether under the laws the expulsion was permissible.

Sometime previous to the expulsion, and on the 31st day of October, 1899, the present President assumed the executive power, issuing the following proclamation:

Considerando: Que por virtud de los acontecimientos que han determinado el triunfo de la Revolución Liberal Restauradora, la situación política que ha surgido en la República es extraordinaria y de un carácter provisional;

Que mientras se llega á la reconstitución normal del país es indispensable establecer un régimen que, aunque transitorio, asegure y proteja los derechos y intereses políticos y sociales de la ciudadanía, Decreto:

ARTÍCULO 1°. Se declaran vigentes en todo el territorio de la República todos derechos, garantías, y prerrogativas que la Constitución Nacional de 1893 reconoce y otorga á los venezolanos.

ART. 2°. Se declaran igualmente en vigencia á las demás disposiciones de la expresada Constitución en cuanto ne se opongan á los fines de la Revolución Liberal Restauradora y sean compatibles con la naturaleza del Gobierno que de ella ha surgido.

ART. 3° Regirán en los Estados de la Unión y en el Distrito Federal todos los códigos y demás leyes nacionales de carácter general ó especial, y todas las leyes orgánicas que venían observándose en los diversos y distintos ramos y esferas de la administración pública.

ART. 4°. Los Presidentes Provisionales de los Estados y todos las demás autoridades de la República cumplirán y harán cumplir este Decreto en la parte que les concierna y en el radio de sus atribuciones.

ART. 5°. El Ministro de Relaciones Interiores queda encargado de la ejecución del presente decreto.

Let us see, now, what were the rights, guarantees, and prerogatives recognized and guaranteed by the constitution of 1893.

TÍTULO IV. — *Derechos de los Venezolanos.*

ART. 14. La Nación garantiza á los venezolanos la efectividad de los siguientes derechos:

5°. La libertad personal, y por ella: * * *

* * * 4°. Todos con el derecho de hacer ó ejecutar lo que no perjudique á otro.

6°. La libre expresión del pensamiento de palabra ó por medio de la prensa. En los casos de calumnia ó injuria, quedan al agraviado expeditas sus acciones para deducirlas ante los tribunales de justicia competentes, conforme á las leyes comunes; pero el inculpado no podrá ser detenido ó preso, en ningún caso, sino después de dictada por el Tribunal competente la sentencia ejecutoria que lo condene.

7°. La libertad de transitar sin pasaporte en tiempo de paz, mudar de domicilio, observando para ello las formalidades legales, y ausentarse de la República, y volver á ella llevando y trayendo sus bienes.

14°. La seguridad individual, y por ella: * * *

* * * 4°. Ni ser preso ó arrestado sin que preceda información sumaria de haber cometido delito que merezca pena corporal, y orden escrita del funcionario que decreta la prisión, con expresión del motivo que la cause, á menos que sea cojido *infraganti*; no pudiendo fuera de este caso ordenarse la prisión sino por autoridad judicial, ni los arrestos por la policía pasar de tres días, después de los

cuales el arrestado debe ser puesto en libertad ó entregado al juez competente.

* * *

* * * 10°. Ni ser privado de su libertad, por causas políticas, sin previa información sumaria, de la cual resulte comprometido en perturbaciones del orden público y sirviendo de obstáculo á su restablecimiento.

Furthermore the constitution provided (Art. 13):

Los extranjeros gozan de todos los derechos civiles de que gozan los nacionales.

In addition to the extracts above given, the excellent and enlightened constitution of 1893 provided:

ART. 23. La definición de atribuciones y facultades señala los límites del Poder Público; todo lo que extralimite esta definición constituye una usurpación de atribuciones.

One is pleased to note from the foregoing that even in time of storm and stress Venezuela recognized that those subject to her jurisdiction were entitled to enjoy freedom of speech and of the press (subject only to trial for abuse thereof before competent tribunals, pursuant to the common laws, with personal freedom until after the sentence), freedom of transit and change of domicile, freedom from arrest (unless pursuant to written warrant, save when taken in flagranti, and except in such case not to be imprisoned unless by judicial authority), not to be deprived of liberty for political reasons, save for disturbing acts, etc.

As appears from a citation already made, the powers of the officers of Government were not autocratic, but Venezuela was a country of laws, governed even in April, 1900, by officials of limited powers; for if their powers were not limited the personal guarantees of the constitution would have been inefficacious — an impossible conclusion, as they were expressly recognized by the proclamation of General Castro.

Let us therefore see what law governed the matter of expulsion, for if none existed the power to expel was wanting. Another conclusion would make Venezuela's Government despotic — not republican or democratic.

The only provisions of law covering the right of expulsion either of natives or of foreigners were in articles 77 and 78 of the constitution of 1893, and read as follows:

ART. 77. Además de las atribuciones anteriores, que son privativas del Presidente de los Estados Unidos de Venezuela, éste, con el voto consultivo del Consejo del Gobierno, ejercerá también las siguientes:

9a. * * *

3°. Arrestar ó expulsar á los individuos de la nación con la cual se está en guerra y que sean contrarios á la defensa del país.

ART. 78. * * *

4a. Prohibir la entrada en territorio nacional, ó expulsar de él, á los extranjeros que no tengan su domicilio en el país y que sean notoriamente perjudiciales al orden público.

According, therefore, to the constitution of Venezuela, only as the nondomiciled foreigner might be shown to be prejudicial to public order would he be expelled. Let us pass over the fact that the Boffolo decree of expulsion declared that his presence was prejudicial to "national interests" and not to the "public order," as limited by the constitution, and see if such cause has been presented to this Commission as would justify the expulsion.

It is suggested that the expulsion may have taken place because of any one of three reasons:

1. That he spoke disrespectfully of the President.
2. That he criticized a subordinate member of the judiciary.

3. That he recommended the reading of "El Obrero," a socialistic paper.

The effective answer to all of these propositions is that freedom of speech and of the press are guaranteed by the constitution of Venezuela, and an expulsion for either one would have been an infringement of the constitution of Venezuela, and this is not to be presumed the President would have done. The umpire is more disposed to believe that for public reasons satisfactory to itself the Government has chosen not to offer the basis of its action, rather preferring to submit to such judgment as to this Commission might seem meet in the case.

The further suggestion is made that Boffolo, being a foreigner, did not possess the right to criticize the Government to the same extent as Venezuelans, while the Government possessed a larger power over him. To this may be replied that the constitution of Venezuela conferred upon foreigners the same rights as were assured to natives, and for the supposed offenses not the slightest punishment could have been inflicted upon Venezuelans.

Summing up the foregoing, we may (in part repeating) say:

1. A State possesses the general right of expulsion; but,
2. Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected.
3. The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences.
4. In the present case the only reasons suggested to the Commission would be contrary to the Venezuelan constitution, and as this is a country not of despotic power, but of fixed laws, restraining, among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) can not be accepted by the umpire as sufficient.

In view of the foregoing it only remains to consider the amount of damages to be awarded. The honorable representative of Italy has indicated that he would be content to accept 5,000 bolivars, and considering the harshness of expulsion as a remedy, the fact that only great provocation will, in the eyes of international law, justify its exercise, and the further fact that expulsion of foreigners so readily leads the way to the gravest international difficulties, as it may be regarded as a national affront, the amount asked seems not intrinsically unreasonable. But bearing in mind the low character of the man in question (as developed before the Commission), and that his speedy return was permitted, the umpire believes his full duty will be discharged in allowing him 2,000 bolivars, and an award of this amount will be entered.

For convenience the umpire subjoins a careful translation of the articles in *Il Commercio* herein referred to.

FOR JUSTICE

[Translation — Article taken from *Il Commercio* of April 1, 1900.]

To his Excellency the ITALIAN MINISTER.

YOUR EXCELLENCY: I do not understand the Venezuelan code of procedure, much less its application; but the fact to which this article relates is so abnormal, so outside the severest penal code, that as a journalist speaking for the bulk of his readers, I am driven to the onerous necessity of praying your excellency to interpose your authority to the end that what is now obscure may be made plain.

I refer, your excellency, to the prolonged imprisonment of my countryman, Mr. Malenchini.

It is now nearly three months that the above-named has been immured in a foul prison for having struck Mr. Pecchio with a walking stick. Mr. Pecchio was not in the least injured by the blow, no physician was called to his aid, and he suffered no interruption whatever in the transaction of his business.

It is said there was a quarrel between the two men on account of an alleged attempt at homicide, Malenchini having been armed with a revolver. According to the logic of the accusation, whoever carries a revolver for self-defense is held to be guilty of attempted homicide. If such were to be the rule, not a few, commencing with the President himself, would be in quod.

It may be said that Malenchini was ready to use the weapon and would have done so had he not been arrested. Such is not the case. He carried it solely as a means of defense and had he intended using it he would not have availed himself of his cane, least of all in a place so crowded as the Plaza Bolivar, where the slightest disturbance would surely be followed by an arrest.

That an assault with a cane deserves punishment is conceded without question, but it should be of a proper kind, and not that imposed by the humor of an over-zealous advocate who had exaggerated the facts in the case.

Malenchini was interrogated by the judge, and three weeks ago he was tried, and a sentence should have been given in three days. A sentence was finally pronounced, but what a sentence! Based on a nullity! Malenchini was condemned for injury to the person, but that there really was such the sentence alone declares, for there is not the vestige of proof. And as if this were not sufficient, the ten days of his sentence expired on Saturday, the 24th, but he still lingers in jail.

As your excellency may see, there is something strange and mysterious in the case of Malenchini. Your excellency alone has the power and authority to have this mystery unveiled. You alone can see to it that justice be not a vain word for Malenchini, who is lying in a dungeon because he is powerless and without defense.

I and my countrymen trust that this unfortunate incident, as truly dangerous to our nationality as to humanity, will soon be cleared up.

Believe me, sir, with profound respect, your most devoted,

G. BOFFOLO

P.S. — On the afternoon of Thursday, after the above was already in type, Mr. Malenchini was provisionally released on the payment of a certain sum by his father, who had arrived in aid of his son. But why provisionally? Another mystery.

EL OBRERO

We have before us the first number of the periodical *El Obrero*. The title clearly indicates the purpose for which our new confrère has entered the lists. Every workman should read it, and support its publication, as it is the first sheet devoted to the workingman's cause. *Il Commercio* wishes a long and prosperous life to the new venture.

CASE OF MASSARDO, CARBONE & Co.

(By the Umpire:)

The Italian protocol providing only for payment of a definite sum for "claims of the first rank derived from the revolutions 1898-1900," and the sums so paid being for certain named claims, jurisdiction will be taken over others of the same period.

Case retained for proof of Italian citizenship of those claiming interest in a succession.

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

The Commissioner for Venezuela contends that the above-mentioned claim should be denied, he interpreting Article III of the Washington protocol of February 13, 1903, in the sense that the Italian Government accepted the sum of 2,810,255 bolivars in complete satisfaction of all indemnities due for acts of the revolution and all other acts from 1898 to 1900, and in support of his opinion invokes, besides the provisions of the article above mentioned, the contents of a note directed by the Royal Italian legation at Caracas to the Venezuelan minister of foreign affairs of December 11, 1902, No. 532.

As regards the protocol, it is to be observed that various arguments may be drawn therefrom to refute the interpretation of the Venezuelan Commissioner. As a matter of fact, Article III speaks of claims of the first rank, arising from the revolution 1898-1900. Now, one rank of claims can not logically be qualified as of the first rank if it is not in correlation with another rank or with other ranks of claims. If it had not been intended to implicitly recognize the existence of other demands for indemnity relative to the period 1898-1900, as coming under the Mixed Commission, it would not be possible to read in Article III the words "of the first rank," which establish a clear distinction between claims already examined and settled in the Royal Italian legation in the sum of 2,810,255 bolivars, and another class of claims not submitted, not adjudicated, and not presented to the Venezuelan Government by the legation itself. If the interpretation of Doctor Zuloaga were correct, the article in question would speak in general terms of Italian claims arising from the revolutions of 1898-1900, and would not make any discrimination whatever.

The same distinction appears in Article III in the establishment of the principle that the claims already adjudicated by the legation shall not be reviewed by the Mixed Commission. This exception is, in fact, not formulated for *all* the claims of the period 1898-1900, but only for those of the first rank.

Article IV, in clear and explicit language, offers another argument in support of this said claimant. It states that "all other Italian claims *without exception*," outside of those considered by Article VIII of the protocol "shall be decided by the Commission."

Why, on the occasion in which the plenipotentiaries made an exception relative to the bearers of titles of the foreign debt of Venezuela, did they not also make an exception relative to the claims of the period of 1898-1900 not comprised in the sum of 2,810,255 bolivars, but stated instead that *all* the others outside of those already settled would be examined and settled? The reason is clear. It is because it was never thought to make the exception now presented by the Venezuelan Commissioner.

But is it admissible that the Italian Government should have wished to bar the way in support of a claim as just as the one in question against which, neither in equity nor from any technical point of view whatsoever, is it possible to raise an objection?

Besides, the Venezuelan Government has never yet pretended that there shall not be settled other claims of the period of 1898-1900 than those of the first rank.

In support of this my assertion I cite the case of Oliva Bisagno, to whom the Government itself has but lately offered the sum of 250,000 bolivars as an indemnity for damages suffered by her *in the period 1898-1900*.

It would seem to me that the Venezuelan Commissioner should insist on placing a more restrictive construction on the protocol than has been given by the Venezuelan Government.

But let us come to note 532 of the legation, the scope of which was a peremptory demand for the payment of 2,810,255 bolivars, amount of Italian claims of the period 1898-1900, *examined and found valid by the legation*. Nothing whatever is said of the claims of that period not yet examined by the legation and judged valid, for which diplomatic action remained open and undecided.

Further, the Italian minister says in said note that the Italian Government makes an express reservation of all claims which were or might be presented by Italian subjects subsequently to the period mentioned, as well for damages arising from the civil war commenced in 1901 as for any others against the Venezuelan Government, and requests that the Government of Venezuela be pleased to declare itself disposed to apply to the settlement of such claims such

provisions as shall eliminate ulterior discussions, accepting the decisions of a mixed commission.

Aside from the fact that every exception contained in said note should be held as having been incidental and not direct, and that the protocol of February 13, 1903, has established principles which, even if they were (as they are *not*) contrary to those enunciated in the note mentioned, should serve as the only and absolute rule of the Mixed Commission, it is well to observe that the Italian minister declared in the above-mentioned document that the Italian Government made express exception not alone of the claims arising from acts posterior to the period of 1898-1900, but of all claims presented subsequent to said period, making special mention of those occasioned by the war initiated in 1901, and of those based on whatsoever other title of credit or action against the Government of the Republic.

There is no indication of a restriction as to time relative to this second rank of claims, which includes all those not already settled, and this is the reason why the Italian minister did not deem it necessary to make a specific exception for the claims of 1898-1900 not already liquidated by the legation, and not therefore comprised in those of the first rank. Let it be thoroughly understood that between want of an express exception of any given category of claims and the abandonment of the right to support them there is an absolute and fundamental difference. A relinquishment can never be presumed, but must be tacitly enunciated.

Taking these principles in accordance with the clauses of the protocol, the Commissioner for Italy is of opinion that the claim presented by Mrs. Ernesta Raffo, widow Massardo, through the receiver of the firm of Massardo, Carbone & Co., should be accepted, and an award made to the claimants of the full sum of 18,212 bolivars, plus the interest.

ZULOAGA, Commissioner:

This claim is of March, 1898, and, by virtue of article III of the Washington protocol, claims arising during the period from 1898 to 1900 from acts of the revolution of said period were paid the Italian Government out of the sum of 2,810,255 bolivars. No claims for damages within said period can therefore, in my opinion, be presented. The Italian Government decided for itself as to the class of claims coming within this period and paid those accepted by it in the manner stated.

This interpretation of the protocol seems to be amply confirmed by the note of the Italian minister of December 11, 1902, published in the volume of *Asuntos Internacionales*, page 102,¹ in which it is stated that the

Royal Government has expressly excepted the claims which were or might be submitted by Italian subjects subsequent to said period, as well for damages arising from the civil war of 1901 as for whatever other title of credit or action against the Government of the Republic.

This latter class doubtless has no reference to damages.

Articles II and III of the German protocol likewise exclude claims for this period. Resting on the above reasons, I reject the claim of Massardo, Carbone & Co.

RALSTON, Umpire:

The foregoing case has been presented to the umpire, the honorable Commissioner for Italy in his opinion favoring an award for the full amount, and the

¹ See the original Report, Appendix, p. 995.

honorable Commissioner for Venezuela opposing on the ground that the claim originated in the month of March, 1898, and grew out of the revolution commencing in that year, while all claims for the wars of 1898-1900 were settled by the acceptance, by Italy, of the sum of 2,810,255 bolivars. He further insists that the note of the minister for Italy of December 11, 1902 (*Asuntos Internacionales*, p. 102 ¹), made no express reserve covering a case for damages occurring during the period mentioned.

Returning to the protocol, we find that the amount above named was given for "Italian claims of the first rank derived from the revolutions 1898-1900." By reference to the above-mentioned book, page 96, it will be found that this sum was allowed for 123 individual claims which had been appraised by the Italian legation.

The question presented, therefore, is whether, assuming that no express reserve of other claims arising out of the wars of 1898-1900 was made by the Italian legation, such claims should now be recognized.

The protocol does not in terms exclude any class of Italian claims from consideration. The amount paid by Venezuela to Italy for claims was not to extinguish, generally, claims arising from the wars in question, but only to settle claims which had been previously enumerated.

The umpire can not imagine that when the protocol was signed there was any intention on the part of Italy to abandon without consideration and without apparent reason other claims of equal equity not theretofore presented. Had the sum paid been designed to extinguish all claims, the situation would have been different.

It is true that the reserves made by the Italian minister may have been vague; but the protocol subsequently passing on the whole matter, and no claims except those of the first rank being reserved from the consideration of this Commission, the umpire believes it to be the duty of the Commission to take jurisdiction over and grant judgment in all other cases originating at least before the date of the protocol where the evidence and the rules of international law justify such action. The umpire reserves consideration of the possible effect upon claims of an earlier date of any prior settlements and treaties not brought to his notice and therefore not now discussed.

The foregoing, however, does not completely dispose of the case. The claim is made in the name of Ernesta Raffo, widow of Massardo. The property taken appears to have belonged to the firm of Massardo, Carbone & Co., whose liquidator is Luigi Carbone, a member of the firm. It does not appear how many members of the firm there were, or what were the interests of each. Neither does it appear that the widow is the sole heir of Massardo, the former apparent member of the firm. If it is designed to claim the interest of the widow alone, her inheritance from the husband should appear and also the proportionate size of his interest in the firm. If it is designed to claim for the entire partnership, the names of all should be given, together with the appropriate proofs of citizenship, for only Italian subjects may have any interest in any claim passed on by this Commission.²

The umpire will not now, therefore, finally pass upon this claim, but will retain it until September 1, 1903, that the lacking elements of proof may be supplied or addition of parties may be made.

(The lacking proof being furnished, award for claimants was subsequently given.)

¹ *Idem*, Appendix, p. 995.

² See Corvaia case, *infra*, p. 609.

BRIGNONE CASE

(By the Umpire:)

In the event of conflict of laws creating double citizenship, that of respondent nation must control.

In case of conflict of laws as to distribution of estate, the law of domicile of decedent, especially because of certain laws of Venezuela, must control the more, as otherwise laws of Italy would be given extraterritorial effect.¹

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

In the case of claim No. 60, presented in the name of the estate of Sebastiano Brignone, and after hearing the exceptions in the case taken by his honorable colleague of Venezuela, the Commissioner for Italy sustains the three following points:

1. Primarily, that the claim should be accepted in its integrity, without regard to the nationality of the heirs of the deceased.

2. Secondarily, that the widow and children of Brignone being Italians, the amount of the claim should be awarded to them.

3. By a parity of reasoning, that the estate should certainly be liquidated according to the law of *de cuius*, and that therefore there should be awarded to the Italian relatives of the deceased residing in the Kingdom and claiming, with the widow, a share of the estate, two-thirds of the sum claimed, in conformity with the provisions of the Italian civil code in such case.

With regard to the first point, the claim is sustained by the royal Italian legation in its entirety, because the claim under consideration is essentially Italian.

To determine the nationality of a claim and the competency of the Commission there should be taken into account only the nationality of the claimant at the time of his suffering the damages, and not of the nationality of the persons in whose favor may redound the sum awarded.

By these principles were guided:

First. The French-American Mixed Commission under the convention of 1880. (See Moore, *Int. Arb.*, pp. 2398-2400.)

Second. The court of arbitration of Geneva in the case of the *Alabama*, and the Alabama Claims Commission, organized under the act of June 23, 1874, for the adjudication of the Geneva award. (See Moore, *Int. Arb.*, pp. 2360-2379.)

The judge who delivered the opinion based on the argument said, among other things:

It was a great principle for which our Government had contended from its origin — a principle identified with the freedom of the seas, viz, that the flag protected the ship and every person and thing thereon not contraband. * * *

Therefore * * * we decide that foreigners entitled to the protection of our flag in the premises, whether naturalized or not, have a right to share in the distribution of this fund. (Moore's *Arbitrations*, p. 2351.)

A fortiori, it should be admitted that claims originally owned at the time of the damage by Italians, ought to be entitled to indemnity. Moore, in the case of the *Texan Star*,² gives an even more conclusive example.

¹ The differences between the doctrines of France, Italy, and Belgium on the one hand and England, the United States, and Germany on the other relative to determination of status, family relations, and successions are extensively discussed by M. Henri Jacques, in 18 *Revue de Droit International* (1886), p. 563, entitled "La Loi du Domicile et la Loi de la Nationalité en Droit International Privé."

² Moore, p. 2360.

Third. We have, besides, among other more notable precedents, the arbitration of the Delagoa Bay Railway (Moore, 1865, et seq.), in which was sustained the right of an American citizen to be indemnified, even though his name did not directly appear in the company, which was English or Portuguese at the time of the presentation of the claim, and who was at the time merely a shareholder in a stock company. The acceptance of contrary principles would lead to most unjust consequences. In fact, let us suppose that Brignone had at his death left creditors in lieu of heirs, would it be equitable to reject the claim because some or all the creditors were not Italians? What, in fact, are heirs, if not creditors of the *universitas juris* formed of the sum of the property of the estate?

But if the equity of the principle advanced by my learned colleague be admitted, no Italian claim may be admitted without conclusive evidence that the Italian claimant is not indebted to Venezuelans, and has not ceded the sum which may be awarded him to creditors of a different nationality, and particularly Venezuelans. It has not yet occurred to anyone to demand such proof.

Let it be noted that such a cession may have been obtained forcibly by anyone, but more particularly by a merchant, as, for example, in the case of failure. But granting a voluntary cession, our principle — that of the original nationality of the claimant — should prevail, because we should not impede the freedom of anyone to dispose of his patrimony. How, then, can we sustain a contrary rule when cession occurs through the least voluntary of all acts — death?

The Mixed Commission is a tribunal *sui generis*, before which the Venezuelan Government is summoned. Before an ordinary tribunal might it perhaps be admitted that the local government, except against a foreign creditor, is not compelled to pay a portion of its proven indebtedness, because the sum claimed belongs, in part, to a Venezuelan? Surely not. Why, then, should such an exception be admitted by the Mixed Commission? Why endeavor, by a legal quibble, to evade the fulfillment of a moral and juridical obligation, and why resort to such an expedient before a tribunal of equity which not only can but must, according to the terms of the protocol by which it is governed, reject all technical objections?

It seems to me that the objection raised by my Venezuelan colleague does not agree with any concept of equity. As a matter of fact, he has taken no exception to the morality or foundation of the Brignone credit, and it is inconceivable that he should attempt to exonerate the Venezuelan Government from the payment of an amount which he impliedly recognizes as due by said Government. What is, therefore, the practical scope of Doctor Zuloaga's objection? Is it not true that the right to claim from the Venezuelan Government a part of the amount of the claim subsists in the widow Brignone, whatever her nationality?

She must run the same risks as the other heirs of the estate, for her interests therein are bound up with theirs and depend upon the same title. By the fact of her having presented to the Italian legation the documents in connection with her claim, and through said agency submitted it to the Mixed Commission she acknowledges the competency of this tribunal and at the same time expresses her choice for the Italian nationality, should any doubt exist on that point. It will be noted that I attach considerable weight to this option, given the circumstance of a conflict between the two laws; but of this we will speak later.

Now, I ask, let us suppose that the sum claimed as indemnity was originally owed to a Venezuelan, and that his heirs were Italian; as a matter of fact, the legation would not support such a claim; but admitting that it presented it to

the Commission, how would it be received by the Venezuelan Commissioner? He would most certainly reject it, objecting, with reason, that the claim was not originally Italian, and would, I am sure, advance still other sound reasons, as, for instance, that the cession by Venezuelans of their interests in a claim against the Republic to Italians, in order that these latter might make them the object of a claim before the Commission, could not be tolerated.

But why, on the other hand, given but not conceded that the widow Brignone is wholly Venezuelan, not apply *a contrariis*, the same rule? Why say, when the injured party is a Venezuelan and those to whom indemnity should be paid are foreigners, that indemnity can not be awarded because the claim is originally Venezuelan and therefore not to be considered, and when the injured party is Italian and the actual claimants Venezuelans the claim should likewise be rejected, because in this case the original nationality of the claim need not be taken into account? Where is the logic of such reasoning, and where the equity of such a principle? Two weights and two measures cannot be admitted.

I will admit that when the cession of an interest forming the basis of a claim takes place, either in bad faith or without just cause, and with the manifest or concealed design of procuring the readiest means for obtaining indemnity, the Commission should not sanction such proceedings; but in the case of the widow Brignone, even though she were a Venezuelan, bad faith is absolutely excluded, and the presentation of the claim as a whole before the Commission is a natural condition of things, not created expressly for secondary ends.

Let us examine the question briefly from a purely juridical point of view. I have observed above that the estate is a *universitas juris*; now, for the same reason the charges against the same, as well as the debts of the deceased, should on principle be charged against all the heirs of the estate; so, also, when it is a question of recovering from the credits of the deceased and of his estate action should be brought in the name and interest of all.

It can not be admitted that a contrary rule should be followed when it is a question of fulfilling an obligation or enforcing a right, when the heirs find themselves, as in the Brignone case, in community, since the object of the successionary rights of each of them is the estate taken in its entirety.

The heir in his quality of successor has the personal representation of the *de cuius*, and by virtue of these principles the claim in question (whatever be the nationality of the heirs) should be examined and judged by the Commission as an Italian interest, and as such is covered by the provisions of the protocols without any restrictions whatsoever, either expressed or implied, having been stipulated in regard thereto.

With reference to the second point: There is no doubt that the widow Brignone was born a Venezuelan; neither is there doubt that by her marriage with an Italian she became Italian. (Art. 19 of the Venezuelan Civil Code, and art. 9 of the Italian Civil Code). The Italian Civil Code declares that the foreign woman who marries an Italian citizen acquires his nationality and retains it even in her widowhood, while according to the Venezuelan Code she is so only during the life of her husband; therefore, on the death of Brignone his widow found herself Italian by the Italian law, and Venezuelan by the Venezuelan law.

If in regard to this circumstance Italian tribunals should be called upon to decide there can be no doubt they would declare the widow Brignone to be an Italian, while the local tribunals would just as surely consider her a Venezuelan. Now, what should the decision of the Commission be on this point, given, but not conceded, that it has power to judge and determine the nationality of a claimant in whom the Royal Government, according to its laws and through its legation, has recognized as an Italian?

There is no doubt in my mind that the Commission should consider the widow Brignone as an Italian, and this for the following reasons:

1. The exception urged by the Commissioner for Venezuela rests on "provisions of local legislation," and should therefore a priori be rejected in obedience to Article II of the protocol of May 7, 1903.

2. The coexistence of two nationalities in the same individual not being theoretically admitted in international law, and (as I have more fully set forth in the claim of Giordana) the nationality of origin being in every way the one that should prevail, the widow Brignone should be considered an Italian. In fact, although the lady was born a Venezuelan, she by the terms of both laws became exclusively Italian on her marriage, and her nationality as a widow can not be other than the one she was peacefully enjoying on the date of her husband's decease, when without ceasing to be Italian she found herself invested with an additional nationality. The fact that this latter nationality is the same she had before her marriage does not affect the case, since the question arises at the moment of Brignone's death — that is to say, when to the Italian citizenship of the widow another was added.

3. Admitting that the juridically abnormal fact of the existence of two nationalities in the widow Brignone should be recognized, an international tribunal, such as this Commission, in whose decisions the circumstance of its sitting in Caracas can have no weight, since it might equally have been called to sit in Rome or Washington, or any other city, can not but take into account that the widow by the fact of having herself presented the claim to the royal legation in favor of the heirs of the deceased shows her preference for the Italian nationality, and unhesitatingly chooses it instead of the Venezuelan.

The Commission, therefore, evidently should not impose on her a nationality she does not desire, and should respect her liberty of choice.

4. But admitting that in her case the Italian citizenship does not exclude the Venezuelan, no one surely would dare to affirm that the latter may on the contrary exclude the former. The claimant would at least be as much one as the other. Now, she is entitled to the full exercise of her rights as an Italian, and among these is that of claiming before this Commission, and by this means obtaining, the share to which she is entitled of the Brignone estate as one of the heirs out of any indemnity which may be awarded them either present or absent.

Article IV of the protocol of February 13 is clear and precise. It speaks of Italian claims without exception. To now except claims of persons to whom, though admitted to the enjoyment of another nationality, that of Italy may not be desired, is an infraction of the protocol itself, and is a restriction of its stipulated terms, which should have been done in Washington by the Venezuelan plenipotentiary, but which can now not be done, according to the dictates of common sense and the maxim laid down by Vattel (sec. 264, Bk. 2):

Si celui qui pouvait et devait s'expliquer nettement et pleinement ne l'a pas fait, tant pis pour lui. Il ne peut être reçu à apporter subséquemment *des restrictions* qu'il n'a pas exprimées.

I ask for no amplification of the protocol, and I hold to its letter "all Italian claims without exception," but I reject all exceptions and restrictions sought to be made in Caracas and which were not made in Washington.

With regard to the third point: If under a most extreme hypothesis, none of the arguments hitherto employed by me have succeeded in convincing the honorable umpire of the justice of my contention, I maintain that the Brignone estate should be liquidated according to the provisions of the Italian law, which says that when, as in the present case, referring to estates *ab intestato*,

the surviving wife or husband joins with the ascending heirs of the deceased, to these latter belong two-thirds of the estate and the remaining third to the survivor aforesaid. (Art. 754 of the Italian Civil Code.) As the father of Sebastiano Brignone is living, as proved by documents submitted by the royal legation, he is entitled to two-thirds of the sum awarded as indemnity by the Commission.

It is a prevailing rule, and the Commission will surely not adopt another, that estates should be liquidated according to the personal law of the deceased, in the correctness of which rule my Venezuelan colleague appears to agree, and thus spares me the necessity for a long dissertation. It suffices for me to quote Article VIII of the preliminary title of the Italian Civil Code, which reads:

The legitimate and testamentary successions, however, whether as to the order of succession or as to the measure of the rights of succession and the intrinsic validity of the provisions, are regulated by the national laws of the person whose estate is in question, whatever be the nature of the property or in whatever country it may be situated.

In thus inscribing and proclaiming in the Italian Civil Code so lofty and liberal a principle of international law its compilers foresaw that it would redound greatly to their credit, and Italian legislation has warmly welcomed it in every case, whatever the nature of the testamentary property, and it seems to acquire additional force whenever this latter is personal, from the maxim, "*Mobilia sequuntur personam*."

Fiore, in paragraphs 103 et seq., Volume I, *Diritto Internazionale Privato*, illustrates and justifies this principle, and in paragraph 109 sums up in these words his learned argument:

Among all the systems, the one which best responds to rational law is the one adopted by the Italian legislator and found in Article VIII (already cited in the present memorial) of the general provisions of the Civil Code.

Pasquale Stanislao Mancini in this connection says that the "*ragione successoria*" being naught else than the combination of the principle of property with that of the family should be governed by the law of the person, and I qualify the principle *tot hæreditates quot territoria* as scientifically erroneous, and conducive to complications, incoherencies, onerous charges, and injurious to the heirs.

My honorable Venezuelan colleague in one of the recent sessions of the Commission said, that if there were conceded to the heirs of Brignone residing in Italy two-thirds of the indemnity awarded, the widow might consider herself as injured in her interests, because the local law gives her a larger share of the property of her deceased husband than is granted by the Italian law.

It seems to me the widow, by the fact of her having submitted her claim through the Italian legation, which means that she accepts the Italian law, has impliedly renounced every right she might have under the Venezuelan law in the matter of the partition of the estate.

It would be far too convenient to invoke the Italian law in the prosecution of the claim, and then the Venezuelan in the award of the indemnity.

In any case, whatever may be the difficulty or responsibility of the Commission, it will be avoided by awarding indemnity "to the heirs" of Sebastiano Brignone, as was done in the case of Massardo, Carbone & Co.

It will be the business of the heirs to divide among themselves, by mutual agreement or according to law, the amount awarded them.

I come now to the conclusion, and ask, first, that the honorable umpire award to the heirs of Sebastiano Brignone an indemnity of 81,137 bolivars,

with interest from November 1, 1892, to December 31 of the current year; and second, that he allow the ascendant heirs of Brignone two-thirds of said amount, or 54,091.34 bolivars, with interest thereon calculated as above.

No opinion by the Venezuelan Commissioner.

RALSTON, *Umpire*:

This case comes to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claimants acquired their rights before this Commission through Sebastiano Brignone, an Italian citizen domiciled for many years in Venezuela as a merchant. The claim originated because of supplies furnished by Brignone, Delfino & Co. to the Venezuelan Government in 1892, and is for 81,137 bolivars, with interest from October 8, 1892.

The original beneficiary was married in Venezuela to a Venezuelan woman, September 5, 1891, and died in Caracas in September, 1898. His widow, who is one of the claimants, has always lived in Venezuela, and the question arises whether she may be treated as an Italian subject, and as such entitled to one-third of the estate. Of course, if she be Venezuelan she has no standing before the Commission. It is said that a conflict of laws as to her citizenship exists as between Italy and Venezuela.

The Civil Code of Italy provides as follows:

ART. 9. La donna straniera che si marita a un cittadino acquista la cittadinanza, e la conserva anche vedova.

ART. 14. La donna cittadina che si marita a un straniero diviene straniera, semprechè col fatto del matrimonio acquisti la cittadinanza del marito.

Rimanendo vedova, ricupera la cittadinanza se risieda nel regno o vi rientri, e dichiara in ambidue i casi davante l'ufficiale dello stato civile di volervi fissare il suo domicilio.

Upon the same points the Civil Code of Venezuela provides as follows:

ART. 18. La extranjera que se casare con un venezolano adquirirá los derechos civiles propios de los venezolanos, y los conservará mientras permanezca casada.

ART. 19. La venezolana que se casare con un extranjero se reputará como extranjera respecto de los derechos propios de los venezolanos, siempre que por hecho del matrimonio adquiera la nacionalidad del marido y mientras permanezca casada.

In the opinion of the umpire there is not a true conflict of laws, if we read the foregoing extracts with a due regard to their spirit.

Each country, speaking for its own nationals, declares that the native-born woman, marrying a foreigner and becoming a widow, having resided all the time at home, reassumes her original condition.

To permit so much of the Italian code as declares that the foreign woman marrying an Italian becomes Italian, to override the Venezuelan code, would therefore be against the spirit of the other section of the Italian code above referred to. It is therefore proper to say that in a true sense there is no conflict of laws.

But if it still be considered that a conflict exists, how should it be determined? Upon this point text writers and courts assist us.

Says Bluntschli (sec. 374):

Certaines personnes ou familles peuvent exceptionnellement être ressortissantes de deux États différents, ou même d'un plus grand nombre d'États.

En cas de conflit la préférence sera accordée à l'État dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les États où elles ne résident pas seront considérés comme suspendus.

In a note to the section he adds:

Contrairement à mes opinions antérieures, je pense aujourd'hui qu'en cas de collision on doit, en faveur de la liberté d'émigration, accorder la préférence à la nationalité de fait, c'est-à-dire, à celle qui s'unit au domicile.

Phillimore, volume 4, chapter 17, section 368, discussing the doctrine determining personal status, says:

An overwhelming majority of authorities pronounce that the law which governs the status is the law of the domicile,

referring to Rocco, Fœlix, and Savigny.

Let us now turn to the courts:

In the cases of *de Hammer* and others against Venezuela (3 Moore, p. 2456), there arose exactly the question before us. The claimants were Venezuelan born, but married to American citizens, and claimed American citizenship by virtue of the law of the United States of 1855, which declared a citizen —

every woman capable of naturalization married or who might marry thenceforward a citizen of the United States.

Commissioner Andrade decided against the claimant, and the American Commissioners, while not always following his reasoning, reached the same conclusion. Said Commissioner Findlay:

The question in the case is whether this law can have an extraterritorial operation and effect against the will and policy of another country in which the persons in whose behalf it is invoked are and have always been domiciled since their birth; and in my opinion there can be but one answer to that question. Whatever rights the United States had in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of non-resident aliens, including the right to take property by descent and succession, and the right to prosecute any claim against the United States; but more than this can not be done without interfering with the rights of other States and involving them and itself in conflicting claims of the most absurd character.

In the case of *Jane L. Brand*, before the British and American Claims Commission (3 Moore, p. 2488), it was held that the doctrine that the national character of a married woman was in all cases determined by that of her husband had always prevailed in Great Britain, as elsewhere, where *the domicile* of the wife and widow had continued to be that of the husband's nationality.

It is true, however, that the majority of the Commission in the cases of *Calderwood* and others (3 Moore, p. 2486), against the strong dissent of Commissioner Fraser, held that a widow of American birth, always remaining in the United States, did not regain her American citizenship, but in view of all the foregoing decisions and authorities this view may be rejected.

The reason for the decision above given, reestablishing citizenship of a woman always resident, upon the death of her foreign husband, in so far as the question of conflict of laws is concerned, is excellently stated in the case of *Alexander* before the British and American Claims Commission (3 Moore, p. 2529), in which a decision was presented by the American Commissioner which met the approval of the umpire, Count Corti. According to English law the claimant was an English subject, and by American he was an American citizen. Said the opinion:

The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no Government would recognize the

right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either Government meant to provide for them by this treaty.

The conclusion to be reached from the foregoing is that the claimant, Madame Brignone, is a citizen of Venezuela, and is without standing before this Commission.

But a second question arises. There are relatives of the original claimant of the ascending line. What part of the succession may these relatives claim?

The civil code of Italy provides:

ART. 754. Se non vi sono figli legittimi, ma ascendenti o figli naturali, o fratelli o sorelle, o loro discendenti è devoluta in proprietà al coniuge superstite la terza parte dell'eredità.

The civil code of Venezuela provides:

ART. 719. * * * Si existen cónyuge y ascendientes legítimos, y faltan hijos naturales, la herencia se divide en dos partes iguales, una que corresponde al cónyuge, y otra á los ascendientes legítimos.

If, therefore, the Italian code is to rule, the ascending heirs will receive from this Commission two-thirds, and if the law of Venezuela governs, they will receive one-half.

The Italian civil code provides:

ART. 7. I beni mobili sono soggetti alla legge della nazione del proprietario, salvo le contrarie disposizioni della legge del paese nel quale si trovano.

I beni immobili sono soggetti alla legge del luogo dove sono situati.

ART. 8. Le successioni legittime e testamentarie, però, sia quanto all'ordine di succedere, sia circa la misura dei diritti successorii, e la intrinseca validità delle disposizioni, sono regolate dalla legge nazionale della persona della cui eredità si tratta, di qualunque natura siano i beni, ed in qualunque paese si trovino.

The Venezuelan civil code contains nothing similar to section 7 of the Italian civil code, but provides as follows:

ART. 8. Los bienes muebles é inmuebles situados in Venezuela, aunque estén poseidos por extranjeros, se regirán por las leyes Venezolanas.

Shall this Commission be controlled by the law of nationality of the decedent, as Italy requires, or by the law of domicile, as indicated by the Venezuelan law? It will be borne in mind that Brignone died at his place of domicile, Caracas.

The differences of principle existing upon the question of succession to the estate of a deceased person are summed up in section 848 of Calvo's work as follows:

SEC. 848. Sur la question des lois généralement applicables aux successions testamentaires et aux successions *ab intestat*, la jurisprudence admet une triple division:

1. La jurisprudence qui soumet *l'universitas juris* (les biens mobiliers et les biens immobiliers) de la succession à la loi du dernier domicile du défunt. Cette jurisprudence est d'accord avec l'opinion de Savigny et les décisions des tribunaux supérieurs de l'Allemagne. Elle est aussi conforme à l'unité de constitution du patrimoine.

2. La jurisprudence, directement contraire, qui soumet les biens à la loi de l'endroit où ils se trouvent, laquelle admet en conséquence la possibilité de l'application de lois différentes aux différentes portions des biens, et ne pose aucun principe relativement aux dettes et aux créances dont il est loisible dans chaque cas de disposer pratiquement aux mieux des intérêts en cause. Cette jurisprudence est basée sur la loi féodale de la souveraineté territoriale.

3. La jurisprudence intermédiaire, qui soumet les personnes et les meubles à la loi du domicile du défunt et les biens à la loi de l'endroit où ils sont situés, *lex situs*. C'est la jurisprudence en vigueur en France (art. 3, du Code Civil), en Angleterre et aux États-Unis.

Si la succession ne comprend que des biens meubles, alors on applique le principe que les biens meubles suivent la personne et son domicile; c'est la loi du domicile qui gouverne la succession mobilière.

In the opinion of the umpire, the true rule, at least as to personal property, is indicated by Savigny, who says (Droit Romain, sec. 377, vol. 8):

La succession *ab intestat* se règle d'après la loi en vigueur au dernier domicile du testateur à l'époque où s'ouvre la succession. Cela s'applique notamment à l'ordre d'après lequel la loi appelle à succéder les héritiers *ab intestat*.

This principle is, it would seem, recognized by the Italian civil code, which declares:

ART. 923. La successione si apre al momento della morte, nel luogo dell'ultimo domicilio del defunto.

The Venezuelan civil code similarly declares:

ART. 894. La sucesión se abre en el momento de la muerte y en el lugar del último domicilio del defunto.

The umpire feels, therefore, obliged to follow the principle recognized by both laws as to succession, despite the conflict above indicated, the Italian law in apparent conflict being regarded as applying under the present circumstances only to estates opened in Italy. Any other view would, in the umpire's opinion, give to the Italian law an extra-territorial effect overruling the law of the domicile where the goods were situate and the decedent was domiciled. The adoption of such contrary principle would in his opinion infringe the territorial supremacy of a state.

But it is urged that no attention should be paid to the local laws of Venezuela because of the provision of the protocol of May 7, 1903, as follows:

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.

This unusual provision is to receive a rational and not a strained interpretation, and in the umpire's opinion amounts simply to saying that any local legislation which operates against equity shall be rejected. An extended interpretation rejecting any and all local legislation would at once defeat the very purposes of the Commission, as may well be illustrated by the present case. Mrs. Brignone was married in Venezuela under Venezuelan laws. Deny efficacy to these laws, and no marriage existed, for marriage is, in civilized nations, regulated by law. Her deceased husband acquired a complete interest in partnership assets from his associate (the partnership itself being created in accordance with the provisions of local law) by virtue of laws providing for such transfers. Proofs in this or in other cases have been taken before judges created by local laws and in the manner they provide. Reject local laws indiscriminately and the whole fabric of sworn testimony built up in more than 300 cases presented or to be presented to the Commission absolutely fails.

The only possible question, therefore, left to consider is, whether the provision of Venezuelan law giving the widow one-half of the estate of her deceased husband (there being no children) is contrary to equity. In view of the number of States in the United States as well as elsewhere in which precisely the same rule prevails, it is impossible for the umpire to say that the provision is opposed to equity or could be conceived as shocking to the moral sense of mankind.

A word should be added relative to the suggestion of the honorable Commissioner for Italy that the claim should be allowed without reference to the present citizenship of the claimant, and to enforce this position he cites Moore, pages 2398-2400, and 2360-2379, and 1865.

The first reference (Camy's case) simply sustains the validity of the assignment of an international claim, but the claim being against the United States, and the assignment having been made by a Frenchman to an American citizen, the demurrer of the United States was sustained and the claim rejected. The case is, therefore, if at all in point, opposed to the contention of the honorable Commissioner.

The second reference (*Texan Star* case) shows that a court acting equitably will in proper circumstances recognize the title and citizenship of the actual owner rather than those of the titular owner, whose title simply served temporary purposes.

The third citation (Delagoa Bay case) sustains the real interests of an American citizen who was required by Portuguese law to create a Portuguese corporation to exploit his concessions, and is not therefore in point.

In the view of the umpire, the "Italian claims," of which this Commission has jurisdiction must have been Italian when they arose as well as when presented.¹ Without discussing this point at length, he confines himself to referring to 2 Moore, page 1353, as well as to cases hereinbefore cited.

No dispute as to fact existing, a judgment will be signed in favor of the Italian heirs of Brignone, for one-half of the amount of the claim, with interest, but without prejudice as to the right of the widow to pursue her remedies elsewhere.

GENTINI CASE

(By the Umpire:)

Local laws of prescription can not be invoked to defeat an international claim. Nevertheless, the principle of prescription will be recognized internationally, and equity will forbid the recognition of stale and secret claims.

A claim first presented thirty years after its supposed inception, the existence of which was never before revealed, may be rejected.²

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

At the session of the Italian-Venezuelan Mixed Commission of the 29th of August the honorable Commissioner for Venezuela, Doctor Zuloaga, intimated that he would not agree to a demand for indemnity from the Italian citizen Odoardo Gentini, because the facts upon which said claim is based occurred more than thirty years ago, from which it appears that my illustrious colleague of Venezuela intends to invoke the principle of prescription.

This conclusion must, it seems to me, be based on motives of equity, or upon rules of international law, or, finally, on the provisions of local legislation.

In each of these three cases the exception taken must be rejected.

With regard to the first point, I observe that a tribunal of equity can not invoke prescription in order to evade obligations established by authentic documents.

¹ See Corvaia case, *infra*, p. 609.

² See Spader case, Vol. IX of these Reports, p. 223; and for limitations on rules laid down in the Gentini case see Giacomini case, *infra*, p. 594, and Tagliaferro case, *infra*, p. 592.

If to-morrow a creditor presents to me a receipt of mine, the genuineness of which I can not doubt, and representing a debt of more than thirty years' standing, even though I may legally refuse payment, my conscience would always counsel me to not recur to such exception unless in the case where, though a *summum jus*, it might be a *summum injuria*.

The law which declares a debt prescribed does not, on that account properly deprive a creditor of his rights, but interposes an exclusively legal obstacle to the double payment of the sum due.

The principle of prescription has indeed been admitted in the codes from motives of public order and with a political character (that of maintaining peace between individuals and preventing property from becoming a perennial source of contention), but it is not based on pure morals, so that when he who may does not invoke it the judge may not officially supplement an unexercised prescription (art. 2109 of the Italian Civil Code) even in case of minors or incapacitated persons. (Troplong on Prescription, No. 89.)

Dumond, commenting on art. 2223 of the French Civil Code, which has a similar provision, gave as the principal reason therefor "that he who does not oppose prescription may be induced thereto by remorse of conscience."

It is admitted in jurisprudence that a magistrate may not constitute himself an indiscreet patron of a party (V. Zacharie, Vol. III, p. 775; Troplong on Prescription, No. 91) or furnish officially a means of defense which, though permitted under the law, frequently offends the conscience of an honest debtor.

From the point of view of absolute equity, which should inspire the decisions of a mixed commission, I categorically reject the exception of my honorable colleague of Venezuela, and should this question come before the umpire, confidently expect his decision will found itself on my criteria.

On the second point I affirm that prescription is not admitted in the juridical reports based on the *jus gentium*.

I have consulted various authorities and found that while their opinions vary as regards the law to be applied when citizens of different nations raise the question of prescription in the act of regulating private interests, none of them has discussed or even raised this question in the settlement of claims, and therefore of actions of credit sustained by a government in the interest of its subjects as against another government and based on the treaties and protocols, as in our case.

I affirm that I have not found this question treated by the authorities consulted by me, though others may have done so; but on this matter we have the decision of the permanent court of arbitration of The Hague — that is to say, of the supreme tribunal in matters of international law, which decision must have a positive value, the more so that the decision to which I refer, that of the "Pious Fund of the Californias," is quite recent and absolutely analogous from the identical point of view in which we are concerned — the Gentini case.

The court of arbitration was convened to decide a case of credit of the Pious Fund of the Californias, represented by the Archbishop of San Francisco and the Bishop of Monterey *v.* Mexico, and the question was submitted to the court under the terms of a protocol stipulated at Washington, May 22, 1902, between the United States and Mexico.

It is worthy of note that, as in the case of present claims of Italy, so in the Pious Fund case, it was not a question of a credit of the United States against the Government of Mexico, but of a debt of this latter in favor of the prelates above named. The representatives of Mexico raised the question of prescription before the court because the case under consideration was one in which demand for payment had for many years been neglected.

The exception seemed to derive additional force that prescription, according

to the law of Mexico, requires five years, and by the existence of a decree of the same Government, promulgated June 22, 1885, calling on all its creditors to present their claims within a certain period (extended by another decree of 1894) under pain of prescription and extinguishment. In fact, the Catholic prelates of Upper California had not insisted upon their credit, either principal or interest, according to the provisions of the above decrees.

The distinguished agent of the United States before the court objected that it was not yet established, that an international tribunal had ever rejected a claim on the ground of an exception based on laws having no validity whatever before a tribunal of such character, and added (as I have already observed herein) that prescription does not extinguish the right of a creditor, but merely impedes his right of exercising it.

It did not require a lengthy argument from the honorable agent of the United States to obtain from the court a decree of payment from Mexico, including this maxim.¹

Les règles de la prescription étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux États en litige.

This principle is besides absolutely logical and moral, since when it is a question of private credits and debits it may be presumed that he who has permitted the lapse of a long period without bringing his rights into court may have intended to renounce them; or it may be admitted that he should suffer the results of his negligence. But when the debtor is a government, and, moreover, when the demand of the individual may be the subject of a claim, the reasons which may induce a creditor to postpone his action may be many and of varied nature; as, for instance, the interruption of diplomatic relations between the Governments concerned, the lack of political influence of the creditor, the unfavorable financial conditions of the debtor government, the want of faith of the creditor in the impartiality of magistrates, who, unprotected by a feeling of permanency, might against their better judgment become pliant tools of a party, and many other similar motives.

Many reasons may therefore operate to render unavailable a credit against a government, and as it is a general rule that the term of a period of prescription does not commence to run until the day when the payment falls due and action for its recovery may be had, it would be necessary to prove (and the proof would always be difficult and uncertain) when these conditions occurred in the case of claims against governments.

As there is not in international law an exact and generally accepted provision which establishes when and within what limits a credit becomes null and void through prescription, there can not be a presumptive negligence on the part of the dilatory creditor, and the plea of prescription must be absolutely rejected.

In regard to the third point, to wit, the eventual invoking by my honorable colleague of the principle of prescription according to the provisions of local laws, it is only necessary to observe that I have already clearly expressed my opinion in the arguments used by me in my reference to the Pious Fund case, but I will add some further considerations. The law of prescription of Venezuela can not be considered here, inasmuch as it is contrary to the provisions of Article II of the Washington protocol of May 7.

If in the case of claims based on alleged denial of justice it may be opportune and even necessary to search the laws of the Republic to afford this Commission unlimited freedom and facility for the full performance of its duty, in any

¹ Sen. Doc. 28, 57th Cong., 2d session, p. 858.

other case the introduction of them would constitute so patent and manifest an infraction of that clause of the protocol, which is for us the supreme law, that such a fact might well be considered a sufficient cause for invalidating our sentence.

The clause referred to, which we should not and can not ignore, was not included in the protocol without due reason, which was not merely to avoid placing the Commissioner for Italy in a position of manifest inferiority to that of his Venezuelan colleague, who is known to be profoundly versed in the laws of his own country, while I am at best but superficially acquainted with them.

But inasmuch as the protocol requires no such learning on my part it is but just that I should avail myself of its authority and refuse to join in any discussion touching Venezuelan codes and legislation.

Without concerning myself, therefore, with the rules from which, according to Venezuelan law, prescription is derived, I wholly reject the principle of prescription as being contrary to Article II of the protocol of May 7, 1903, and request the Commissioner for Venezuela, or the honorable umpire in case the Commissioners fail to agree as to the question of principle, to receive the claim of Odoardo Gentini and award him an indemnity in the following amounts: 293.50 bolivars due him as per receipts; 360 bolivars for eighteen days forcibly closing of his store, and 546.50 bolivars for his illegal arrest — in all, a total of 1,200 bolivars.

ZULOAGA, *Commissioner* :

Thirty years have passed since the transaction to which this claim refers without its appearing that during this long period it has been submitted to the consideration of the Government of Venezuela. The cause upon which this claim is based is barred. It is barred in accordance with the internal law of Venezuela. It is barred in accordance with the Italian law (arts. 1956 and 1936, Civil Code of Venezuela, and 2135 and 2114, Italian Civil Code). It is barred in accordance with the principles of international law, which establishes prescription as a legitimate cause for the extinction of obligations.

Prescription is founded upon a social necessity, and by all civilized peoples and at all times, it has been recognized as a substantial element of stability and peace.

Prescription, says Laurent, is more than a right consecrated by a law. It is a right of humanity. Nations have conceded also that a State is subject to prescription the same as an individual. (Art. 1936, Civil Code of Venezuela; 2114, Civil Code of Italy; 2227, Civil Code of France.) Limitation, therefore, runs against a State as a State ordains that it should run against individuals. Limitation will run against the Italian State as it ordains that prescription should run against an individual, and I do not see why these principles, which have been considered just in the internal civil law, should not be so considered in the life of nations, and why a claim of a civil nature only, and therefore essentially liable to prescription, must become unextinguishable thereby because it is converted into an international claim. It is not explained how a right already barred (if it is called to the attention of the claimant government after the expiration of the legal term) can give rise to a valid claim by the circumstance that the claim, as in the present case, appears as in the first instance as an international one. What would be the length of time necessary for prescription? It would be difficult to determine the shortest period, because an internal law can not govern; but, for my part, I do not doubt that a period of thirty years is more than sufficient, especially where there is a reference to a question between Venezuela and Italy, all the more since this period is greater than both States have fixed for prescription; having made it such an

essential to public order that both recite in their respective laws that there can not be pleaded in opposition to it want of title or good faith.

As a precedent in the Mixed Commissions we find the case of John H. Williams, No. 36, of the United States and Venezuela Commission of 1890 (Moore, p. 4181), which disallowed the claim because it was barred by a lapse of twenty-six years. The argument contained in the opinion gives us to understand that a less term is sufficient.

I believe, therefore, the claim of Gentini against the Government of Venezuela is barred.

AGNOLI, *Commissioner* (supplemental opinion):

The undersigned prays the honorable umpire to take into consideration the fact that the Italian Government has never heretofore had a protocol or a mixed commission for the settlement of its claims against the Government of Venezuela, while the majority of the other European powers — that is to say, France, Spain, England, Holland, and even the United States — have obtained the adjustment of claims by means of commissions opened to all claimants. Therefore, even if the principle of prescription had been admitted by a previous mixed commission, such precedent could have no application to Italian claims, because Venezuela has always refused us mixed commissions and the liquidation of claims accorded by it to other nations, basing her refusal on an erroneous interpretation of the treaty of 1861, against which refusal we have always protested.

It is worthy of note in this connection, besides, that, notwithstanding that, in the French-Venezuelan Commission five claims more than 30 years old (not *one*, as affirmed by the honorable Commissioner for Venezuela), have been liquidated.

In any case, we have the right to invoke in this question also the “most-favored nation” clause (Art. VIII of the protocol), it not being admissible that Italy should have intended to renounce her right to indemnity in a category of claims which other nations have had occasion to obtain.

The honorable umpire should, in addition, appreciate the fact that in the protocol which confers upon this Commission the right of competency in all classes of Italian claims no reserve is made of antiquated claims, but express mention is made of those relative to holders of bonds and those otherwise settled (Art. IV), the only ones not submitted to the action of the Commission.

RALSTON, *Umpire*:

In this case, referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela, it appears that the claimant, an Italian, was, in 1871, a resident of Trujillo, when, as it is said, his store was closed temporarily and business injured by the presence of a large number of soldiers, the claimant sent to prison on the order of the jefe, his establishment plundered, and later on forced loans were imposed upon him under threat of imprisonment. The proofs were taken the following year, and from that time till the past month nothing appears to have been done with the claim, it not having even been called to the attention of the royal Italian legation. The claim is for the sum of 3,900 bolivars.

It is submitted on behalf of Venezuela that this claim is barred by prescription, although it is admitted that no national statute can be invoked against it.

On the other hand, it is insisted for Italy that prescription can not be recognized in international tribunals, this contention being based upon the arbitral sentence given by the Hague permanent court of arbitration in the Pious Fund

case. If this contention be correct the argument must stop at this point. Let us examine it carefully.

In the Pious Fund case it was urged by Mexico that the claim, as presented, was barred by two short statutes of limitation, one of five years and a later one of about the same length of time, the claimants having failed, it was said, to present their claims before the proper authorities within the time limited. On the other hand, it was contended on behalf of the United States (American agent's report, p. 63¹), that —

it has never yet been held in international tribunals that a claim brought before them could be defeated by reason of the existence of a statute of this sort, such statute having no authority whatsoever over international courts.

Passing upon these diverse contentions, the court held (American agent's report, p. 858) that

les règles de la prescription étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux États en litige,

adopting almost verbatim the position taken on behalf of the United States.

It will be noted that the declaration of the court had reference not to the principle of prescription, but to the rules with which civil law had surrounded it. A "règle," as we are told in Bourguignon & Bergerol's *Dictionnaire des Synonymes* —

*est essentiellement pratique et, de plus, obligatoire * * * ; il est des règles de l'art comme des règles de gouvernement,*

while principle (*principe*)

exprime une vérité générale, d'après laquelle on dirige ses actions, qui sert de base théorique aux divers actes de la vie, et dont l'application à la réalité amène telle ou telle conséquence.

The permanent court of arbitration has never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so. Such denial would tend to upset all government, since power over fixed areas depends upon possession sanctified by prescription, although the circumstances of its origin and the time it must run may vary with every case. The expressions of many international law writers upon this point, including Wheaton, Vattel, Phillimore, Hall, Polson, Calvo, Vico, Grotius, Taparelli, Sala, Coke, Sir Henry Maine, Brocher, Domat, Burke, Wharton, and Markby, are collated in the case of *Williams v. Venezuela*, Venezuelan-American Claims Commission of 1888, cited at length in 4 Moore, page 4181. To them we may add Bello, who, on page 42 of his *Derecho Internacional*, says:

La prescripción es aun más importante y necesaria entre las naciones que entre los individuos, como que las desavenencias de aquellas tienen resultados harto más graves, acarreando muchas veces la guerra.

Bluntschli (sec. 279) finds that a taking of territory, originally wrongful, becomes by time transformed into a legal condition.

But it remains true that the international law writers have referred almost invariably to that form of prescription involved in the taking and possession of property known at one time as usucaption, and we are left to examine whether the general principles of prescription should be applied to claims for money damages as between nations.

¹ Senate Document No. 28, 57th Cong., 2d session—United States *v.* Mexico. Report of Jackson H. Ralston, agent and of counsel.

In using the word "prescription" in the ensuing discussion, let us follow the definition given by Savigny (*Droit Romain*, vol. 5, sec. 237):

Quand un droit d'action p rit parce que le titulaire n glige de l'exercer dans un certain d lai, cette extinction de droit s'appelle prescription de l'action.

The same idea is embodied and somewhat enlarged in Article 2219 of the Code Napol on, which says:

La prescription est un moyen d'acqu rir ou de se lib rer par un certain laps de temps et sous les conditions d termin es par la loi.

On examining the general subject we find that by all nations and from the earliest period has it been considered that as between individuals an end to disputes should be brought about by the efflux of time. Early in the history of the Roman law this feeling received fixity by legislative sanction. In every country have periods been limited beyond which actions could not be brought. In the opinion of the writer these laws of universal application were not the arbitrary acts of power, but instituted because of the necessities of mankind, and were the outgrowth of a general feeling that equity demanded their enactment; for very early it was perceived that with the lapse of time the defendant, through death of witnesses and destruction of vouchers, became less able to meet demands against him, and the danger of consequent injustice increased, while no hardship was imposed upon the claimant in requiring him within a reasonable time to institute his suit. In addition, another view found its expression with relation to the matter in the maxim "*Interest republica ut sit finis litium.*"

The universal opinion of publicists and lawgivers has been that the statutes of prescription or "limitation," as they have come to be called, were equitable and the outgrowth of a general desire for the attainment of justice. Let us quote some not given in the opinion hereinbefore referred to.

Savigny says (Vol. 5, sec. 237):

Le motif le plus g n ral et le plus d cisif  galement applicable   la prescription des actions et   l'usucaption est le besoin de fixer les rapports de droits incertains susceptibles de doutes et de contestations, en renfermant l'incertitude dans un laps de temps d termin . Un second motif est l'extinction pr sum e du droit que prot ge l'action. Mais ce motif grave et v ritable peut ais ment  tre mal entendu. Le sens de cette pr somption est l'in vraisemblance que le titulaire du droit ait n glig  pendant un temps aussi long d'exercer son action si le droit lui-m me n'e t  t   teint d'une mani re quelconque, mais dont la preuve n'existe plus. * * *

Le demandeur peut intenter son action quand il lui pla t; il peut, donc, en la d f rant, augmenter les difficult s de la d fense; car les moyens de preuve peuvent p rir sans la faute du d fendeur; par exemple, si des t moins viennent   mourir. Restreindre ce droit absolu du demandeur, dont la mauvaise foi peut abuser, est surtout ce qui m rite consid ration.

In section 245, Savigny says:

Mais la prescription, quoique de droit positif, n'en est pas moins une institution des plus bienfaisantes, et nous ne devons pas,   cause de son origine, affaiblir ou m me annuler son efficacit  par des restrictions sans fondement.

Says Troplong in "*Droit Civil Expliqu *," title Prescription, 2d ed., Vol. I, p. 14:

Ces consid rations sont, je crois, suffisantes pour nous montrer tout ce qu'il y a d' quitable et de rationnel dans le principe de la prescription. Que le droit arbitraire soit intervenu ensuite pour d terminer la mesure du temps au bout duquel se trouve la d ch ance, c'est ce qui  tait n cessaire pour tenir en  veil la prudence des

citoyens et pour donner à tous une règle uniforme. Mais le droit civil n'a fait que travailler sur des notions préexistantes; le droit naturel avait parlé avant qu'il ne songeât à codifier.

Says Laurent, title Prescription, volume 32, page 23, section 12:

C'est plus qu'un droit consacré par une loi; c'est un droit de l'humanité; donc, en cette matière toute distinction entre nationaux et étrangers s'efface, comme n'ayant pas de raison d'être; tout homme peut invoquer la prescription.

In Bouvier's Law Dictionary (Rawle's edition), title Prescription, we read:

The doctrine of Immemorial Prescription is indispensable in public law. (1 Phill., Int. L., sec. 255.) The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent since all are parties to it. None can safely disregard it without impugning its own title to its possessions. (1 Wheaton, Int. L., 207.) The period of time cannot be fixed in public law as it can in private law; it must depend upon varying and variable circumstances. (1 Phill., Int. L., sec. 260.)

As appears to the writer, all the arguments in favor of it as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equally with an individual lose its vouchers, particularly when, if any exist, they are in the hands of far distant subordinate agents? If there be collusion between claimant and official will not government witnesses die as readily as those of private individuals? If the claimant's own action be the cause of the misfortunes of which he complains, will not knowledge of the fact be lost with the flight of time? May the claimant against the government, with more justice than if he claimed against his neighbor, virtually conceal his supposed cause of action till its investigation becomes impossible? Does equity permit it?

And this brings us to a further point. We are told with truth that this is a Commission whose acts are to be controlled by absolute equity, and that equity will not permit the interposition of a purely legal defense, as prescription is said to be.

But is this position correct? As appears from the foregoing citations, the principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost, having only his own negligence to accuse.

Additionally, however, we may refer to the position taken by courts of equity in England and the United States with reference to statutes of prescription.

Says Bouvier (Rawle's edition) title Limitation:

Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless especial circumstances of fraud or the like require in the interest of justice that they should be disregarded. (12 Pet., 56; 130 U.S., 43, etc.) Courts of equity will apply the statute by analogy, and in cases of concurrent jurisdiction they are bound by the statutes which govern actions at law. (149 U.S., 436; 169 U.S., 189). Some claims, not barred by the statute, a court of equity will not enforce because of public policy and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches.

It thus appears that courts of equity, even when not bound by the statute recognizing its essential justice, have followed it in spirit.

Let us turn to the cognate title of Laches, in the same work, and we find that —

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution. (5 Col. App., 391; 155 U.S., 449; 160 id., 171.) The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether under all the circumstances the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner (160 U.S., 171); it is not measured by the statute of limitations (155 U.S., 449); but depends upon the circumstances of the particular case (141 U.S., 260). Where injustice would be done in the particular case by granting the relief asked, equity may refuse it and leave the party to his remedy at law (158 U.S., 41), or where laches is excessive and unexplained (34 U.S. App., 50).

* * * * *

Laches in seeking to enforce a right will, in many cases in equity, prejudice such right, for equity does not encourage stale claims nor give relief to those who sleep upon their rights (4 Wait, Act. & Def., 472; 9 Pet., 405; 91 U.S., 512; 124 id., 183; 130 id., 43; 142 id., 236; 150 id., 193; 1 App. D. C., 36; 157 Mass., 46); this doctrine is based upon the grounds of public policy, which requires for the peace of society the discouragement of stale claims (137 U.S., 556). * * *

It has been held to be inexcusable for thirty-six years (16 U.S. App., 391); twenty-seven years unexplained (145 U.S., 317); twenty-three years (146 U.S., 102); twenty-two years, during which the defendant company spent much money and labor in improvements (161 U.S., 573); twenty-two years after knowledge of the facts (152 U.S., 412); nineteen years on a bill to establish a trust (7 U.S. App., 481); fourteen years in the assertion of title to lands which meantime had been sold to settlers (4 U.S. App., 160); ten years, in proceedings to enforce a trust in lands (158 U.S., 416); ten years, after the foreclosure and sale of a railroad in a bill by a stockholder to set aside the sale for collusion and fraud, which were patent on the face of the proceedings (146 U.S., 88); nine years in a suit to have a deed declared a mortgage on the ground that it was obtained by taking advantage of the grantor's destitute condition (7 U.S. App., 233); eight years' acquiescence in a trade-mark for metallic paint, during which the defendant had built up an extended market for his product (17 U.S. App., 145); eight years in proceedings where complainant in consideration of \$10,000 had released certain claims and sought to set the release aside on the ground that it was entitled to a much larger sum than it received (159 U.S., 243); three years where a person bought property of uncertain value, and after three years brought suit to rescind the contract on the ground of fraudulent representation (31 U.S. App., 102).

We may refer for a moment before concluding to such international precedents as exist upon the subject.

The first case to be cited is that of Mossman before the American and Mexican Mixed Claims Commission of 1868. The claimant alleged that he had been imprisoned unjustly by the Mexican authorities in 1854, and first presented his claim in 1867. Sir Edward Thornton, the umpire (4 Moore, p. 4180), in the course of his discussion said:

It seems unfair that the latter (the Mexican Government) should be first informed of the alleged misconduct of its inferior authorities more than *fifteen years after the date of the acts complained of*. The umpire can not, under this circumstance, consider that the Mexican Government can be called upon to give compensation for a very doubtful injury, and he therefore awards that the claim be disallowed.

The same subject was thoroughly discussed in the case of *Williams v. Venezuela* (4 Moore, p. 4181), heretofore alluded to, in which there had been a delay of twenty-six years in the presentation of an account. After a very learned and thorough discussion, the Commission held (p. 4199):

Upon these principles, too lengthily discussed, without awaiting further proof called for in defense from Venezuela, we disallow claim No. 36. It was withheld too long. The claimant's verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement.

We next have the case of *Barberie v. Venezuela*, No. 47, of the same Commission, and we quote from 4 Moore, pages 4202, 4203, expressions that cast a strong light upon the whole subject-matter under discussion.

It is true that this Commission is an international tribunal, and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts; but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence by which the equality of the parties is disturbed or destroyed, and as a consequence renders the accomplishment of exact or even approximate justice impossible. Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal, in dealing with it, can not escape the obligation of a universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed. The treaty under which it is sitting requires that its decisions shall be made in conformity with justice, without defining what is meant by that term. We are clearly of the opinion that in no sense in which the term is used would it be just for us to make an award which would require the levying of a tax on the whole present population of Venezuela to pay a claim which originated before nearly all of the oldest of them were born, and which is presented at a time when it is impossible to say whether it is well founded or not, the delay being without excuse or justification, and we accordingly reject the claim and dismiss the petition.

Before the same Commission was presented the case of *Driggs v. Venezuela*, No. 7, which was rejected on the same grounds as the *Williams* case. The Commission, among other things, say: ¹

Twenty-eight years had elapsed since the alleged wrong by the Colombian Government, and not a complaint had been made by *Driggs*. There is not a case on our list that better illustrates the wisdom of the prescriptive rule.

The same principle has just received the consideration of the American and Venezuelan Claims Commission now sitting. The claim of *William V. Spader* was, by the opinion of Commissioner *Bainbridge*, rejected. The honorable Commissioner, speaking of it, says: ²

A right unasserted for over forty-three years can hardly, in justice, be called a "claim."

He further declares —

It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that "great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

In opposition to the foregoing it is suggested that the umpire of the French-Venezuelan Commission, now in session in Caracas, has admitted claims

¹ See Decisions United States and Venezuelan Claims Commission, 1890, p. 404.

² See vol. IX of these Reports, p. 223.

dating from 1867, although there have been intermediate French commissions. As it is understood that the arbitral sentences referred to were not accompanied by a statement of reasons, we may imagine that they were based upon some exception to the rule above indicated, and we may now refer, at least partially, to exceptions to the application of the principle of prescription between nations.

In a case referred to in 4 Moore, page 4179, it seemed to have been considered that where there was an infraction of a treaty obligation by the legislative power of the Government itself, prescription would not lie. Whether the position be sound or otherwise need not be discussed.

Again, it was recognized in the Williams case (4 Moore, p. 4194) that the time which would bar an account might not affect a bond as to which a public register had been kept.

Further, the fact will not be lost sight of that the presentation of a claim to competent authority within proper time will interrupt the running of prescription.

The qualifications above referred to, and others which might be imagined, can not, however, have any application to the present case, in which for thirty-one years after proof had been prepared the case does not appear to have been presented in any manner, the royal Italian legation, even, until very recently, having been in ignorance of its existence. Of this conduct on the part of the claimant no explanation is offered.

The umpire, while disallowing the claim, expresses no opinion as to the number of years constituting sufficient prescription to defeat claims against governments in an international court. Each must be decided according to its especial conditions. He calls attention to the fact that under varying circumstances the civil-law period is ten, twenty, and thirty years; in England, for many years — for contracts, six years; in the United States, on contracts with the Government, six years, and in the several States, on personal actions, from three to ten years.

It is sufficient to say that in the present case the claimant has so long neglected his supposed rights as to justify a belief in their nonexistence.

A judgment of dismissal will be signed.

GUASTINI CASE

(By the Umpire:)

Opinion in the Sambiaggio case as to non-responsibility of government for acts of unsuccessful revolutionists save in case of proven negligence (p. 666) affirmed and followed.

The legitimate government can not enforce a second payment of taxes once paid to revolutionary authorities when the latter were for the time being at the place in question the *de facto* government.¹

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

The honorable umpire in the claim of Sambiaggio has expressed the opinion that the protocol of February 13, 1903, does not implicitly allow indemnity for damages caused by the revolution.

The Italian Commissioner not being able to accept this point of view, on account, no doubt, of a lack of similar data of fact and of law, has the honor to

¹ See same principle affirmed by the British-Venezuelan Commission, Vol. IX of these Reports, p. 455.

present the following new considerations on this controversy, supporting them by documents not heretofore produced and by arguments not yet fully examined.

The honorable umpire justly remarks that the treaty of 1861 does not explicitly admit damages caused by revolution, but we must observe that neither does it reject them. In fact, it says that "Italians in Venezuela shall be entitled to indemnity in the same measure as the nationals," *not* that they "shall have right only." Now, if one right is conceded to foreigners this does not necessarily mean that they shall be excluded from additional rights, which is in point provided by article 26 of said treaty containing the most favored nation clause. And let us observe, by the way, that the treaty of 1861 may not be invoked against the protocol of February 13, and this is to say, that the protocol recognizes rights superior to those recognized by the treaty — that is, including the right to indemnity for revolutionary damages (Art. VIII of the protocol of February 13) above all when a similar advantage is granted others.

Now, we will undertake to show that the Royal Government has intended to reserve and make good the rights of Italian claimants on the basis of a responsibility which includes revolutionary damages. The whole question, according to and judging by the arguments employed in the Sambiaggio case, seems to hinge on the meaning of the word "injury" contained in the English version of the protocol.¹ "Injury," according to its English law meaning, is a "damage done contrary to law; illegal damage." The honorable umpire, therefore, holds that in order to render Venezuela responsible it would be necessary to show that she is so according to the "*jus gentium*." To reach this conclusion the honorable umpire has recourse to the correspondence between Italy and Venezuela prior to the protocol, and from it he thinks it may be shown that the royal Italian legation sought only to reject the pretension of the Venezuelan Government to limit its responsibility to that recognized by the decree of 1873; but it does not seem to us that his opinion is justified; in fact, the royal Italian legation not only denied this restriction of responsibility decreed by Guzmán Blanco, but has expressly declared (in the note of April 24, 1901, of the royal Italian legation) as follows:²

The Government has given me, in addition, the charge of adding, and I do so add, the most ample reservations in regard to the rights of Italian claimants.

This general reservation had for its object to protect the more important rights of injured Italians — rights which have been contemplated subsequently by the protocol of February 13 (Art. IV). Plainer still was the memorandum note presented by Minister Riva on December 11, 1902, which, by order of his Government, informed the Government of Venezuela that not only did it exact the payment of claims recognized by the legation, but made reservation with regard to other claims on the basis of a much broader Venezuelan responsibility than that partially discussed previously, and which Italy never expressly surrendered. This memorandum served as a starting point for fixing the conditions of the protocol of February 13, 1903. This has been impliedly admitted by the honorable umpire, who has evidently intended to take the text of the memorandum in order to explain the views of the Royal Government, and has formally alleged it, saying he had consulted the correspondence of the high contracting parties to acquaint himself with their intentions. Now the memorandum³—

¹ The Italian Protocol was signed in English.

² See the original Report, Appendix, p. 990.

³ Idem, Appendix, p. 995.

expressly reserves all those claims which, posteriorly to the period 1898-1900, were or shall be presented by Italian subjects as well for damages arising from the civil war begun in 1901, *as for whatsoever title of credit or action* toward the Venezuelan Government.

Here, on the eve of a rupture of relations between the two countries, we have a new phase — one in which Italy has asked for a generic and complete, not partial settlement, of all accounts with Venezuela, in which she has considered her rights as a whole, making the most ample reservations, and invoking a broader and indisputable responsibility.

What is the significance of the words, “all those claims * * * for damages arising from the civil war begun in 1901?” Is it not evidently intended to cover thereby all losses and destruction of property occurring in civil strife? Such losses must include those occasioned as well by government as by revolutionary forces.

In the memorandum note reservation is also made “for whatsoever other title of credit or action against the Government of the Republic,” thus making double reference to future demands for indemnity on account of Venezuela’s negligence in protecting Italian citizens, and to revolutionary damages.

The damages arising from civil war form a sum total embracing all losses, deteriorations, destructions, and damages suffered by property, since such is the meaning of the word “damage,” which has nothing to do with the sense of the word “injury,” as understood by various American and English jurists. The word damage employed in the memorandum has been repeated in Article IV of the protocol, and translated in the English text by the word “injury.” In case of doubt, which of the two meanings should hold, the Italian or the English? Fiore, at paragraph 1036, says:

Where a word used in a treaty has a different juridical meaning in one State from that which it has in the other, it should be determined according as it is understood in the State to which the disposition of the treaty refers.

Evidently this State can be neither England nor the United States, but Italy, the English language having been employed simply for translation, or as an auxiliary tongue, because the third powers can have no part in a litigation which does not concern them. The language of a third nation can not have served except as a copy of the original substantiating the original in case of doubt, but is not to be construed against it. As a still further proof, it may be added that in the official documents published by the Venezuelan Government (Memorandum of December 11 and *Gaceta Oficial*, containing the official translation of the protocol), the words “danno” or injury were translated into “daño, daños,” which are the equivalent of the English term.

The sense of the word “danno,” as understood in the vernacular, as well as in Italian jurisprudence, is one and the same, whether referring to damages from natural causes, as storms, fire, etc., or the result of accident or intention, or to damages arising from war. While not wishing to enter into a juridical dissertation on this point, we will, nevertheless, remark that a damage caused by the fault of one occasioning it, directly or indirectly, becomes a civil crime or quasi crime. Only in practice has it happened that the meaning of quasi crime has sometimes been confused with that of damage, in order to avoid the reiteration of definitions and explanations already well understood.

In the Roman law the definition of *injuria* is taken from the Digest: “*Injuriam accipimus damnum culpa datum*,” to become crime or quasi crime (in the English sense of “injury,” which, however, at times simply means damage). To “damage” must therefore be added a new element — that of guilt. We say in Roman law that the “*damnum est ademptio et quasi dimi-*

nutio patrimonii;" that is to say, a subtraction and a quasi diminution of patrimony; in other words, an indirect loss equivalent to a diminution.

From the foregoing it follows that the protocol did not intend to distinguish between damages caused by unlawful acts and those brought about by civil war, and has not therefore eliminated those of the latter class which the *jus gentium*, according to some authorities, does not consider entitled to indemnity.

The Venezuelan Government having assumed so broad and extraordinary a responsibility as that of Article IV, should pay not only the damages caused by the revolution, but also those caused by the operations of war, such as bombardments, breaching of walls by shot during battle; in other words, all damages coming under "whatsoever title of credit or action against the Government of the Republic." It is useless to repeat here that Articles III and IV set a limit to the powers of this Commission as regards claims of the second class of the period 1898-1900, and for all other claims without exception, saving as provided in the last line of Article IV.

The responsibility sanctioned by the protocol is, according to the principle that a nation admitted to the concourse of civilized nations, as Venezuela has been, should be held responsible for whatever abnormal occurrences happen within its territory in damage to the interests of pacific foreigners and neutrals. Such is the view of the "Institute of International Law," and more than once expressed by that distinguished body, which counts as members the greatest expounders of the doctrine of the "*jus gentium*." And further, the rule of the institute itself, formulated after mature consideration and learned discussion, and representing, as it were, the last word in the science of argument, establishes the general responsibility of a state for damages occurring during an uprising or a revolution.

*Text of the regulation on the responsibility of states for damages suffered by foreigners during riots, insurrections, or civil war, adopted by the Institute of International Law in the session of September 10, 1900.*¹

1. Independently of cases where indemnity may be due foreigners in virtue of the general laws of the country, foreigners have right to indemnity when they are injured in their person or property in the course of a riot, an insurrection, or a civil war; (a) when the act through which they have suffered is directed against foreigners as such, in general, or against them as subject to the jurisdiction of any given state; or (b) when the act from which they have suffered consists in the closing of a port without previous notification at a seasonable time, or the retention of foreign vessels in a port; or (c) when the damage results from an act contrary to law committed by an agent of the authority; or (d) when the obligation to indemnify is founded in virtue of the general principles of the laws of war.

2. The obligation is likewise established when the damage has been committed (No. 1 (a) and (d)) on the territory of an insurrectionary government, either by said government or by one of its functionaries. Nevertheless, demands for indemnity may in certain cases be set aside when they are based on acts which have occurred after the state to which the injured party belongs has recognized the insurrectionary government as a belligerent power, and when the injured party has continued to maintain his domicile or habitation in the territory of the insurrectionary government. So long as this latter is considered by the government of the injured party as a belligerent power, claims contemplated in line 1 of article 2 may be addressed only to the insurrectionary government, not to the legitimate government.

3. The obligation of indemnity ceases when the injured parties are themselves the cause of the events which have occasioned the injury.

There is evidently no obligation to indemnify those who have entered the country in contravention of a decree of expulsion, or those who go into a country or seek to

¹ *Annuaire de l'Institut de Droit International*, volume xviii, pp. 254, *et seq.*

engage in trade or commerce, knowing, or who should have known that disturbances have broken forth therein, no more than those who establish themselves or sojourn in a land offering no security by reason of the presence of savage tribes therein, unless the government of said country has given the emigrants assurances of a special character.

4. The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations.

5. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of a denial of justice, or of evident violation of justice, or of the *jus gentium*.

CONCLUSIONS

1. The Institute of International Law expresses the hope that states will refrain from inserting in their treaties clauses of reciprocal irresponsibility. It believes that such clauses are wrong in that they dispense the states from the duty of protecting the foreigner in their territory.

It believes that states which, through a series of extraordinary circumstances, do not feel themselves to be in a position to insure in a sufficiently effective manner the protection of foreigners on their territory can not withdraw themselves from the consequences of such a state of things except by a temporary interdiction of their territory to foreigners.

2. Recourse to international commissions of inquest and international tribunals is, in general, recommended for all causes of damages suffered by foreigners in the course of a riot, an insurrection, or a civil war.

Is not the protocol of February 13 a sanction of these very principles which seem to be dictated by a desire to safeguard a pacific and well-ordered agreement among civilized nations? The council of contentious diplomacy in Rome referred directly to the foregoing expressions of the Institute of International Law in enunciating the views which served as a basic motive for the rupture of relations with Venezuela, and a demand for an equitable satisfaction.

In accord with this, Fiore, very far from sharing the opinions of the honorable umpire, as he seems persuaded, giving his views on the situation in Venezuela, thus defines her responsibility in the case of one Mammini, already known to this Commission.

The Venezuelan Government is especially responsible by reason of insufficient measures of security and a lack of vigilance in contravention of the principle laid down in the Italian-Venezuelan treaty of June 16, 1861, which provides that the citizens and subjects of one of the contracting states shall enjoy in the territory of the other the most constant protection and security in their persons, etc. (Extract of ministerial dispatch of March 29, 1899.)

It is clear, therefore, that Article IV refers to losses and deteriorations of property in civil wars, and to those inflicted by the government, by states, by the federation, and their employees, as well as by revolutionists, and undue appropriations chargeable to both parties. We lay stress on the term "undue appropriations." To unduly appropriate an article is to despoil the legitimate owner to one's own profit, and is equivalent to enriching one's self at the expense of one's neighbor. Whatsoever spoliation, says the protocol, if undue — that is, without right on the part of the spoliator — must give occasion to a claim for indemnity. Thus was had in view the numerous spoliations and forced requisitions unjustly suffered by Italians, especially during the struggles between contending factions at times when foreigners were frequently unable to tell which represented the legitimate power. Such are the limits which the protocol

assigns to the responsibility of a state, and this view is the only one which gives a logical and natural meaning to Article IV.

It is idle to insist that such a view is unreasonable and absurd in that, giving a too extended interpretation to Article IV, the Venezuelan Government would be obliged to recognize any claim for damages, even if inflicted by private individuals, and any claim which the royal legation might see fit to present. It is insinuated that in admitting such a responsibility the Venezuelan plenipotentiary would not have been in his right mind; but such a supposition is out of reason, because having accepted the situation we have clearly explained it was but natural he should have affirmed it. May he not have been in the same frame of mind which impelled the Commissioner for Venezuela in the French-Venezuelan Commission to accord, without objection, indemnity for revolutionary damages in 82 cases of the period 1900-1903?

If the French protocol of 1902, was, without objection by Venezuela, construed as allowing indemnity in a multitude of various cases, for the most part of revolutionary origin, running as far back as 1867, France having already had two settlements since that date, while Italy had had none, how can the latter nation be denied an equal treatment when it has a more stringent protocol and enjoys besides the provisions of the most favored nation clause?

Can the Venezuelan Commissioner above mentioned have intended to convey a lesson to the honorable Mr. Bowen, or did not, rather, the latter clearly recognize a condition of affairs so eminently logical and natural? Can the Commissioners and the umpires who on this point have so exactly agreed with the views here expressed be said to have lost their reason? If it be desired to ascertain the views of the high contracting parties, have we not here most precious data?

We have never maintained that indemnity should be exacted for damages inflicted by private parties for whatsoever motive. We have only sought to establish a responsibility for the state of disorder and insecurity arising from the revolutions which have almost continuously distracted the land, and obtain indemnity for damages in the past, with a moral guaranty for our people in the future.

This special responsibility the Institute of International Law establishes on a general principle such as to justify a demand for indemnity in all cases arising from riots and revolutions. In other words, there would be, according to the institute, a general responsibility from the very fact of the admission of Venezuela among the family of civilized nations. Having been received on a par with more progressive nations, it should guaranty order and security of persons and property. Failing in this, it should suffer the consequences of an habitual deviation from internal political order when such results in damage to its associates, and this in virtue of the principles of reciprocity of guaranties established on equal terms among civilized peoples. The International Institute lays down this concept as a fundamental maxim, and as the highest expression of progress in the "jus gentium."

Even should the Italian Commissioner not go as far as the Institute of International Laws in its conclusions on this point, he must insist that the protocol has established a concrete rule modeled after the most progressive doctrine, and this to him is sufficient.

But there is another point to be examined in this controversy. From our standpoint Venezuela has not been sufficiently diligent in the protection of foreigners — that degree of diligence the omission of which the honorable umpire himself holds to be sufficient to render the State responsible, and to receive claims for damages arising from the revolution. This lack of diligence consists not only in not preventing by appropriate means, but also in encour-

aging instead of repressing, the damages, violence, and spoliations charged.

To prove this it needs but to narrate in brief the different phases of the "Hernandez" revolution. This revolution, breaking out on May 2, 1898, interrupted on June 12 following, by the capture of its chief, burst forth afresh October 17, 1899. On May 27, 1900, Hernandez was again captured and shut up in the fortress of San Carlos to December 11, 1902. But his associates and partisans continued the war, coalescing subsequently with the forces of General Matos, who had in truth but a small following aside from the Hernandists.

The insurrection spread throughout almost all the Republic, embracing a majority of the nation, and involving an extraordinary organization. It established a *de facto* government, many even contending that the government so established in various States for considerable periods was more legitimate than that of the capital, alleging that the election of the President had been irregular and that the constitution was illegal, not having been duly published. But we will not enter into a discussion unsuited to a foreigner, who should be content to receive the protection and indemnity due him while respecting the laws of the country in which he lives.

Seeing itself unable to make headway against so many tireless enemies the Caracas Government compromised and offered guarantees and official positions to the principal leaders, civil and military, of the Hernandists, who controlled the most important nucleus of the revolution. In this guise attained to power, in part at least, the revolutionary party of "El Mocho" (Hernandez), which now has members in the cabinet, in Congress, among the high officials of the customs, and even among the presidents of the States. Some of these have governed uninterruptedly, first in the name of the revolution and now in the name of the Central Government. To others were given positions and emoluments, so that the revolution, to-day in subjection, might to-morrow become the controlling power of the Government.

For these reasons, in addition to the general responsibility sanctioned by the protocol, there is invoked here a special responsibility for the period of the Hernandez and Matos revolutions, the latter being a continuation of the former, whose adherents were its mainstay.

In the present case it is contended that the authorities failed in the use of due diligence. The officials who took part in the recent insurrections might, in fact should, be compelled to a restitution of the goods wrongfully taken. They should be proceeded against and condemned to punishment. But the Government has made no effort to punish or even prevent the wrong, nor is it our intention to advise it to do so, since we are not called upon to criticise its political movements. This policy, however, unquestionably weakens the guarantee of security to foreigners provided for by the treaties, by its constitution, and by international law. It would be absurd to require the claimant, in each case of damage from the Hernandez-Matos revolution, to prove that the Government could, but would not, prevent the damage, since the responsibility of that Government rises to the origin, even to the political and moral causes which precipitated the revolution, and depends upon the character and general consequences of civil war.

The case of *Divine* (Moore, Vol. 3, p. 2980) can not be appealed to in justification here. A pardon in certain special cases of riots is comprehensible, but certainly not in cases where revolution has progressed so far as to actually take on the functions of government.

In the present instance, either the Government is strong enough to crush the rebellion, and then it should punish at least the ringleaders, causing a restitution of the property unlawfully seized, or else, confessing its inability

to cope successfully with the opposing faction, seek to compromise by sharing its functions with the leaders, and then the honorable umpire is in duty bound to award indemnity in virtue of the very principles admitted by him (on which we make reservations with the object of establishing a general responsibility) in the case of successful revolutions. And besides, in the Divine case there was no protocol containing so categorical a clause as that of Article IV of the protocol of February 13, 1903. In that case it is stated that governments granting pardon are not obliged to pay indemnity for damage inflicted by rebels, while in our case, leaving out the discussibility of the principle in virtue of which Mexico was absolved from paying indemnity in the case of Divine, an agreement was made *ad hoc* which could not have sanctioned the civil and penal impunity enjoyed *de facto* by the successful revolutionists now sharing in the legal Government. Not thus, without cause, was abandoned the obligation of protecting foreigners, which led to the extreme resort of the blockade. What weight would an isolated and little known case in Mexico have in such a question by comparison with a general moral principle and the obligation of safeguarding the interests of foreigners?

Summing up our arguments, we maintain:

1. That no distinction should be drawn between revolutions wholly or partially successful.
2. Venezuela has been and is wanting in that degree of diligence which the umpire expressly recognizes as necessary to the exclusion of governmental responsibility.

Returning now to the construction to be given Article IV, let us determine to whom it belonged to make restrictions to the principle of general responsibility defined by the Institute of International Law and sanctioned by the protocol, and what modes of interpretation should be adopted for Article IV.

The making of restrictions, the elucidation of doubtful points, if such there can be, properly fell to the plenipotentiary for Venezuela. There having been submitted to him so rigid a draft of a protocol, one which insisted on a most categorical responsibility on the part of Venezuela (unprecedented in the annals of treaty making), would he not have refused to assent to the measure, if there had been any doubt in his mind, without further explanation? The opinion of Vattel (sec. 264, Vol. II), incorrectly invoked by the honorable umpire in favor of Venezuela, on the contrary, militates against that country. The Venezuelan Government, with power to explain itself clearly, failed to do so, and it can not now bring forward restrictions of which it gave no intimation in the protocol or during the negotiations at Washington. It accepted its responsibility in all cases of damages and wrongful takings and the admission of all claims without exception. On the other hand the Italian plenipotentiary based himself principally on the memorandum of December 11, above referred to, and on the well-understood meaning of the word "*danno*" (as was invoked by the honorable umpire himself, who has misinterpreted the intentions of the Royal Government and its plenipotentiary and their idea as to the character and extent of responsibility). The Italian ambassador had even considered the term "*Matos revolution*" (see the diplomatic documents), inserted in a first draft of the protocol, decisive though it was, not sufficiently rigid and comprehensive, and so preferred a more general formula, which would embrace all claims without exception. Who can complain if Venezuela did not see fit to protest against such general formula without precedent in diplomatic history? Certainly not Venezuela, as is evidenced by the fact that she allowed some 82 claims in the French-Venezuelan Commission for damages arising from the revolution without the least objection.

We will observe in passing that in the event of interpretation of clauses in-

volving the interests of persons who have actually been injured, despoiled, and robbed, any doubt in regard thereto should be resolved, according to general principles of jurisprudence, preferably in favor of the injured party.

The opinion of Wharton (Digest, sec. 133) inclines in favor of the claimants, since the Royal Government knew the extension given to the responsibility of Venezuela and was itself the proposing party.

As to the opinion of Woolsey (sec. 113), it seemed derisive to speak of benefits for claimants while intending to reject their claims, since no real advantage is reserved to them, but at most only a part of what they have lost, and in the case of revolutionary damages, even that will be lost to them.

It is their right, their just due, that it is proposed to secure to them not a favor or a benefit, a just indemnity; perhaps incomplete, but certainly not a gift. The benefit will, on the contrary, fall to Venezuela, whose payments will be far less than they would be were she to pay all she justly owes.

The vague opinion of Pradier-Fodéré (sec. 1188), quoted in the Sambiaggio case, is not sufficient to neutralize the effect of a public treaty so grave and important as is the protocol, under the pretext that there is something doubtful in its provisions and it can only have reference to matters of detail and not to the essence of an express stipulation. Were it so wished it would be possible to find in the clearest and most explicit of texts some elements of doubt and uncertainty by which its most equitable and just purposes might be assailed. What would be the use of protocols if they are to be opposed at every step by doubts, uncertain principles of international law, complex local legislation, and generic and hypothetical views of authors who, under the cloak of the rarely-applicable opinion of Pradier-Fodéré, would emasculate every provision drawn in the interest of unfortunate foreigners whose indemnities Venezuela has undertaken to pay.

How many opinions or maxims might not be adduced in favor of injured Italians! Calvo (par. 1650) says:

Les traités étant essentiellement des contrats de bonne foi (*actus bonæ fidei*) doivent avant tout s'interpréter dans le sens de l'équité et du droit strict. *Lorsqu'il n'y a aucune ambiguïté dans les mots, que la signification est évidente, et ne conduit pas à des résultats contraires à la saine raison, on n'a pas le droit d'en fausser le sens et la portée pratique par des arguties et des conjectures plus ou moins plausibles.*

Is it not an evident violation of the foregoing rule to seek to twist and distort out of their obvious meaning the words of a treaty, and to confuse the word "*danno*" with the word "*delitto*," or "*quasi-delitto civile*" (see art. 1151 *et seq.* of the Italian Civil Code), instead of applying to them their common meaning, spread throughout the entire Italian legislation?

Fiore (par. 1037) recommends:

The second general rule which it appears to us should be established is suggested to us by Grotius, and this is that, even though the intention of the parties and that to which they have consented is to be considered as expressed in the words written and subscribed to, nevertheless there should be found a meaning in harmony with that which the parties intended, and not have recourse to pitiful subtleties to destroy by the dead letter the true intent of the contracting parties.

Now, who will undertake to say that the plenipotentiaries at Washington intended to elaborate out of their own minds that complicated tissue of hypothesis and technicalities upon the word "*danno*" with a view to giving it a meaning out of the ordinary, and such as to exclude the payment of indemnity for revolutionary damages — that is to say, more than half of all the Italian claims — while the honorable umpire, speaking of damages of the revolution, by this alone seems to give the word the meaning invoked by us in the name of common sense.

But it is superfluous, nay, even injurious to the cause of justice, to indulge in so many quotations, precedents, decisions of tribunals more or less obscure or contradictory, contrary to the spirit of the protocol, which takes equity as its principal rule of action. The Italian Commissioner and the royal legation have no desire to and can not follow in this road the other members of the arbitral Commission, since, so intending, they might by similar means destroy the integrity of any protocol whatsoever. "Give me but two words of any man's utterance," said Napoleon, "and I will undertake to hang him."

It would thus be possible to take away every vestige of restriction to the powers of the Commission as established by Article IV, which stipulates that in the case of damage or unlawful seizure it must determine if the damage actually occurred, if the seizures were unlawful, and what amount shall be paid.

Now, is it logical and equitable to say the damage took place, the Venezuelan Government is responsible in principle? These things are indisputable. But nothing will be awarded because the plenipotentiaries, though admitting that awards should be made to claimants who were fortunate enough to see the troops who despoiled them enter Caracas, decided to reject the claims of those whose damages were caused by those who did not succeed, but might yet do so, almost as if it had been their intention to cast the fortunes of these claimants on the hazard of a die, or the chances of success of the opposing factions as one would wager on the result of a horse race (in fact, Matos was still in the field after February 13). Would it not have been much more simple and logical to clothe the Commission with unlimited powers by suppressing altogether Article IV and thus, without words, say to the Commission: "Judge with full and absolute liberty, whether the damage done be legal or illegal, according or contrary to international law?" Where do we find international law, the existence of which is opposed by many, and which is of no force and effect without the mutual consent of the parties, sanctioned by the protocol as a rule of action, giving it preponderance over an express and mandatory clause?

Finally the following point is insisted upon: To say that Article IV, which affirms and establishes in principle the responsibility of Venezuela for damages to property, was simply and only intended to eliminate the objections which had in the past been discussed between the two Governments, is contrary to the rule of international law in matters of interpretation of treaties which states that each special clause must have a special object. Now, in order to do away with the objections formulated by Venezuela on the basis of her laws and the decree of 1873 with regard to claims, it would have been quite sufficient to invoke: First, the constitution of the Mixed Commissions having jurisdiction over all claims without exception, thus avoiding decrees and local legislation; second, Article II of the supplemental protocol of May 7 which removed objections of a technical nature, or those founded on the provisions of local legislation. The reservations made by Article IV have therefore another purpose and may not be considered vain or superfluous by a long argument based on the very local laws so expressly disregarded by the Italian plenipotentiary at Washington, and appeals to which were expressly prohibited by Article II of the protocol of May 7.

It is curious to note how, on certain occasions, for reasons which escape our comprehension, Venezuela pays for damages committed by the revolution, as for instance in the case of Gen. Manuel Corrao, who received 7482.29 bolivars for loss of stamps stolen from him by revolutionists. (See *Gaceta Oficial* of August 14, 1903.) It may be urged that this is simply a case of voluntary relief to which the Government was in nowise compelled.

But why afford relief when all should suffer equally; why derogate indirectly

and in favor of certain privileged ones to a principle which is proclaimed as absolute?

Let us now examine the question solely from the standpoint of equity.

It is repugnant to the umpire to hold the Venezuelan Government responsible for damages caused by revolutionists, for the reason that they are the enemies against which Venezuela is fighting. At first this seems plausible, but in fact is not so. It is not a case of foreign enemies penetrating from outside into the national territory and robbing the inhabitants. It is rather a case of damages committed by insubordinate subjects, whose very insubordination must be held as due to a lack of care and provision on the part of the Government.

The Venezuelan revolutionists are not belligerents, and they have not been regarded as such by either Venezuela or the powers. Their repression is wholly a question of internal policy, and Venezuela can not, in order to escape her responsibility, invoke the rules of international law, applicable only and in a certain measure to damages caused by belligerents.

For the chronic condition of internal political agitation in Venezuela some one must be found morally responsible, and this some one can be none other than the Government, upon whom falls, as a logical consequence, likewise a material responsibility for all damages occasioned by the revolutions.

In addition to refusing indemnities for damages caused by revolutionists, the honorable umpire places foreigners in a condition of manifest inferiority to the natives in so far as regards the protection of their persons and property. The latter may defend themselves by force of arms, the former can not. The natives run the chances of perils or advantages consequent upon the discomfiture or the success of the party to which they belong; but there is nothing for the foreigner but perils and damages. Justice demands, then, that provision be made for a relative indemnity, and thus in favor of the latter the powers have intervened and the protocols of Washington have been framed.

It is futile to say that the carrying out of these protocols will place the foreigners in better position than that occupied by Venezuelans. Venezuela is under no obligation not to indemnify her citizens, and she can readily place them on a par with the foreigners in this respect, as she has done in certain cases of revolutionary damages. Italy has nothing to do with this phase of the question. She only asks that justice be done her sons, and is in no wise concerned with those whom she is not bound to protect. So that if any difference of treatment exists, the fault thereof will not lie at her door, nor will her demands on that account be less equitable.

The refusal to grant indemnity for revolutionary damages will be a grave offense against equity under another point of view. It is a fact that the troops of the Government have everywhere defeated those of the revolution, and that all the arms, ammunition, stores, animals, money, etc., in possession of these latter, have passed into the possession of the former, for their use and disposal. Almost all of this property was violently, or at least unduly, taken from the inhabitants, and it is no exaggeration to say that the larger share belonged to foreigners. Were the honorable umpire to deny indemnity to the foreigners in question he would be sanctioning an enrichment of the Venezuelan Government at their expense — a thing which to us appears contrary to justice.

When, therefore, damages have been inflicted upon foreigners simultaneously by government and by revolutionary troops, or successively by either, it has frequently been impossible for claimants, perhaps for a lack of eyewitnesses easily understood at times of agitation and terror, perhaps because the courts were not in operation for months after the occurrences complained of, to deter-

mine what portion of the damages suffered by them were chargeable to one and what to the other party — i.e., government or revolution.

Now, it may happen that in these cases the honorable umpire will fail to find elements by which to discriminate between damages entitled to indemnity and those to which he has so far refused it. He must, therefore, either integrally accept the claims or reject them utterly. In the first hypothesis — the only just and acceptable one — he will run counter to the principles heretofore laid down by him; in the second he will deny the sacredness of a right admitted without restrictions of any kind by Venezuela herself.

Let us now cast a look to the future. However optimistic we may choose to be, it would be difficult to believe that revolutions in Venezuela are at an end. Hence, future revolutionists (never, according to our experience, promptly suppressed), strong in the decision of the honorable umpire, may with absolute impunity make themselves masters of the persons or property of Italians with entire freedom from any obligation to indemnify in the event of their party not being successful. This feeling of security will be a powerful incentive to abuses of every sort, while the assurance that the country would in every instance be held to a strict accountability for damages inflicted upon foreigners could not but act as a salutary check.

The decision in the Sambiaggio claim on the other hand will strongly tend to make Italians heedless of their neutrality, for even the honorable umpire himself would hardly expect these people to rise to the sublime heroism of allowing themselves, with meekness and equanimity, to be stripped of their possessions by revolutions, with the certainty that their claims would never be indemnified. They will have to either resort to arms for self defense, or, making common cause with the revolutionists, assist these latter to attain to power as the only means of securing reimbursement. All of which would injure the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of affairs.

Great as may be, therefore, the responsibility which the honorable umpire seems thus far disposed to assume for past events, a much greater will rest upon him in the future, either on account of attempts upon the life and property of Italian citizens, or the political tranquillity of the Republic, which, in view of its best interests, can hardly be grateful to him should he in this present claim decide not to adopt principles different from those governing his previous decision.

Let us now consider the treatment to which Italian subjects are entitled under the provisions of the "most-favored-nation" clause contained in the Italian-Venezuelan treaty of 1861, and confirmed with especial reference to claims in the Washington protocol of February 13, 1903.

Assuming that the Guastini claim (which, had it been French, would have been awarded indemnity for revolutionary damages, but, being Italian, is in danger of rejection) seems expressly calculated to render more glaring the injustice of the treatment which it is proposed to inflict upon our fellow-citizens, let us call attention to the fact that the treaty of 1861 has never been repealed, and has never for a moment ceased to be in force. There has been no declaration of war between Italy and Venezuela, and the blockade has been no more than an interruption of diplomatic relations, which could not have annulled existing treaties according to the opinion of the best authorities on international law.¹

¹ See, however, decision of the Hague Permanent Court of Arbitration in the Venezuelan case, considering that a state of war existed. Vol. IX of these Reports, p. 107.

It is true that Article VIII of the protocol of February 13 speaks of the treaty as being "renewed." But if we consider well we will see that the word was used *ad abundantiam*, to obviate all future doubt and discussion. In the said article there is no explicit declaration that the treaty had ceased to exist, and the sole purpose in view was precisely to explicitly confirm the "most-favored-nation" clause now in force, and to give it so full and ample an application as to render its elusion by subterfuge impossible.

It was not possible to more clearly express this intention than was done by the phrase —

The Italians in Venezuela and Venezuelans in Italy shall in all respects, and particularly in the matter of claims, enjoy the provisions of the most favored nation clause, as stipulated in article 26 (of the treaty).

In order that the scope of this fact might not suffer diminution from any restrictive interpretation of Article IV of the treaty, which, without excluding better conditions, provides that Italians in Venezuela shall not in any case receive a less favorable treatment than that accorded the nationals, the last line of Article VIII of the protocol provides that the treaty shall never be invoked against the provisions of the protocol.

In the decision in the Sambiaggio case not only was there no account made of this provision of the last line of Article VIII of the protocol of February 13 and the treaty invoked against it, but there was likewise invoked the noted Article IV, to prevent the application of which it is well known that the last clause of Article VIII, above mentioned, was especially framed, if it be desired to discuss the question logically and with unprejudiced mind. But let us admit, for the sake of argument, that the treaty of 1861 was no longer in force on February 13 of this year. None the less would the "most favored nation" clause apply in favor of Italian claimants since the treaty was renewed and confirmed by the protocol of that date.

In fact, it can not logically be held that so important a clause of a protocol framed expressly to settle a preceding question with regard to claims should not be applied to the claims themselves; to claims of a civil war not yet then terminated, and which continued for five months after the signing of that instrument.

It is in any event an unquestioned rule of law that an explanatory clause is retroactive in its effect, because, except in cases of *resjudicata*, it tends to clear up the intention of the legislator, and, in the present case, that of the original negotiators.

Fiore, after a long discussion of this subject, thus sums up his arguments in the following maxim (par. 1012):

The effects of international conventions extend, on general principles, to juridical relations established and formed prior to the stipulations of the treaty. A contrary provision might, however, be provided by express agreement.

This "express agreement" does not appear either in the treaty or in the protocol, and hence the umpire's concept of the nonretroactivity of Article VIII of the protocol does not seem to conform to the principles of international law.

To us, however, it seems clearly established that the "most favored nation" clause should apply in every supposable case in the interests of Italian claimants. It remains to be seen whether this application may be invoked by us in view of the decisions rendered in the French-Venezuelan and German-Venezuelan Commissions, in which indemnities were granted to French and German claimants for revolutionary damages.

With regard to this, it has been objected that if this principle were admitted, should those commissions subsequently render decisions of an opposite nature,

it would become necessary for this Commission to follow them in this devious and uncertain path. Hence it has been concluded that this Commission is not to accept as binding on it decisions rendered in the others.

We will merely observe, in relation to the foregoing supposition, and more especially with reference to the French-Venezuelan Commission, that the latter has about terminated its labors, that more than eighty indemnities for revolutionary damages have been granted without discussion on the part of the Venezuelan delegate in said Commission, and that when he, with tardy objections attempted to raise difficulties, the umpire cut short those objections by declaring that there must be complete similarity between damages created by the Government and those of the revolution. So far as the German-Venezuelan Commission is concerned, we have time to consider this point, and should it transpire that its decisions have changed we will not refuse to do so, but there is no reason to anticipate such change, in view of the evident equity of the course so far adopted by it.

It suffices us that a single one of the Commissions assembled in Caracas for the settlement of foreign claims should have granted indemnity for revolutionary damages to give us the right to demand and obtain that an equal treatment be accorded Italian claimants.

In fact, the decisions in this sense of a single Commission even would constitute the authentic and sovereign interpretation of the treaty and of the protocol stipulated by the Venezuelan Government for the pacific settlement of claims brought forward by subjects of the respective nations. Hence it is that, according to the protocols and treaties, of which the decisions of the Commissions are the unchallengeable interpretations, we demand for our fellow-citizens the application of the "most-favored-nation" clause. But granting that Article IV of our protocol lends itself to a double interpretation, which we positively deny, the honorable umpire should, even reluctantly, give a decision granting indemnity for revolutionary damages, in order to avoid giving one which, in view of the action of the French and German Commissions in this respect, would be in open contradiction with the provisions of Article VIII of the protocol of February 13, above named.

If the treatment accorded the most favored nation be not accorded us by the granting of indemnity for revolutionary damages, in what other case may we hope to obtain this advantage? What effect, if not this, has the clause referred to? Shall we remain satisfied with a differential treatment which leaves us in a position of manifest inferiority, when the treaty of 1861 and the Washington protocol guarantee to us the contrary in the widest and most explicit manner?

If the honorable umpire rejects claims for revolutionary damages, the effect will be as though Article VIII of the Washington protocol had not been written, or as if the provisions of the same were to have no application — a conclusion repugnant at once to intellect and to conscience. In short, such a course would be tantamount to an emasculation of the entire protocol, since what has so far been granted by the honorable umpire is nothing if not that which in principle was not refused by Venezuela, even before the framing of that instrument — that is, that indemnity should be granted for damages caused by the Government or its agents. Now, when it is considered that, as has already been remarked, the Venezuelan Commissioner in the French Commission conceded, without discussion, over 80 claims for revolutionary damages, it should logically and in good faith be recognized that the interpretation given in that tribunal to the French protocol, much less explicit than ours, is the one admitted by the Venezuelan Government itself.

If, indeed, the Commissioners are free to judge according to rules of equity

and justice, and with full and absolute independence, the facts and circumstances on which the claims are based, and the efficacy of the respective proofs, they are none the less, in questions of principle, as in the question of revolutionary damages, bound by the instructions of their governments, and governed by them in the judgments they render.

None of us has accepted the honorable charge which has been intrusted to him without first thoroughly investigating between what limits and according to what general rules lay the duties of his office. Our appointment as Commissioners, who are not exactly or exclusively judges, clearly shows this.

The diplomatic course pursued by Italy in Venezuela in favor of her claimants, if always inspired by extreme moderation, has nevertheless constantly aimed to secure to injured Italians a treatment analogous to that granted to other foreigners. The honorable umpire will find an absolute proof of this in the documents we send herewith, which are all of an earlier date than that of the protocol of February 13, to wit, in the note of the royal Italian legation at Caracas to the Venezuelan minister of foreign affairs of April 24, 1901, in that of the Italian minister of foreign affairs at Rome to the United States ambassador at Rome, in a telegram of the aforesaid minister to the ambassadors at Berlin, London, and Washington and in the telegraphic reply to the latter.

Convinced that the honorable umpire will recognize that Italy is not here asking more than it has always been her intention to ask, even prior to the negotiations at Washington, we await with confidence a decision from him in favor of the claimant, Luigi Guastini in the sum of 582 bolivars for damages inflicted upon him by civil authorities and for judicial expenses, and in the sum of 6,247 bolivars on account of requisitions, forced loans, and other damages from troops and authorities of the revolution, or a total of 6,829 bolivars.

ZULOAGA, Commissioner:

In this case the honorable Commissioner for Italy has deemed it proper to reopen the discussion touching the responsibility of Venezuela for damages caused by acts of revolutionists, especially with reference to the Washington protocol.

To me it seems that the decision of the honorable umpire, given in the Sambiaggio case, has settled the question. The Commissioners fully stated their opinion in that case before the honorable umpire, verbally and in writing, and he then gave a learned and extended decision in which were carefully considered and solved all the points which the honorable Commissioner for Italy now desires to reconsider, and I believe the subject to be exhausted, as appears proven by the fact that the new opinion of the honorable Commissioner simply endeavors to refute the decision of the umpire. I will not undertake for my part to make a new exposition, since it would only result in uselessly prolonging the labors of the Commission.

Venezuela never accepted responsibility for claims arising from acts of revolutionists, as is evidenced by her laws. In the case referred to by the honorable Commissioner for Italy, which appears to be inferred from an Executive resolution published in the *Gaceta Oficial* of August 14, only by a strained interpretation may it be construed that the Government had accepted such responsibility. There was no disbursement in payment thereof, nor was it paid in any other way.

The honorable Commissioner for Italy insists that the French-Venezuelan Commission accepted revolutionary claims, and referring thereto I will quote here the opinion of the Venezuelan Commissioner in that Commission:

Notwithstanding the respect which the Commissioner for Venezuela owes to the decision which has been rendered by the honorable umpire in the claim of Antoine

Bonifacio and in other cases where indemnity has been claimed for damages to property by revolutionary forces which have committed depredations in various sections of the Republic, and principally in the town of Carúpano, I consider it my duty to maintain the opinion heretofore expressed by me, that claims based on negotiations, loans contracted between revolutionary chiefs and private individuals, as well as those for forced requisitions and damages sustained at the hands of revolutionary troops by neutrals, do not affect the responsibility of the Government of Venezuela.¹

The historical-political narration made by the honorable Commissioner for Italy for the purpose of deducing the responsibility of the Venezuelan Government for its lack of diligence in suppressing the revolution is weakened by serious inaccuracy in both its general scope and minor details. The Venezuelan Government did energetically and resolutely attack the revolution, and the fact of its having continued to the present year was due to the action of the three allied powers in destroying the war vessels of the Government, with which Venezuela was pursuing the dismembered revolutionists, permitting the latter to reorganize, and thus cause new and bloody combats.

"The most-favored-nation" clause invoked by the honorable Commissioner for Italy finds no place in the labors of this Commission, but refers solely to the drawing up of treaties, not to the application of their provisions, which must necessarily depend on the point of view of those who construe them. It would be well to note, however, that it is extremely difficult to determine which is the nation having the most favored claimants in these mixed commissions.

In some, as in this one, by the decision of the umpire a long delay has been granted for the presentation of the claims: in others, not. In some, the consideration of proof has been left absolutely free; in others, not. In some, the responsibility of the Government for acts of revolutionists has not been admitted, while admitting its responsibility for the acts of its agents; in others, the Government has been held accountable for the acts of revolutionists, but not for the acts of its agents. Again, interest has been allowed in some commissions, and not in others. England has presented no revolutionary claims, yet it has a protocol similar to the Italian. By what criterion is it possible to determine which is the most favored nation in carrying out the provisions of the various protocols?

There remains but a brief consideration of the serious charge made by the honorable Commissioner for Italy that the doctrine of the non-responsibility of the Government for acts of revolutionists will prejudice the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of things, and, he adds, the umpire will incur a grave responsibility for future attempts against the lives and property of Italians in Venezuela, and even for the peace of the Republic, in deciding, as he has, that the Government can not be held for the acts of the revolution.

Immoral and unjust it is to assume to withdraw Venezuela from the operation of laws which govern all cultured peoples, and insist that the honorable umpire shall decide accordingly. Immoral and unjust to ask that foreigners in Venezuela shall be governed by laws other than those under which Venezuelans themselves live, and that the Government shall be as an insurance company against real or imaginary losses from *force majeure*, and profoundly immoral it would be, as well, to advocate the doctrine that the state is responsible for acts of revolutionists.

Foreigners should be interested in the preservation of peace and public order, and they have numerous ways of contributing thereto without inter-

¹ Acquatella case, *supra*, p. 5.

vening in the politics of the country. But the day when the state is made responsible for the damages mentioned will see foreigners grow indifferent to the continuance of public peace, aye, and even become eager to foment revolution, as a means of acquiring by trumped-up claims what they might not be able to obtain by means of honest labor.

The honorable Commissioner for Italy seems unduly preoccupied as to the future. In the future the foreigner in Venezuela will live as he has in the past — under the constitution of the country, which establishes that the nation has no more or greater obligations toward them than it has toward its own citizens, according to the laws of the land — as the Venezuelans themselves live, who know very well that under the law they have no right to claims for damages committed by revolutionists.

I am confident that the honorable umpire, abiding by his decision, will reject the claim of Guastini as one based on acts of revolutionists.

RALSTON, *Umpire*:

The above case has been referred to the umpire upon difference of opinion between his honorable associates relative to an allowance for damages committed by insurgents during the recent revolution.

The questions presented in this respect are the same as those presented by the recent case of Salvatore Sambiaggio, No. 13,¹ in which the umpire reviewed in extenso the subject of responsibility of the Government for revolutionary damages in the case of unsuccessful revolution. In the present case, as before, the honorable Commissioner for Italy has presented a learned and able exposition of his views, which exposition has received the careful and respectful consideration of the umpire. He is, however, unable to change the views then expressed, but feels obligated to discuss briefly some of the fundamental positions taken on behalf of Italy.

The honorable Commissioner for Italy rests his opinions largely upon the assumed inequity of a refusal to require the Government to pay such revolutionary damages. The subject was fully investigated by the umpire in the former opinion, in addition to which discussion he desires now to call attention to article 21 of the treaty of 1892 between Italy and Colombia, which reads as follows:

It is also stipulated between the two contracting parties that the Italian Government will not hold the Colombian Government responsible, save in the case of *proven* fault or negligence on the part of the Colombian authorities or of their agents, for injuries occasioned in time of insurrection or civil war to Italian citizens in Colombian territory, through acts of rebels or caused by savage tribes beyond the control of the Government.²

The foregoing sufficiently indicated the opinion of the Italian foreign office, and, in exact accord as it is with the opinion he expressed in the Sambiaggio case (as well as with a fair interpretation of the Italian-Venezuelan treaty of 1861, as pointed out in the case mentioned), confirms the ideas of the umpire; for had Italy believed such a clause inequitable and unjust to her subjects that

¹ See *supra*, p. 499.

² It appears that by an exchange of notes, dated October 27, 1902, between the minister of Italy in Bogotá and the Colombian minister of foreign affairs, it was understood that if other countries were granted by Colombia damages for acts of revolutionists or savage tribes Colombia would afford the same relief in favor of Italians. ("Trattati e Convenzioni fra Il Regno d'Italia e gli altri Stati") This does not affect the recognition by Italy of a just principle, and, furthermore, in the case of Venezuela, she has accorded no more (or even as much) to other nations as to Italy. (Note by umpire.)

enlightened and cultivated nation would never have solemnly ratified a treaty with Colombia, situated as it was and is like Venezuela, containing such a provision.

It is worthy of note that, according to the opinions of nearly if not quite all the umpires now in Caracas in the various Commissions, there exists no legal responsibility on the part of Government for the acts of unsuccessful revolutionists. Such is the view of the umpire of the English and Netherlands Commission,¹ of the German Commission,² and, as it appears, of the Spanish Commission.³ Furthermore, it is the opinion of the umpires above referred to (save that of the Spanish Commission, possibly) that such claims are inequitable. It is true that the umpire of the German Commission, influenced by a construction of his protocol which this umpire can not conscientiously follow, has allowed (but within strict limits) certain claims of the character in question. It is also true that the umpire of the Spanish Commission, notwithstanding his apparent belief as to their illegality, has granted claims of this nature, considering the objections raised thereto by Venezuela as "technical," and therefore opposed to the protocol. This view the present umpire is unable to accept, believing as he does that an objection going to the foundation of the right to recover can not be regarded as technical. In addition to the Commissions above named, the American Commission has already indicated⁴ that it would deny the right to recover for claims of this nature. Nothing is said above about the decision of the umpire of the French Commission, as, according to information furnished, the reasons for his decision were not given and the particular facts are unknown.

To the suggestion that Italy is entitled to the benefit of the "most-favored-nation" clause contained in the protocol, and that she has been deprived of it — a point argued at length and ably — it only remains to add that Italy obtained from Venezuela a protocol, certainly so far as this discussion is concerned, more favorable than those given other nations, for while (to illustrate) under the German protocol Venezuela admitted its liability —

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

in the Italian protocol Venezuela admitted its —

liability in cases where the claim is for injury to *persons and* property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (a) Whether the injury took place or whether the seizure was wrongful; and (b) if so, what amount of compensation is due.

The French protocols contain no similar admission.

It is true that there have existed differences of opinion among umpires as to the responsibility of Venezuela for acts of unsuccessful revolutionists; but such differences of opinion, relating as they do to questions of international law or of the construction of protocols, can not be said to have any relation to a "most-favored-nation" clause obligatory upon Venezuela, which nation has apparently given Italy all she promised. These opinions may be studied to

¹ Vol. IX of these Reports, p. 408; and *infra*, p. 713.

² *Supra*, p. 390.

³ *Infra*, pp. 741 and 748.

⁴ Vol. IX of these Reports, p. 145.

advantage, but they are not protocols, nor are they "treatment," within the meaning of the Italian-Venezuelan agreement.

It is greatly urged that the decision in the Sambiaggio case rested largely upon the meaning of the word "injury," and that the word "danni," used in the Italian version of the protocol, has a vastly different meaning. To this observation several answers are to be made. The text of the protocol is in English and Italian. It was the result of long negotiations between the representatives of England, Germany, and Italy on the one hand, and Mr. Bowen, Venezuela's representative, on the other. These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it.

But if this were not so, no difficulty would arise. We must conceive that the language employed, used as it was in a document in a sense legal, is to be interpreted with some regard to law. Examinations of articles 1151-1152 of the Italian Civil Code, with reference to "danni," "quasi delitti," shows that:

1151. Any act of man which results in damage to others obliges the one through whose fault the damage occurred to indemnify therefor.

1152. Every one is responsible for the damage which he has occasioned, not only by his individual act, but also by his own negligence or imprudence.

Careful examination of these words descriptive of "danni" will fail to show any difference between its significance where used in a legal way, and that of the word "injury" similarly employed, for there always exists the idea of responsibility only for acts with which one has some association, physically or by intendment of law.

Furthermore, if difference exist, it should be settled in favor of the party obligated, as pointed out under other conditions in the Sambiaggio case.

Although the umpire has the highest respect for the opinions of the Institute of International Law, which are referred to by the honorable Commissioner,¹ he does not discuss them specifically, as the principles covered by the citation made by him have received the attention of the umpire at great length, so far as they may be esteemed pertinent to the present case.

The claimant demands 150 bolivars for having paid double license to the revolutionary authorities in 1902 and 1903. The facts in connection with this item appear to be as follows:

The claimant paid —

To the revolutionists:

		<i>Bolivars</i>
Apr. 1, 1902	For second quarter of 1902	50
July 16, 1902.	For third quarter of 1902	50
Mar. 10, 1903.	For first quarter of 1903	50

To the Government:

Jan. 1, 1902.	For first quarter of 1902	50
Mar. 24, 1903.	For the entire year of 1902 and first quarter of 1903 . . .	250

It appears from the receipts evidencing the foregoing that during the period named the claimant was a merchant of the fifth class at El Pilar, and subject to annual license of 200 bolivars, payable quarterly.

It is impossible to grant the claim in the manner presented. If the taxes were wrongfully exacted by the revolutionary authorities the Government can not be required to refund them.

But the claimant apparently has a ground of recovery founded upon another

¹ *Annuaire de l'Institut de Droit International*, Vol. XVIII, p. 254 (1900).

principle. We are justified in believing from the evidence in the case that during nine months of 1902, and at least to March 10, 1903, the revolutionary authorities were in possession of El Pilar. The claimant was therefore authorized, and we may presume compelled, to pay them the license fees which would have been payable to the legitimate authorities had they controlled the town. In fact, without such payment or some other, he could not have gained his livelihood as a merchant. A payment to them discharged (at least so far as the "expediente" informs us) his obligations toward his municipality. For him in his local relations the revolutionary authorities were the Government. They constituted his municipal government *de facto*.

We learn from Bouvier's Law Dictionary (Rawle's edition, title *de facto*) that:

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public. 159 U.S., 596. An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it — such a one being an officer *de jure* only. * * * An officer *de facto* is *prima facie* one *de jure*. * * * An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts.

Money paid, therefore to the *de facto* authorities in the shape of public dues must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those exercising public functions in a regular manner.

We must apply to the facts before us the principle which would be invoked if the acting jefe civil had been illegally appointed or elected by legal authorities acting improperly. In such case no dispute could possibly exist as to the right of the taxpayer to be protected by payment to such illegal but acting officer.

Says Morawitz on Corporations, sec. 640:

In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a *de facto* public officer to exercise the powers of his office can not be investigated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officer.

In *Norton v. Shelby Co.*, 118 U.S., 425, the Supreme Court of the United States held that where an office exists under law, it matter not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office and exercises the power and functions.

Let us add another consideration. During the period for which taxes were collected by the revolutionary government, the legitimate government (as we may believe from the "expediente") performed no acts of government in El Pilar. It did not insure personal protection, carry on schools, attend to the needs of the poor, conduct courts, maintain streets and roads, look after the public health, etc. The revolutionary officials, whether they efficiently performed these duties or not during the time in question, displaced the legitimate authorities and undertook their performance. The legitimate government therefore was not entitled at a later period to collect anew taxes once paid to insure the benefits of local government which it was unable to confer.

We need not question the obligation of taxpayers to pay to the rightful authorities taxes accrued but not paid during illegitimate government. That does not enter into this discussion.

If the opinion above expressed need support from precedent and the views

of others, it is at hand. A situation analogous to that now presented arose out of the holding of the town of Castine, near the eastern extremity of the State of Maine, by the British during the war of 1812 between the United States and Great Britain. That eminent jurist, Justice Story, in passing upon the questions presented to the United States Supreme Court, said (*U.S., v. Rice*, 4 Wheaton, 246):

The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears by the pleadings that on the 1st day of September, 1814, Castine was captured by the enemy and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and, upon the reestablishment of the American Government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant for the security of them.

Under these circumstances we are all of opinion that the claim for duties can not be sustained. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy and resumption of authority by the United States did not and could not change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties when imported, or not at all. That they were not so liable at the time of importation is clear, from what has been already stated, and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory, ceded by treaty to the United States, and the goods had been previously imported there. In the latter case there would be no pretense to say that American duties could be demanded, and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

American statesmen have since followed the precedent. For instance, in 1873, Secretary Fish wrote to Mr. Nelson (*Wharton's Digest of Int. Law*, vol. 1, sec. 7, p. 29):

The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. * * * Since the close of the civil war in this country suits have been brought against importers for duties on mer-

chandise paid to insurgent authorities. Those suits, however, have been discontinued, that proceeding probably having been influenced by the judgment of the Supreme Court adverted to. (*U.S. v. Rice*, 4 Wheaton, 246.)

Without multiplying at length possible citations, reference is also made to a letter to like effect from Mr. Cass, Secretary of State, to Mr. Osma, dated May 22, 1858. (*Wharton's Int. Law Digest*, vol. 1, sec. 7, p. 28.)

Perhaps the latest similar instance in American international affairs is to be found discussed in *Foreign Relations* for 1899, and refers to an attempted second collection by the Government of duties at Bluefields, Nicaragua, a first payment having been made to a revolutionary government. After an extended correspondence, and pursuant to instructions from Mr. Hay, Secretary of State, the American envoy extraordinary and minister plenipotentiary, W. L. Merry, signed an agreement for settlement, providing, among other things, that —

The deposit (conditional deposit for second payment made by merchants) shall be paid by Her Britannic Majesty's consul to the authorities of the custom-house if it is decided that that Government has had the right to demand the payment claimed, or to its owners, the American merchants, if it is decided that the payment made to the revolutionists of Bluefields was legal for the reason that they pretend that the revolutionary organization of General Reyes, between February 3 and 25, 1899, was the government *de facto*. (*For. Rel.*, 1899, p. 576.)

It will be seen that the only question for consideration was the character of the government. In the pending case its *de facto* character is sufficiently established, and therefore the second payment, made, as satisfactorily appears, under circumstances of compulsion, must be returned to the claimant.

In this case an award will be signed for 1,517 bolivars, including amounts taken by the Government, for which receipts were or were not given, and the second payment of taxes above referred to, with interest, and refused for acts of revolutionists, no want of diligence on the part of the Government having been shown.

CASES OF REVESNO, BIGNOSO, STIZ, MARCHIERO, AND FANTI

Government is not to be held liable for acts of revolutionists unless negligence be clearly apparent or proven by claimant, the more so when claimants have never appealed to it for protection.

RALSTON, *Umpire*:

The above cases, all from Colonia Bolívar, came to the umpire on difference of opinion between the honorable Commissioners for Italy and Venezuela.

It is urged on behalf of Italy that the above cases come from a distance not greater than 30 miles from Caracas, that the takings were all by Matos revolutionists under command of General Rolando, and occurred during the months of May and October, 1902, and January, February, March, April, May, June, and July of 1903, happening at Custire, El Bautiamo, Chispita, and Colonia Bolívar; that by reason of their nearness to Caracas they could have been prevented by the exercise of proper diligence, and that therefore these cases are exceptions to the general rule laid down in the *Sambiaggio* case, No. 15,¹ and affirmed in the *Guastini* case, No. 225.²

A study of these cases will show that the burden of proving want of diligence

¹ See *supra*, p. 499.

² See *supra*, p. 561.

rests upon the claimants. In the "expedientes" now under consideration not a word of affirmative proof is furnished to show negligence on the part of the Government. The umpire is aware of the fact that for several months the revolutionists remained within a short distance of Caracas without being dislodged by the Government, or perhaps without a serious attempt being made to dislodge them. But he is also aware that during that time war was being actively prosecuted over large areas of the country, while the external relations of Venezuela were in a state of danger. He is unable, and if furnished with data would doubt his right, to judge as to the military or political considerations which made military activity or concentration more necessary in one portion of the country than another.

Furthermore, he knows nothing of the relative strength of the forces of General Rolando and of the Government in this neighborhood or their advantages of location. He only knows that when the tension was apparently released elsewhere the forces of Rolando were attacked and ultimately defeated.

The claimants, so far as the evidence shows, never made any appeal to the Government for protection, as it was their right to do if they desired to obtain it, and although such appeal, if made, might have had an important effect upon the question of liability.

In view of the foregoing an order dismissing said cases will be signed.

GUERRIERI CASE

Government will not be held responsible for results of legitimate acts of warfare.

RALSTON, *Umpire*:

The above case has been presented to the umpire upon difference of opinion existing between the honorable Commissioners for Italy and Venezuela.

The larger part of the claim is for damages committed by unsuccessful revolutionists, and, resting upon the principles discussed in the Sambiaggio and Guastini cases,¹ can not be given further consideration.

A further claim of 225 bolivars is made because of the fact that the Government steamers bombarded the town of Puerto Cabello, where claimant's property was situated, a shell in part destroying the walls of claimant's house. It is urged that the bombardment was without reason or purpose, and therefore the Government should be held responsible for wanton destruction of property. This principle was adopted by the Commission in the case of Eugenio Barletta, consul at Ciudad Bolívar,² and, in the opinion of the umpire, correctly adopted, it then appearing that the Government vessel had thrown 1,400 or 1,500 shells into the town without directing its attack upon the quarters of the revolutionary troops, without any supporting force to make the bombardment effective, and when the city had not broken out in insurrection, but a body of troops had defaulted in their allegiance.

Nothing like this is proven in the present case. We are simply informed that shells were thrown, one of them injuring claimant's property. Upon this statement of a single fact, a state of war existing, the umpire is not justified in assuming that the act was needless or unjustifiable. The legal presumption would be in favor of the regularity and necessity of governmental acts.

A decree of dismissal will therefore be signed.

¹ See *supra*, pp. 499 and 561.

² No written opinion. See de Lemos case, vol. IX of these Reports, p. 377.

MILANI CASE

(By the Umpire:)

In cases of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries. However such matters may be treated by the diplomatic branch of a government, an international commission can only accord damages to a citizen or subject of a claimant country — not to the country itself, and taking no account of offenses to a nation as such.¹

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

Article 4 of the Italian Civil Code declares that “the father being a citizen, the son is likewise a citizen.”

The constitution and the civil code of Venezuela declare, instead, that all who are or may be born on Venezuelan soil are Venezuelans. From which it follows that sons of Italians born in Venezuela are Italian citizens according to the law of Italy and Venezuelans according to the law of Venezuela. In the event of conflict between the two provisions, would Italy have the right to protect individuals finding themselves in the juridical condition above mentioned, and would the Mixed Commission be competent to consider the claims of such according to the protocol of February 13, the principles of equity, and the principles of international law?

To both questions I answer in the affirmative. The right of Italy to accord diplomatic protection to the sons of her citizens, wherever born, was expressly reserved by the Royal Government, so far as concerns Venezuela, in a note of the royal chargé d'affaires at Caracas, dated March 13, 1873, by which protest was made against the provisions of the Venezuelan act of February 14 of that year.

The sons of citizens are citizens by the national law, and subsequent legislation by another State can not deprive them of this quality or minimize the rights accruing to them under the former act.

The imposition of a nationality on a preexisting one is a fact juridically abnormal, and certainly can not in any manner vitiate the original one.

We must distinguish between these two facts: The acquisition of the new nationality and the loss of the old one. The first depends exclusively upon the foreign law; the second exclusively upon the home law, and it is clear that the denationalization of an Italian is not to be sanctioned by any but Italian law.

Our law grants the citizen full and absolute liberty to become a foreigner, but insists that the change shall be of his own spontaneous choice. We can not, therefore, consider a foreigner him upon whom a foreign law imposes a new nationality, when it does not appear that he has lost or relinquished his Italian nationality, and we can not abandon him.

Were we to accept such a rule we would arrive at excessive consequences, since we would thereby subject ourselves without discussion to the provision of any foreign law whatever operating upon our citizens in this respect, however illiberal and contrary to general custom it might be in principle.

The consequence being thus illogical and absurd, the principle from which it flows must be erroneous and unacceptable.

Granting that the local law may impose another nationality on the sons of Italian subjects born in Venezuelan territory, it can not thereby deprive them of the quality of Italian citizenship. In regard to this very question the court of Lyons laid down this maxim:

¹ Same doctrine discussed in British-Venezuelan Commission, Vol. IX of these Reports, p. 385.

Si l'acquisition d'une nationalité est régie par la loi du pays où elle est obtenue, la perte de la nationalité l'est par celle du pays auquel appartenait l'individu naturalisé.

If, therefore, loss of nationality does not take place under the conditions above stated, neither can Italy lose the right to protect the sons of citizens born on foreign soil. If such were not the case, by the operation of special Venezuelan laws all foreigners here residing might be declared citizens of Venezuela, in which event claims would cease to exist, and there would no longer be need of diplomatic representation.

Now there can be no doubt that the limits of diplomatic action are fixed by international law, and can not be restricted by internal legislation.

This right being established, there logically flows therefrom the admissibility of claims of persons coming under this head before the Mixed Commission.

This Commission, be it understood, is governed by the terms of the protocol, which, from our point of view, has referred to it all classes of Italian claims, without distinction or exception.

Why should the Commission deem itself incompetent to pass upon them? Is it not a tribunal which was constituted and accepted by the mutual agreement of both Venezuela and Italy? What motive is there for rejecting the consideration of claims of persons having two nationalities, and therefore entitled to the protection of both countries? None, from the point of view of equity, so the claim be just and well founded. There would only remain the elimination of technical exceptions, but this is already accomplished by the protocol.

The tribunal of arbitration is therefore competent, even in the case where the incubus of a dual nationality bears upon the claimant, because under no circumstances may the local citizenship outweigh the other.

But we may go further. It seems to me that, as between the two nationalities enjoyed by Venezuelan-born sons of Italians, that of Italy ought, for various reasons, to prevail. There is no doubt that the more liberal laws do not regard the mere accident of birth in any country as being of itself sufficient to convey citizenship, but hold, on the contrary, that it should be determined with due regard to family. The contrary principle, sanctioned by various legislations, especially the American (with the exception of the United States, the Supreme Court of which favors the view (based on the act of April 9, 1866, Rev. Stats., U.S., sec. 1992) that children born in the union of foreign parents who have not been naturalized are themselves foreigners), constitutes an abandonment of the rules which inspired the wisdom of the Roman legislator and are a return to the now-condemned system of the middle ages, adopted for political reasons and expediency, but carrying within itself something contrary to the order and peace of the family, in that a father might have ten sons, each of a different nationality. While the ties of family rest on sacred and indissoluble foundations, which are the basis of our social order, there is not always a moral bond, a tie of affection, or a mutual interest between the land and the person born therein.

Cogordan (p. 25) observes:

Il était logique, en effet, sous l'ancien régime, d'attribuer la qualité de français à quiconque était né sur le sol de France; puisque la nationalité n'était que la soumission au Roi; mais quand parut le sentiment de la race, l'idée de la patrie française existant en elle-même, abstraction faite du Roi, et résidant dans l'ensemble des français, il était juste de revenir à la filiation, puisque c'est par la famille qu'on acquiert les qualités physiques et morales qui rattachent l'homme à une race et à une patrie.

The fact of birth in any given country may be a mere accident.

Fiore (par. 330 et seq. of Vol. I of "Diritto Internazionale Privato"), examining the question of a double nationality coming before a tribunal of a neutral State — that is, a tribunal which, like the present Mixed Commission — is not to apply any particular law on the question of citizenship, but determine that of a given person, holding to the principles of international law as well as to the general principles of common law, concludes that such tribunal should admit that "a legitimate son acquires by birth the nationality of his father (Vol. I, p. 334), and adds (p. 335, par. 333):

The principle which bestows upon the son the nationality of the father is derived from Roman law, and rests on the natural tendency of the individual, which warrants the assumption that each desires the citizenship of his father. The oneness and homogeneity of life, of the affections, of the sentiments of family, all render such assumption reasonable, founded as it is on the ties of blood, and surely more rational than that which would attribute to the son the nationality of the soil on which he was born, "*jure territorii*."

The court of cassation of Belgium, founding itself on the adage, "*Nasciturus pro nato habetur quando de ejus commodo agitur*," decided that the son of a person who changed nationality after the conception, but before the birth, of said son, may invoke the nationality which his father had at the time of his (the son's) conception, and thereby admitted that citizenship should be considered as a personal right of the individual from the moment of his conception.

According to this ruling the Venezuelan-born sons of Italians first possessed Italian citizenship, and at birth acquired the Venezuelan; but the original and prevailing one, the one to be considered by the Commission, which is not to apply either Italian or Venezuelan laws, but, on the contrary, reject exceptions based on local laws, is surely the Italian.

The Mixed Commission, resting upon sound principles of international law, should hold inefficient the law which would impose citizenship when not only is there no act tending to show a voluntary renunciation of the original nationality, but everything showing a preference for it, as in the case of claimants, who, having a dual citizenship, in fact, choose the Italian, as clearly evidenced by their appearance before this tribunal demanding indemnity due them from Venezuela through the intermediary of the royal Italian legation.

Bearing in mind that the courts of the Republic dispense justice with no less impartiality than does the Commission, and considering as well that while the sentences of the former are susceptible of immediate execution, those of the latter are subject to some years' delay and to the fluctuations of Venezuelan custom-house receipts, it is evident that a claimant having two nationalities who turns to this tribunal rather than to the local courts for justice in spite of all delay, impliedly testifies his choice for Italian nationality. Various reasons, both in law and in equity, exist why this Commission should accept well-founded claims of Venezuelan-born sons of Italians. But the strongest, to my mind, is that, the Italian nationality of the claimants having been established, the nationality of their claims can not be denied, and that therefore they should be treated according to the provisions of article IV of the Washington protocol of February 13 of this year.

Claims of this character have been received and adjudicated in the French-Venezuelan Commission, before which the question of nationality of sons of French citizens born in Venezuela was not even raised. Our own are, therefore, under Article VIII of the above-mentioned protocol, entitled to equal treatment.

AGNOLI, *Commissioner* (additional opinion):

With one or two exceptions, in which damages for which claims were presented to this Commission were suffered in person by Venezuelan-born sons

of Italians, all claims of persons finding themselves in regard to citizenship in the condition above mentioned were by them presented as representatives of deceased fathers, who had themselves suffered the losses on which the claims were based and about whose citizenship there was and could be no question.

The undersigned maintains that Venezuelan-born sons of Italians are competent to present claims before this Commission, not only because of the reasons assigned in the first part of this memorial, but also because said claims are of Italian origin, since in nearly all cases indemnity is asked for damages suffered by persons unquestioningly recognized as Italian by their heirs.

The gist of the question at issue, therefore, lies in deciding whether the original nationality of the claim shall be taken as the fundamental and decisive reason for its admission to the Commission.

The Commissioner for Italy feels no hesitancy in taking the affirmative on this point, being impelled thereto by every consideration of law, of logic, and of equity. The lack of time and the amount of work before him compel him to sum up briefly as follows:

The protocol makes no restriction as to the presentation of claims. To restrict the range of that instrument would be equivalent to an infringement of its spirit.

All requisitions, acts of personal violence, forced loans, illegal imprisonment — in short, all damages inflicted upon an Italian by the Venezuelan Government, or by its agents, or committed against an Italian on Venezuelan soil, when not characterized as acts of private malice, constitute an offense against the Italian Government, because by their nature and repeated occurrence they take on a political character and establish the right of intervention, and that of exercising a protective action — that is to say, a diplomatic action.

If to-morrow an Italian is killed in Venezuela, or his private interests are damaged, under circumstances which establish lack of diligence or prevention on the part of the Venezuelan Government, the Kingdom of Italy intervenes and claims. Would it be admitted in the course of diplomatic negotiations that Venezuela might object that the murdered man had no heirs, or that his heirs were born in Venezuela, and by this quibble escape the granting of adequate satisfaction? Certainly not, because in the person of the citizen the nation has been offended. Did the United States stop to inquire whether there were any heirs of the American citizen assassinated by brigands in Asia Minor when they demanded and obtained an indemnity of \$100,000 from the Turkish Government?

Did France undertake to determine the nationality of the widows or children of the Italian operatives murdered at Aigues-Mortes, when an indemnity was awarded them on the demand of the Italian Government?

Now, should an exception, which would not be admitted, and I believe would not even be offered in the course of a simple convention between governments, be accepted before a mixed commission? No, because the mixed commission was constituted for the purpose of giving effect in its results to the diplomatic action which preceded it.

The Washington protocols were not drawn with a view to restricting the rights of claimant governments, but to affirm them in the solemnity of an international agreement.

Let us suppose that a principle contrary to the foregoing is admitted; what will be the consequences? The first would be that every debtor government would seek to retard to the utmost the fulfillment of its obligations, and each passing year would see diminished the amount of indemnity to be paid. Each death of a claimant leaving no heirs, or leaving heirs born on foreign soil having laws like those of Venezuela, would mean the virtual annulment of the claim.

We would therefore see negligence compensated, or, what is worse, encouraged.

But let us consider another result, and as a practical case, that of the claim of Poggioli recently submitted to this Commission.

The firm of Poggioli Brothers (and I do not enter here into any consideration of the value of the evidence) suffered heavy damages through the operations of governmental agents. The firm was composed exclusively of Silvio and Americo Poggioli, brothers, both Italians, born on Italian soil. Among the damages for which claim is made was the wounding of Silvio, who remains a cripple, and the murder of Americo, whose heirs, associated in the claim and forming now part of the existing firm of the same name, are the widow, daughter of an Italian but born in Venezuela, and several minor children, likewise born in this Republic.

The claim of Silvio Poggioli, for himself and his heirs, may not be denied for reasons of nationality, *because, though badly wounded, he was not killed*. The share of the claim demanded for Americo and his family may be rejected, and why? Because Americo was not merely wounded, he was killed, and to his widow and children, born in Venezuela, this Commission should award nothing. It would have perhaps been better to suppress Silvio as well; then there would be no occasion to discuss the Poggioli claim.

If the Commissioner for Italy could believe that a principle contrary to the one he is advocating is to prevail in this Commission, he would consider it his duty to advise the heirs of Americo Poggioli and all other claimants analogously situated to withdraw their claims, so as to leave a way open to future diplomatic action on the part of his Government.

The case is quite different when the claimants have voluntarily assumed Venezuelan nationality, either by naturalization or marriage, acts in which may clearly be seen a deliberate renunciation, excepting, however, the case of Berti-Nieves, in which the marriage of the Italian claimant to a Venezuelan was not solemnized until after the stipulation of the protocol at Washington.

It is an elementary rule in logic that any principle which leads to unjust or absurd consequences must itself be deemed unjust and absurd.

I invite the attention of my Venezuelan colleague and of the honorable umpire to decision No. 34 of the American-Venezuelan Mixed Commission of Revision in the case of Albino Abbiatti,¹ who suffered damages while he was an Italian citizen, and, being subsequently naturalized as an American citizen, presented his claim before that Commission, which in its just sentence enunciated these two principles: "The infliction of a wrong upon a State's own citizen is an injury to it," and that "in claims they must have been citizens at least when the claims arose."

No opinion was filed by Doctor Zuloaga.

RALSTON, *Umpire*:

The above-entitled claim is referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claim is based upon "vales" or receipts given by certain chiefs in 1871 and 1872, and as well upon seizures said to have been made by revolutionary and governmental chiefs in 1899 and 1900. The claim for the events of 1871 and 1872 during his lifetime belonged to Michele Miliani, an Italian subject, who was married to Matilde Miliani May 29, 1872, she then being a Venezuelan citizen. He died in Valera, Venezuela, in 1890. Their children were apparently born in Venezuela, which, by legal presumption, may be considered

¹ Moore, p. 2347.

still their residence, though no proof is offered on the subject. The widow has always lived in this country.

It is urged against the claim, first, that the earlier part is barred by prescription, thirty-one years having elapsed since its origin, and it never having been presented to the Venezuelan Government; and in addition, second, that the widow and children, claiming as of their own right for the later damages and by inheritance as to the earlier ones, are to be regarded as Venezuelan citizens. The latter objection will be discussed.

So far as the rights of the widow are concerned, the questions affecting them were disposed of in the case of the estate of Sebastiano Brignone,¹ wherein it was held that in the event of conflict of laws the status of a woman born in Venezuela, married here to an Italian, and becoming a widow and always residing here, was to be determined by the laws of Venezuela, the land of her domicile, which declared her to be Venezuelan. The condition of the widow in this case being identical, her claim must be rejected for want of jurisdiction, but without prejudice to her other remedies.

The case of the children deserves careful consideration. The Italian civil code provides:

ART. 4. È cittadino il figlio di padre cittadino.

The Venezuelan constitution provides:

ART. 8. Los venezolanos lo son por nacimiento ó por naturalización.

(a) Son venezolanos por nacimiento;

1. Todas las personas que hayan nacido ó nacieren en el territorio de Venezuela, cualquiera que sea la nacionalidad de sus padres.

It thus appears that a conflict of laws again exists, Italy claiming her nationality for the children of her subjects, without limitation as to the location of their birth, and Venezuela claiming as her citizens those born within her territory, irrespective of the nationality of their parents. Which should control?

England, the United States, Portugal, and nearly all the Central and South American States accept the rule followed by Venezuela, while Germany, Austria, Hungary, France, Sweden, and Switzerland follow broadly the rule adopted by Italy. Either theory has, therefore, very respectable support.

It is urged on behalf of the Italian rule that Venezuela should not be deemed to have power perforce to confer nationality irrespective of the desires of the person concerned; that a child is Italian not merely from the time of birth but from the time of conception, and that the Venezuelan law, operating from birth, can not change a nationality already established.

The doctrine that citizenship is fixed by conditions existing from the moment of conception, while occasionally referred to by courts and writers, is not so far established by reason or authority in international disputes as to induce the umpire to largely regard it. To base citizenship upon the conditions of such an uncertain moment would be to introduce into the international law an element of doubt.

In the umpire's opinion, therefore, the natural moment for determining the commencement of citizenship is that of birth, both laws from that moment receiving such effect as they may deserve. Assuming this position, it can not be contended that Venezuela, more than Italy, has given an enforced citizenship.²

¹ See *supra*, p. 542.

² On pourrait élever un doute sur la question de savoir si le bienfait attribué au fils né, dans notre royaume, d'un étranger non domicilié depuis dix ans, pourrait

In discussing the rule that place of birth determines citizenship Cogordan (La Nationalité, p. 39) says that "the eminently practical spirit of the English Government has inspired a wise solution," in that Lord Malmesbury, in writing to Lord Cowley, ambassador at Paris, on March 13, 1858, said that if England recognized as English, children born in England of foreign parents she did not pretend to protect them as such against the authorities of the parents' country, which claimed them, above all when they voluntarily returned to that country; in other words, the Frenchman born in England would be protected by England in Germany, Italy, everywhere, in fact, except in France, where he could be legally called to military service.

Restating the same rule as existing in certain States, Tchernoff (Protection des Nationaux Résidant à l'Étranger, p. 470) says:

Un individu à double nationalité n'en aura qu'une dans le territoire de chacun des États qui le considèrent comme leur sujet. C'est la pratique de l'Angleterre et de la Suisse.

It follows from the foregoing that while the children of Miliani may with absolute legal propriety be recognized as Italians in Italy, or by Italy in any country other than Venezuela, in this country, and, as a consequence (following the decisions cited in the Brignone case, and accepting the domicile as furnishing the rule in case of conflict), before this tribunal, they must be considered, for the purposes of this litigation, as Venezuelans.¹

The umpire is the more disposed to the rule above indicated because certain equities in the case favor it. Miliani came to Venezuela some time prior to

s'étendre aussi au fils conçu dans le royaume et né à l'étranger, en vertu du principe infans conceptus pro nato habetur, quoties de commodis ejus agitur. Nous sommes d'avis que le législateur ayant employé le mot nato, on ne peut étendre la disposition à l'enfant conceptus, et que la fiction par laquelle on répute comme déjà né l'enfant seulement déjà conçu ne peut valoir dans tous les cas. Pourtant, si le père eût continué à tenir domicile dans le royaume après la naissance de l'enfant, et si la naissance à l'étranger pouvait être considérée comme un fait accidentel et de passage, la disposition de l'article 8 pourrait être appliquée. Le fait seul de la conception, quelquefois difficile à constater et susceptible de nombreuses contestations, ne peut par lui-même être suffisant pour fixer une qualité aussi importante que celle de la nationalité. Mais si, indépendamment du fait d'avoir été conçu, l'enfant avait été élevé et avait reçu l'éducation dans le royaume, les facilités de l'article 8, fondées sur les attractions instinctives pour les lieux où l'enfant se développe et passe son enfance, ne devraient pas être refusées, par le seul motif qu'il était accidentellement né à l'étranger pendant un voyage (1).

(1) Confr. Richelot, t. I, p. 115; Caen, 5 février 1813; affaire Montalembert. V. Émigré. (Note de M. Fiore.)

La même solution est donnée par la jurisprudence française. Il est admis, en effet, et enseigné que l'enfant né à l'étranger, de parents étrangers, ne pourrait se prévaloir des dispositions de l'article 9 du Code civil, bien qu'il eût été conçu en France: la maxime infans conceptus pro nato habetur, quoties de commodis ipsius agitur, n'étant point applicable dans ce cas, parce qu'il résulte, et du texte de l'article 9 et de la discussion au Conseil d'Etat, que c'est exclusivement à la naissance sur le sol français qu'est attaché le bénéfice dont il s'agit. Voir Zachariæ, édition d'Aubry et Rau. 1^{re} partie, Chapitre IV, § 70, t. I^{er}, note 1, p. 209, et les auteurs cités par les annotateurs. P. Pradier-Fodéré.

(Fiore, Droit International Privé, livre I, pp. 113, 114).

¹ The rule here laid down is that accepted by Bluntschli, who says (Droit Public Codifié, sec. 374):

"Certaines personnes ou familles peuvent exceptionnellement être ressortissantes de deux états différents ou même d'un plus grand nombre d'états.

"En cas de conflit la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les états où elles ne résident pas seront considérés comme suspendus."

1871, and died in 1890 at the age of 56 years. He had married in 1872. His children were all born here, and, so far as appears, have never claimed Italian citizenship till now, or lived in Italy. It is scarcely to be supposed that they have any intention of living upon Italian soil. To declare them to be Venezuelans is not to deny them anything that they have ever felt in any essential way they possessed, and an option to choose Italian citizenship is scarcely to be inferred from the fact that their mother has seen fit in their names to file a claim before this Commission.

Another consideration may be added. Michele Miliani, the father, deliberately established his domicile and married in Venezuela, choosing that his children should there and under her laws first see the light of day. While he had not power to select the land of his own birth, he could control that of his children. In so far as a father may be considered as selecting the citizenship of his children he did so, and under all the circumstances of the case it seems proper they should abide the consequences of his actions.

The foregoing considerations make it unnecessary to discuss the question of prescription.

The umpire has not discussed the suggestion that the claim, largely at least, was Italian in origin and should be considered, even if not now Italian, because involving an infraction of international duty on the part of Venezuela toward Italy which would survive even change of citizenship on the part of the individual claimant. It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so. On the other hand, commissions have and exercise jurisdiction over contract claims, while the diplomatic branch of government, although usually reserving the right, rarely presses matters of this nature. While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the nation can be said to have a right which survives when its citizen no longer belongs to it. Italy, save when her own pecuniary rights are affected, recovers nothing for her own benefit before a tribunal such as this, however much her own dignity may have been affected by the treatment of her subjects.

A decree may therefore be entered dismissing the claim, but without prejudice to such rights as the claimants may have elsewhere.

PETROCELLI CASE

The Government is liable for loss from having so taken possession of property as to especially expose it to destruction, but not for damages incident to ordinary warlike operations.

RALSTON, *Umpire*:

This case is submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

While the claim is for 45,000 bolivars, embracing a large number of items, very few circumstances are so established by proof as to be worthy of consideration, and these only will be discussed.

It appears that the Government troops in the month of May, 1902, entrenched themselves in front of the claimant's dwelling house at a street corner in Ciudad Bolívar, and that as a result a battle raged around that house for five days,

it being made the object of attack and being greatly damaged. It further appears that the same troops broke open the doors, smashed wardrobes, and helped themselves to property, but no satisfactory evidence is furnished as to the value of property so taken or injured. It seems fair to believe that the house was used in connection with the entrenchments. In addition, it is said that during the battle of last July five bombs were thrown, apparently by the Government troops or vessels, which entered this house and another, causing considerable damage. An expert valuation of the amount necessary to restore the dwelling house fixes it at 1,850 bolivars, and to repair a storehouse, belonging to the claimant and located elsewhere, at 100 bolivars.

The damages to the storehouse are rejected, as incident to the operations of war. The damages to the dwelling rest upon another principle. When the Government troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction. The claimant's property was exposed to a special danger, in which the property of the rest of the community did not share. The Government's responsibility for its safe return was complete. The principle upon which such responsibility rests is above indicated, and is more at large set forth in 4 Moore, page 3718, *Putegnat's Heirs*, decided by the American-Mexican Commission formed under the treaty of 1868, which decision was recently followed in the case of the American Electric and Manufacturing Company *v.* Venezuela,¹ the opinion being presented by Doctor Paúl, in the American-Venezuelan Commission now sitting in Caracas.

Part of the damages caused to the dwelling house were from shells thrown by the Government during the battle of July, and, as incident to the usual operations of war, no recovery from them can be had.

An expert examination shows that the dwelling house can be repaired for 1,850 bolivars. Only so much of this amount can be paid as may be considered the result of the special use made of it by the Government. The evidence does not distinguish, and perhaps could not be expected to distinguish, clearly the damages caused by the two classes of acts — those involving and those refusing responsibility. The umpire, however, believes himself justified in holding responsibility to the extent of one-half of the amount claimed for damages to the dwelling house, or 925 bolivars.

TAGLIAFERRO CASE

Responsible officers of the Government having had full knowledge of the claim from the beginning, the reclamation, although 31 years old, is receivable.

Where the reason for the application of the principle of prescription ceases, as in this case, prescription can not be invoked to defeat the claim.²

Illegal refusal of amparo by superior judge and procurador-general will sustain claim for denial of justice.

RALSTON, *Umpire*.

The above-entitled cause is referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claimant, an Italian subject, was, in 1872, a merchant of Tariba, doing

¹ See Vol. IX of these Reports, p. 145.

² See Gentini case, *supra*, p. 551, and Giacomini case, *infra*, p. 594.

a considerable business. On January 28 of that year, the general in chief of operations in the States of Mérida and Táchira issued an order of the collection of enforced exactions against a number of citizens of Táchira, requiring, among things, the collection from the claimant, by name, of 12 "morocotas," a morocota being the equivalent of an American 20-dollar gold piece, the order stating that those who should not make the payment "will be conducted to the prison, subject to the disposition of Gen. Manuel Pelayo."

Pursuant to the foregoing, the claimant was, on February 1, required to pay the money, but refused, electing to accept imprisonment. Immediately upon being imprisoned his petition for "amparo" or protection was presented to the superior judge, who, contending that the military power was superior to the civil, refused to grant amparo.

Immediately thereafter, and on February 5, the claimant addressed a petition to the procurador-general of the nation for the State of Táchira, setting up the foregoing facts, and praying that he might be set at liberty, and that the order depriving him of the same might be revoked. The procurador returned claimant's petition to him on February 6, authorizing him to apply again if he saw fit, producing documents showing that he was an Italian subject, without which requisite, he said, nothing could be done.

The duration of claimant's stay in prison is not fixed in the expediente, but, as on March 11 he prepared his proofs, we may presume that it did not exceed forty days at the outside. It does not appear that he paid the exaction.

The first question presented is one of prescription, more than thirty-one years having elapsed between the infliction of the injury and the presentation of the claim. In the Gentini case, No. 280,¹ the umpire sufficiently indicated the reasons why prescription could properly be invoked in international claims. It may be said that none of the reasons then adduced can be given effect in the pending case. Here the acts complained of were committed pursuant to the orders of the highest military authority of the State. The injured party at once appealed to the judicial authority, which denied relief, and then to the immediate representative of the nation, who, upon a subterfuge, refused his assistance. The responsible constituted authorities knew at all times of the wrongdoing, and if the complaint were baseless — an impossible conclusion under the evidence — judicial, military, and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now.

It is true that the claimant has not presented his claim to the Government at Caracas, but his unavailing efforts to get relief at home may well have discouraged him. As having some incidental bearing we are told that complaints made by Italians of acts of the character here indicated came to the General Government about the time of the occurrence of the injuries, and strict orders for the cessation of the causes for them were very promptly and properly given, a representative of the Government being sent to the neighborhood to secure correction of abuses.

The offenses complained of now are double in nature, consisting of unjust imprisonment and denial of justice. The only cause for imprisonment was the nonpayment of an illegal exaction. Clearly this affords ground for recovery. That there was a denial of justice is likewise evident. Military authority could not justly override civil authority, as the superior judge seemed to admit, and it was immaterial whether the claimant were Venezuelan or Italian, although the procurador refused relief because of a supposed lack of proof of Italian citizenship.

¹ See *supra*, p. 551.

The forced loan violated many provisions of the constitution, among them, that property should only be subjected to contributions decreed by the legislative authority, in conformity with the constitution; that no Venezuelan could be taken or arrested for debts not proceeding from fraud or wrongdoing; that all shall be judged by the same laws and subject to like duties, service, and contributions. Strangers enjoy, under the constitution, all the rights of Venezuelans.

In refusing the relief prayed for, the officers of the judicial department were guilty of a gross denial of justice, failing, as they did, to follow the excellent laws prescribed by Venezuela. In so doing they unfortunately subjected the Government to liability.

The claimant fixes no amount for his demand, but the royal Italian legation asks 5,000 bolivars. In view of the gravity of the case this amount seems reasonable, and will be accorded without interest.

GIACOPINI CASE

Venezuelan authorities having been notified of the taking of proof thirty-two years ago and having assisted therein, the principle of prescription held not to apply, although no express demand was made.
Allowance made for imprisonment of claimant.¹

¹ Measure of damages for unlawful imprisonment is largely discussed in the Topaze case (*supra*, p. 329), and many of the authorities to be found in Moore are abstracted in that case on page 330. In addition in Moore and elsewhere may be enumerated the following:

Moore, pages 1646-1653, case of Charles Weile, before the Peruvian Claims Commission, for imprisonment for an uncertain time, payment was allowed of \$32,407.

Moore, page 1655, case of George Hill, before the same Commission, for being fired upon and made a prisoner for three days, without food or medical attendance, claimant was awarded 6,000 Peruvian soles, or \$5,555.

Moore, page 3240, case of Baldwin, before the Mexican Commission of 1839, for 84 days of imprisonment, claimant was awarded \$20,000.

Moore, page 3247, case of Barnes, before the Mexican Commission of 1868, for sixty days' detention, claimant was awarded \$5,100.

Moore, page 3248, case of Rice, before the same Commission, for three days' imprisonment, claimant was awarded \$4,000.

Moore, page 3251, case of Jonan, before the same Commission, for imprisonment during long periods in 1853 and 1854, claimant was awarded \$35,000 Mexican gold.

Moore, page 3252, case of Moliere, before the Spanish Commission, for sixteen days' imprisonment, claimant was awarded \$3,000.

Moore, page 3253, case of Jones, before the same Commission, for thirty-one days' imprisonment, claimant was awarded \$5,000.

Moore, page 3277, case of Casanova, before the same Commission, for twenty days' imprisonment, other elements entering into the affair, claimant was awarded \$6,000.

Moore, page 3282, case of Rahming, before the British Commission, claimant was imprisoned about eight months, and was awarded the sum of \$38,500.

Moore, page 3283, case of Stovin, before the same Commission, for five weeks' imprisonment, claimant was awarded \$8,300.

Moore, page 3285, case of Shaver, before the same Commission, for two months and twenty-one days' imprisonment, claimant was awarded \$30,204.

Moore, page 3288, case of Ashton, before the same Commission, for three months and four days' imprisonment, claimant was allowed \$6,000.

Moore, page 1807, case of Van Bokkelen *v.* Haiti (Foreign Relations U.S., 1888, p. 1007), plaintiff was allowed \$60,000 for an imprisonment of fourteen months and twenty-two days.

RALSTON, *Umpire*:

This case comes to the umpire upon a difference of opinion between the honorable Commissioners for Italy and Venezuela.

In 1871 Domenico and Giuseppe Giacomini, Italian subjects, were merchants, doing an extensive business at Valera. In November of that year their partnership store was entered by Venezuelan troops, by order of General Pulgar, commanding the right wing, and there was forcibly taken from it property of the value indicated: Coffee, 14,400 fuertes; potatoes, 250 fuertes; cacao, 40 fuertes; fennel, 112 fuertes; general merchandise, 2,000 fuertes; personal and household effects, 500 fuertes; figs, 640 fuertes. In addition, mules were taken to the value of 2,400 fuertes and oxen worth 100 fuertes. About the same time Domenico Giacomini was arrested on an unfounded charge of complicity in political disturbances, and transported by the army, in chains, under dangerous conditions, to Maracaibo, where, contrary to the Venezuelan constitution, he was thrown into prison in association with criminals, and again, contrary to the same instrument, loaded with fetters. After some weeks he was released from prison upon payment of a forced exaction to General Pulgar of 400 fuertes and the execution of a bond requiring his presence in Maracaibo to meet any charge brought against him. None such was ever brought, and after seventy-five days of absence from his business, part in actual and part in virtual captivity, he was restored to his home in Valera. Giuseppe Giacomini also spent some time in prison, but its term is not fixed, and this element of damage is not considered for reasons hereinafter given.

Against the claim it is first urged that prescription should lie, about thirty-two years having elapsed since its origin. In the Gentini case, No. 280,¹ in this Commission, the umpire referred to the fact that under certain circumstances prescription would not be recognized as a defense, mentioning specifically that of bonds "as to which a public register had been kept," and furthermore stated that the presentation of a claim to competent authority within proper time would interrupt the running of the time of prescription, adding that there were other qualifications "which might be imagined" without entering into an attempt to enumerate them.

Examination of the expediente in the present case shows that the tribunal before which the proofs were made (in November, 1872), directed notice to the fiscal of the nation before their taking; that he was present and vigorously cross-examined the witnesses; that he asked and was accorded by the judge a copy of the evidence. The Government knowing in this manner of the existence of the claim had ample opportunity to prepare its defense.

As was stated in the Gentini case:²

The principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant.

In the present case, full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails.³

In addition, as bearing upon the question of its good faith (though not to be considered as of conclusive legal value), the claim was made known to the royal Italian legation in 1872. At a later period one of the claimants (with a letter from a high Venezuelan authority recognizing the justice of his demand) came to Caracas to press for relief, but died here before anything could be accomplished.

¹ See *supra*, p. 551.

² *Supra*, p. 551.

³ See also the Tagliaferro case, *supra*, p. 592.

In the Gentini case the claimant never made his supposed grievances known to anyone in authority in any manner for thirty-two years.

We are brought next to the consideration of an objection to a part of the claim. As before stated, one of the original complainants, Giuseppe Giacomini, is dead. His widow has remarried with a Venezuelan citizen. Giuseppe Giacomini's children were born in Venezuela. By the laws of this country the foreign woman who marries a Venezuelan becomes Venezuelan. Under the decision in the Miliani case, No. 223,¹ the children of a foreigner who are born in Venezuela are Venezuelans. In so far, therefore, as the claim belongs to Venezuelans, it is not considered and must be dismissed without prejudice.

The value of mules, coffee, potatoes, cocoa, fennel, merchandise, household articles, figs, and oxen taken from the firm was 20,442 fuertes, or 102,210 bolivars. Four hundred fuertes, or 2,000 bolivars, were paid (apparently in the end by the firm) to General Pulgar, to secure the release of Domenico Giacomini. One-half of this amount may be awarded to Domenico Giacomini. For the time he was in constraint, either in prison or in Maracaibo, the average sum of 50 fuertes per day, or a total of 3,750 fuertes, will be awarded without interest.

The total award to Domenico Giacomini will therefore be 52,105 bolivars, upon which interest may be calculated since December 1, 1872, approximately the date of the taking of proof, and 3,750 fuertes without interest. No award is made of the sufferings of Giuseppe Giacomini nor for money expended by him personally, as only his heirs could possibly be entitled to an interest therein, and they are excluded from this judgment for the reasons hereinbefore set forth.

BOTTARO CASE

Letter received to explain statement of facts.²

RALSTON, *Umpire*:

The umpire has carefully considered the expediente in this case, as well as the opinions of the honorable Commissioners for Italy and Venezuela; this case reaching him because of their differences of opinion.

It is contended on behalf of Venezuela that the case is badly proven; two of the witnesses testifying, not from their knowledge of the facts, but from their public notoriety, and the third witness giving no reason to support the testimony furnished by him. Furthermore, it does not appear in evidence whether the troops taking the property, for the seizure of which recovery is sought, belonged to the Government or revolutionary forces.

On the other hand, it is contended that the proof is sufficient, and it is pointed out that a letter from the claimant has been filed, showing that of the eleven chiefs whose action was complained of, four were chiefs of the Government.

In some respects the proof in this case affects the umpire favorably. For instance, the property taken has been enumerated specifically and the values of each class given; the values so furnished being in every case apparently reasonable. It is true that two witnesses attest the facts from public notoriety, but the third witness speaks with sufficient definiteness, and apparently of his own knowledge.

¹ See *supra*, p. 584.

² As showing extent to which informal proof may be received, see Lasry case, Vol. IX of these Reports, p. 147, Faber case, *supra*, p. 438 and note and *infra*, p. 747.

The proof is not as complete as it should be, in that it fails to show the number of cattle, burros, or horses taken by each particular leader, either of the Government or of the revolution. We are only favored with the aggregate number. The letter of the claimant designating which chiefs were of the Government or of the revolution, undertakes to attribute to the governmental chiefs the taking of more than four-fifths of the property lost by him. As but four of the eleven chiefs were of this side, the umpire is disposed to think that while his statement may be true, it is not probable, and no details are furnished which would tend to establish its probability. In view of this fact, and bearing in mind the proportion existing between the two contending forces, he is disposed to think that approximate justice will be rendered by charging the Government with the taking of property to the extent of 6,000 bolivars, upon which amount interest may be calculated to the 31st day of December, A.D. 1903.

The umpire accepts as evidence, though, naturally, of the lightest character, the letter written by the claimant; it being his duty under the protocols to receive and carefully examine everything presented to him.

DI CARO CASE

In estimating damages for unlawful killing, age and station in life, deprivation of comforts and companionship, and shock to surviving members of the family may be taken into consideration among other elements.

An award will not be made in favor of Italian subjects who have served in revolutionary forces.

Claim for money said to have been taken rejected because of deficient proof.

RALSTON, *Umpire*:

The claim of Beatrice Di Caro, widow of Giovanni Cammarano, has been submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela, upon the question of the amount of damages.

The admitted facts seem to be that on May 4, 1902, two government soldiers went to the store or "pulperia" of Giovanni Cammarano in Duaca, when he was absent, and, after demanding various articles with which they were supplied, attempted to assault the claimant, Beatrice Di Caro and her daughter-in-law. The two sons of Giovanni Cammarano struggled with the soldiers and one son, getting possession of the gun of a soldier, shot and killed him. The remaining soldier escaped. The sons thereupon fled.

A detachment of soldiers in charge of an officer shortly after went to the house and, finding Giovanni Cammarano, who had meanwhile returned, demanded the whereabouts of his sons. This he was unable or unwilling to give. They seized him and, conducting him about a square and a half, cut him with a machete and shot and killed him in the street. Thereafter the soldiers sacked the store and again, on January 27, 1903, the store having been somewhat replenished, it was plundered by the government forces.

The claimant fixes the value of property taken at 16,468 bolivars and of cash money at 13,554, or at another place at 14,072 bolivars.

The sons of the claimant, shortly after the occurrences first mentioned (and possibly before), joined the revolutionary army, but there is no sufficient reason to believe that claimant's deceased husband took any part in the domestic difficulties of Venezuela.

The first question presenting itself is as to the damages to be awarded claimant for the unwarranted killing of her husband. The honorable Italian

Commissioner would fix this award at a considerable amount. The honorable Commissioner for Venezuela, arguing that the deceased, had he been a young man, could not have earned more than 3 bolivars a day and that, being 64 years of age, his expectancy of life could not exceed six more years, would award damages for his death at not to exceed 6,510 bolivars.

The argument in favor of the sum last named is based exclusively, as appears, upon the theory that the deceased was but a laborer, and that his death only deprived his family of his value as such laborer. But the evidence tends to show that he was a shopkeeper and bought and sold coffee and other productions in considerable quantities, besides apparently cultivating a small piece of land, the extent of which is not given. We may fairly consider, therefore, that his earning power would be much more than 3 bolivars a day.

But while in establishing the extent of the loss to a wife resultant upon the death of a husband it is fair and proper to estimate his earning power, his expectation of life, and, as suggested, also to bear in mind his station in life with a view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations. For all this no human standard of measurement exists, since affection, devotion, and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honorable Commissioners as entering into the calculation and the additional elements adverted to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of 50,000 bolivars would be just.

The next question of difference is as to the award for property taken. The umpire is not disposed to accept the claim for cash money said to have been taken. This, it is alleged, was sent to the decedent by a bank a short time previous to his death, and the sons, for whose benefit the umpire does not feel he can make an allowance because of their revolutionary career, were apparently interested in it. Besides, its existence is not clearly shown; and if it had been received from a bank, this fact was susceptible of definite and disinterested proof, which is lacking. In addition, the amount, considering the claimed value of the deceased's other property, is so unreasonably large that excessive exaggeration may be presumed. The umpire is further satisfied, taking the evidence as a whole, that the value of the contents of the "pulpería" has been grossly overestimated, and that if he allows 1,000 bolivars as the value of the widow's interest in all of the personal property, he will be doing full justice.

BIAJO CESARINO CASE

Governments are liable for the wanton acts of their officials ¹

RALSTON, *Umpire*:

The foregoing cause was duly referred to the umpire, on difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claim arises because of the killing of Gaetano Cesarino, father of the

¹ Cf. Poggioli case, *infra*, p. 669 and notes.

claimant, in the town of Tocuyo on the 9th day of April, A.D. 1903, by a shot fired by a police official named Manuel Aguilar. The claimant asks 50,000 bolivars.

From the undisputed facts in the case, it appears that Manuel Aguilar was at the time a police official, and fired upon the deceased, a pedlar by occupation, as he was crossing a street of Tocuyo. The first proofs submitted tended to show that Aguilar was about 50 meters from the deceased at the time he shot, but subsequent more exact information places the distance at 200 meters.

At first it was proven simply that the deceased was killed by the official named, no particulars being furnished, leaving it open to be supposed that the killing might have been accidental, or brought about upon sufficient cause. The later evidence, however, demonstrated that the deceased was a peaceful, inoffensive man, who had taken no part whatever in any political questions, and was engaged in no disturbance and furnished no cause for the act against him. The assailant professes entire ignorance of the event, but a man who stood next to him, Gimenez, saw him raise his gun and fire at the deceased, and suggests no provocation or excuse.

There is considerable evidence tending to show that there were street fights in Tocuyo on the morning in question between Government troops originally in possession and revolutionary troops which were entering, and the testimony of some of the witnesses would seem to indicate that the killing of Cesarino occurred about the time of an exchange of shots. Other papers submitted apparently demonstrate that there was no contest between the contending parties until about an hour after Cesarino was killed. Whatever may be the exact fact as to this point, it does appear that the deceased took no part in the contention, but was shot down in the street unarmed. Nowhere is it suggested that he suffered because believed to be taking part with the revolutionists, and one is unable to determine whether he was killed by Aguilar in a spirit of reckless bravado or in unreasoning panic. Certain it is that the killing was utterly causeless, while deliberate.

The umpire can not, under all the evidence in the case, accept the theory that the death of Cesarino was one of the incidents of war for which no responsibility exists. True it is that governments are not to be held to too close accountability for the misdirected shots of their soldiers or for every display of lack of judgment, but this is not to say that the existence of war frees them from every responsibility. Cases before the present Commissions in Caracas afford many illustrations of decisions holding the Government of Venezuela liable for the wanton or negligent acts of its agents in war and in peace, and, in the judgment of the umpire, the present claim should be added to the list of such cases.

The claimant apparently claims for himself and his mother and a minor child. In the estimation of damages, he, being a man of full age and married in Venezuela, will not be recognized. There is no proof of the marriage of his mother or the existence of a minor child, except as he has stated, and, in the opinion of the umpire, the royal Italian legation requesting it, an opportunity to furnish other and more exact proof should be afforded. No award will therefore be made pending the furnishing of fuller proof.¹

¹ Later the lacking proof was furnished and award given for 40,000 bolivars.

OLIVA CASE

(By the Umpire:)

Expulsion under circumstances of contumely and upon mere suspicion will sustain a claim for damages.

Concession indirectly taken away by unlawful expulsion may be compensated for, the measure of damages in this case being limited to amounts properly expended in procuring it, speculative and conjectural profits being rejected.

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

The principle involved in the claim under consideration is analogous to the one which was fully studied in the Boffolo case, in which was delivered an elaborate decision by the honorable umpire, and to the case of Clemente Giordana, in which an indemnity was agreed upon between the Commissioners.

The circumstances attending the expulsion of Lorenzo A. Oliva, however, and the consequences flowing from the arbitrary proceedings against the interests and to the injury of the claimant, are of special gravity and require to be set forth in detail.

Oliva had lived in Venezuela a number of years, and from 1891 to 1898 was employed in the important commercial house of Bisagno, Oliva & Co., Italian merchants of Maracaibo. It does not appear, and no proof to the contrary has been adduced, that the claimant during all this time had ever embroiled himself in the political struggles of the Republic, notwithstanding that during this period the Crespo revolution burst forth. We have from this moment evidence of Oliva's pacific tendencies, for, on the 3d of July, 1900, he made arrangements with the Government of Caracas to contract for the erection of a public cemetery, the clauses of which contract we will examine more closely further on in the course of this memorial. On the 31st of October of that year he entered into an agreement with the firm of I. Brocchi & Co., of Habana, in virtue of which said firm was to advance him \$50,000 American with which to commence the construction of the cemetery. On the 23d of November following the claimant went to the Venezuelan consul at San Juan de Puerto Rico and asked for and obtained a passport for La Guaira. It will be noted that, as passports are not required of foreigners disembarking at ports of the Republic, the spontaneous presentation of himself at the office of the consul, as aforesaid, constitutes for the claimant presumptive evidence that he was proceeding to Caracas for the transaction of important business and not for political reasons.

The claimant reached La Guaira the 27th of that month and Caracas the 28th. On the day following he was arrested, and the next, by official decree, he was expelled.

What were the reasons of the Government of the Republic for issuing an order which not only infringed the liberty of the claimant, granted him under the constitution and by the treaties, but prevented him from carrying out an advantageous contract stipulated nearly five months before between him and the Government of Caracas?

The writer believes there were no reasons, and this from the following considerations:

The decree of expulsion in nowise explains, nor does it even fasten upon the claimant, the vague and indefinite stain of being "notoriously injurious to public order."

He had had personal relations with the ex-president, Ignazio Andrade, and from this arose the suspicion that not only was he a revolutionist, but so closely allied with the rebel factions as to have undertaken to carry with him their

political correspondence to Venezuela. All of which is extremely improbable and even absurd. No proof has been advanced in support of these suspicions, and no incriminating papers were found on him at the time of his arrest.

The Venezuelan Government which, when the royal Italian legation, in December, 1900, intervened in behalf of claimant, had alleged as the cause of expulsion "the inconvenience of the attitude assumed by that subject (i.e., the claimant) as contrary to the security of the peace," has not been able to furnish this Commission anything more definite than a report of the Venezuelan consul at San Juan de Puerto Rico that there were rumors connecting Oliva with the Andradists.

It is worthy of note that the consul, to whom Talleyrand would have found it unnecessary to give his famous advice, "*Surtout pas trop de zèle*," waited until the 2d of April, 1901, to explain why he had conceived suspicions in the preceding November regarding the claimant, and there is nothing to show that he had, either by telegraph or in a letter by the steamer on which Oliva was traveling, denounced him to the Venezuelan authorities; but even admitting that he had done so, it is beyond question that had the consul attributed any weight to the rumors concerning the claimant he would have taken steps to have him searched or arrested on board the *Philadelphia*, so that the Government might eventually gather proofs in support of the accusations directed against him and prevent all danger from the supposed revolutionary correspondence. But, however all this may be, it is indisputable that nothing material or convincing has been submitted to us that would make us believe or admit that Oliva was a revolutionary agent, or was returning to Venezuela for any other purpose than to complete the contract for the erection of the cemetery at Caracas.

The foregoing would be sufficient to prove his expulsion harsh and arbitrary; but there are other very strong reasons for believing that he was simply the victim of a precipitate and abusive measure.

Even though the claimant be in nowise bound to furnish negative proof of his abstention from political affairs, a most difficult thing in any case, but particularly so in his case, on account of having been compelled for many years to live far from Venezuela, he nevertheless exhibits the statement of Ramiro Callazo, then consul for Venezuela in Habana, from which it appears that that ex-functionary had always known him in that city as a man of pacific habits and one occupied exclusively with the conduct of his business affairs.

It should also be remembered that he had contracted with agents of the very Government that had deposed Andrade from the Presidency to build the cemetery; that there never had been the least probability that the deposed President would ever again assume the reins of government, nor even was there a party that thought of restoring him to his high office after his forced departure from his country. It can not be shown that he ever schemed or intrigued with this end in view, or ever encouraged revolts. It is notorious that Andrade is far from being venturesome, but is of a conciliatory disposition, and his recent submission to President Castro, who has permitted him to return to Caracas, where he is now living peacefully, is the best evidence of the truth of these assertions.

These circumstances are so well known that it is not worth the while to insist on them. They have merely been related to show the impossibility of admitting, except on absolute proof to the contrary, that the claimant at the time he was coming to Caracas for the purpose of constructing the cemetery according to the contract entered into by him with the functionaries of the existing Government, was simultaneously in the secret service of a President and a party that had not the slightest probability of returning to power; he, who from his long

residence in the Republic, must have been perfectly acquainted with the internal political conditions among which he had always observed the strictest neutrality. To hold the contrary would be to consider the claimant as guilty of both imprudence and improvidence to an improbable degree.

On the question of the arbitrariness of claimant's expulsion the Italian Commissioner believes he has said enough to place it beyond doubt. An indemnity should therefore be awarded, and it only remains to fix the amount thereof according to rules of equity.

The claimant demands 2,158,707 bolivars, which is an exaggeration. The sum is thus divided by him: 1. For the forced settlement of his business house in Habana, 32,295 bolivars; for moral reparation of his arbitrary arrest and expulsion, 1,000,000 bolivars; for loss of his share of profit following the forced suspension of the contract, 1,126,512 bolivars.

Let us examine these three items.

The claimant has submitted an extract from his account books, sworn to before a notary, from which it appears that during the period from July 1, 1899, to December 31, 1900, his business house in Habana suffered a loss of 32,295 bolivars, as before stated. Of this sum 4,917 bolivars were spent in voyages to Venezuela on business connected with the construction of the cemetery, and this sum it would seem proper to reimburse. It is not possible to state exactly, nor can the claimant on this point give more conclusive evidence than that already furnished, whether the ulterior loss of 27,378 bolivars was the direct result of the precipitate liquidation of the Habana business, but it is presumable that it was largely so. Therefore the writer begs that the honorable umpire, in determining what amount of indemnity shall be allowed, will take into due consideration in this respect the indications furnished by the claimant of the losses suffered by him in consequence of the forced abandonment of the contract for the erection of the cemetery.

The item of 1,000,000 bolivars in compensation for expulsion is by far too large, but an award is certainly due him under this head. Considering, therefore, the good reputation always enjoyed by the claimant, his industrious character, and the high social class in which he moves, as well as the fact that the expulsion was from a free country, without just motives or the assignment of any adequate reasons therefor, besides the injury to his standing and business relations resulting from so arbitrary an act, the writer is of opinion that an indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity.

Let us now turn to the oft-cited contract, and assume that no consideration need be given the clause in article 10 thereof, in which Oliva renounces the right to claim by diplomatic recourse. The claimant could not renounce what was not exclusively his, since governments exercise diplomatic protection whenever the same seems to them a just and proper measure in defense of their interests and dignity, without regard to any private agreements to the contrary, particularly as these latter are often made through necessity on the part of their subjects. Never has any validity been attributed to clauses analogous to that found in the Oliva-Otanez contract, and which are frequently encountered in contracts entered into with governments of South American republics, and it has sometimes been necessary to depart from the rule adopted by the legislatures of many of those States, according to which foreigners have not, except in extreme cases, the right to appeal to their governments for protection; this in deference to the principle that sovereignty is not absolute, but limited

by the right of others to make good whatever valid reasons they may have.

But in the present case there is more, and that is that by the protocol of February 13, 1903, the Venezuelan Government expressly renounced all exceptions of this nature in the Mixed Commission.

Now we must consider in the first place that the contract drawn up between the claimant and the municipal government of Caracas, which is nothing more than a branch of the Federal Government, has nothing in common with those fantastical concessions so frequently put forward as the bases of unjustifiable claims. Oliva undertook to furnish Caracas with something of which it stood and still stands greatly in need. With this object in view, he closed out his business in Habana with the intention of definitely abandoning that city, and made trips to Venezuela, submitting to the Government officials here plans of the proposed cemetery (which are to be found among the papers) designed by the engineer Enrico Giorgi, to whose collaboration the claimant had had recourse.

Before leaving Habana he secured, by means of a special contract, the financial aid of the firm of G. Brocchi & Co., which agreed to furnish him at once \$50,000 for the commencement of the proposed work, and additional sums later on, all of which conclusively shows the earnestness of Oliva's purpose. The calculation which he makes of the losses to which the breaking of the contract has subjected him, while certainly not exact, is by no means devoid of foundation.

He certainly could not predicate the number of deaths in Caracas during the twenty years' duration of the concession, nor how many of the families of such deceased would have been minded to purchase the sepulchers that it was proposed to construct, and no one could tell with any degree of exactness whether the prices which it was proposed to charge for the various tombs and chapels would have been within the means of said families, but there is no doubt whatever that the death rate of Caracas is considerable and that many persons intend honoring the remains of their dear departed by depositing them in appropriate sepulchers, and that here one can neither live nor die cheaply.

It is quite possible that claimant may have, in his calculations as to profits, indulged his fancy somewhat largely; but, considered as a whole, his claim is just.

It is worth our while to compare the accounts of the claimant with certain data. From various documents forming part of the expediente, and particularly from the issue of the *Gaceta Municipal* of January 10, 1903, it is shown that in 1902 3,368 bodies were buried in Caracas. Of this number 2,340 were classed as insolvent. The remaining 1,028 belonged to classes in easier circumstances and were officially designated as solvent. From the report of the governor of the Federal District of February 27 and laid before the National Congress of the present year, it appears that during the years 1901, 1902, and 1903 the number of deaths in this capital were 2,838, 3,233 and 3,199, respectively, and that of those who died during the last of these three years 949 were solvent and 2,257 insolvent. It would therefore seem that the claimant's calculations as to the death rate here is correct; but he exaggerates somewhat the number of families able to purchase tombs for deceased members. According to his figures these would amount to between 33 and 40 per cent, while official data in our possession show not more than 30 per cent.

We must observe, however, that claimant's memorial is dated March, 1901 — that is to say, before the last war, which caused great dearth in business and brought ruin to many families. Should the present conditions of public tranquillity continue, as is hoped and as everything seems to indicate, the normal condition will again be reached.

As to the prices at which the tombs were to be sold, we have not, in truth any official and correct data to establish this point. From the contract we gather that for each high-class funeral the claimant had agreed to turn into the treasury of the city 40 bolivars and for ordinary funerals 20 bolivars, and further that the contract authorized him to receive from whoever might desire to possess a tomb, either large or small, the sum of 350 bolivars, retaining the privilege of disposing of the mortuary chapels at any price that might be agreed upon. These latter, according to plans, were to be 124 in number.

The claimant in his calculations assumes he might have sold the small tombs at 240 bolivars each, the large at 340 bolivars, and the mortuary chapels at 10,000 bolivars each. The tombs, not counting the chapels, numbered, according to the plans, 7,930, and as about 1,000 persons of the better class die each year in Caracas, this claimant affirms, apparently not without good reason, that in less than twenty years the cemetery to be constructed by him would have been filled.

In order to establish the accuracy of his calculations it would be necessary to have data which, perhaps from the lack of statistics and economic research, neither the claimant nor anyone else could here produce. In other words, it would be necessary to determine beyond question what number of those classed as "solvents" belong to families capable of purchasing tombs at from 240 to 340 bolivars each, and how many (certainly few in Caracas) would undertake to purchase a mortuary chapel at 10,000 bolivars.

It is upon this point that the claimant is, perhaps through no fault of his, vague and indefinite in his estimate. The writer thinks therefore that it would not be equitable to award the sum claimed under this head as representing the value of a ten or twenty years' exploitation of the cemetery.

If the act of expulsion, of which he justly complains, prevented his carrying out an enterprise which would have proved profitable, and besides entailed upon him the expense of voyages and compensations to those who were associated with him in this enterprise, loss of time, etc., it is nevertheless true that since his enforced absence from Caracas he has been at liberty to display elsewhere the activity which he would have employed here.

It is equally to be borne in mind that the sum of 971,000 bolivars which was to be used in the construction of the cemetery could not have been furnished him gratuitously by his capitalists, and even though a portion thereof was to be lent him by Brocchi & Co., of Habana, who, in consideration of which loan, were to have a special interest in the future profits of the cemetery (a deduction on account of which the claimant has already made), the remainder of the funds required to carry on the proposed work must necessarily have been productive before its amortization, whether furnished by himself or obtained from others, but this circumstance seems not to have been considered by him. Had it been it would have lessened his estimate of the amount of prospective benefits.

Taking all these facts into account, the Italian Commissioner is of the opinion that the claimant is entitled to an indemnity for enforced nonexecution of his undertaking of not less than 280,000 bolivars — that is, one-fourth the amount claimed by him under this head; for his arbitrary expulsion, 40,000 bolivars, as above stated; for reimbursement of expenses for voyages to Venezuela, etc., 4,917 bolivars; in all, a total of 324,916 bolivars.

ZULOAGA, Commissioner:

Lorenzo A. Oliva, an Italian, domiciled in Habana, was expelled from the territory of the Republic by a decree of the chief executive magistrate of November 30, 1900. The Government of Venezuela considered the foreigner, Oliva, objectionable, and made use of the right of expulsion, recognized and established

by the nations in general, and in the manner which the law of Venezuela prescribes. Italy makes frequent use of this right. The undersigned does not believe that Venezuela is under the necessity of explaining the reasons for expulsion.

Nevertheless, in the Oliva case, the agent of Venezuela has presented a report of the consul of Venezuela in Puerto Rico and two letters, from which it appears that Oliva was denounced by several persons with whom he came in a ship from Habana as an agent of the revolution of General Andrade, and this denunciation having been transmitted to Caracas, was the cause of the arrest of Oliva. The latter in an interview published in the *Pregonero* says that on being apprehended he was shown an official telegram in which there appeared the denunciation of the consul at San Juan, and in his letter to the minister of Italy at Caracas, December 6, 1900, he says that "The Government proceeded by virtue of a letter from its representative at San Juan;" and he admits, moreover, that he traveled with General Andrade from Habana to Puerto Rico.

The circumstances which the consul of Venezuela recites and the letters which he sent (which were confidential documents of the minister of foreign relations) are entirely sufficient to justify the suspicions of Oliva's revolutionary character. To this circumstance there is added the fact that Oliva was in fact a personal friend of Andrade, and that he had lived a long time in Venezuela in former years, whereby his complicity with the revolutionists was very plausible. The act of having gone to demand a passport from the consul of Venezuela in order to come to this country when it was not necessary shows also that his mind was not easy, and there were reasons for this. (The denunciation which was made to the consul was subsequent to the granting of a passport, as appears from the report.) As to how far it was ascertained that Oliva was a revolutionist is not a matter for discussion. It was sufficient that there existed well-founded reasons in order that the Government of Venezuela might so believe, and this appears to be proved. The honorable Commissioner of Italy asserts that General Andrade was not a revolutionist. The opinion of the Venezuelan Government was different.

Oliva demands fantastic amounts as damages, which he says he suffered because he could not execute a contract which he had made with the municipal council of Caracas to construct the cemetery of Caracas, a chapel, and a pantheon for families, and the honorable Commissioner of Italy believes that a large part of them should be allowed him. If Venezuela makes use of a right in decreeing the expulsion, it is clear that it can not be condemned to pay damages, although they were ascertained. This doctrine appears virtually to have been established in the decision of the honorable umpire in the case of Boffolo,¹ since the damages there allowed are not and could not have been for damages inflicted in the exercise of a right, but for "useless vexations in exercising it," which is very different.

It is useless, therefore, to enter into a concrete examination of what is demanded by Oliva, but it is not useless to observe, even if it only be for the moral appreciation of the case, that all his premises are false.

First. It is not true that because of his expulsion it was impossible for him to complete the work, because he might have done so through another person, or at least obtain new extensions of time within which to begin the work, by the consent of the authorities over him.

Second. The assertion is not true that he had the concession for the cemetery of Caracas. He had only the right to construct therein a building to keep

¹ *Supra*, p. 528.

remains and build vaults to deposit cadavers in. The cemetery was to remain such as it is.

All the statements are therefore erroneous.

I do not find that it is shown that Oliva has suffered in his expulsion violences or insults which were not the natural consequences of the decree, and of the necessity of carrying it out, and considering the charges made against Oliva it is easily understood that he was not allowed liberties which might aid the fulfillment of a revolutionary commission, if perchance he carried it.

AGNOLI, *Commissioner* (in reply):

The Venezuelan Commissioner has characterized the principle that I have maintained as absurd; that is to say, that a contract is broken as soon as one of the contractors is expelled by the other from the territory of the state in which the contract ought to have been performed.

The undersigned refrains from calling the opinion of his colleague as absurd, but he finds it very original, to say the least.

Mr. Oliva stipulated with the municipality of Caracas, which is nothing but a branch or an organ of the Federal Government, to execute his contract himself.

To demand that Oliva should have had recourse to managers or to powers of attorney, to ask of him and impose on him the placing of his confidence in people whom we do not know and whom perchance he could not find — to pretend in fine that he should assign his contract without knowing that anyone would accept his terms or that he should direct the work which was to have been done at Caracas from Habana or any other place — is preposterous.

His contract was broken *de facto*, because its execution under the conditions agreed on, was rendered impossible by an arbitrary measure of the *state*, it is true, but of a state which had been by the intervention of one of its organs one of the contracting parties.

Has the Venezuelan Government at last shown its good will by revoking the decree for the expulsion of Oliva? Never.

Under these circumstances it is certain and sure that the claimant has a right to an indemnity because of the consequences of the breach of his contract.

There is not a court in the world that would not allow damages under such circumstances, and the Mixed Commission, which is a tribunal of equity, ought all the more to allow them.

If the demand which Oliva presents on this account is rejected under the pretext that he had not commenced the work on the cemetery when he was expelled, and that therefore he suffered no direct damages, the absolutely subversive principle is sanctioned that the Venezuelan Government can, by an act of expulsion, or by no matter what illegal act, fail in the performance of its obligations assumed by contract, without making itself liable to any penalty.

The Valentiner case ¹ that the Venezuelan Commission cites proves nothing, or rather proves that the claim of Oliva is well founded in principle.

Mr. Valentiner made a claim because of the consequences of the recruiting of his laborers. The recruiting was a *legal act* in principle; and the umpire of the German Commission, in refusing indemnity, has acted properly.

Liability can not attach to a person who exercises his right.

Oliva makes a claim on account of the consequences of an *illegal act*, and all the more unjust because this act was committed against a person who was in

¹ *Supra*, p. 403.

possession of a contract entered into with the Government itself, which by this abusive measure injured him.

The Venezuelan Commissioner finds that Mr. Oliva has not proved his innocence. It is not his place to prove this innocence. Every man is considered innocent until the proof of the contrary is produced. It was therefore the Venezuelan Government that should have proved that the claimant was guilty and this is just what it has not done.

When expulsion is resorted to in France or Italy the proofs are at hand. Mere suspicions may justify measures of surveillance, but never a measure so severe as that of forbidding the residence in a country of a man who has important interests therein. In the opinion of the Venezuelan Commissioner there is constant mention of a *chapel*. It was not only a chapel that Mr. Oliva was to have built; it was a chapel and a *cemetery*. A plot of ground had been granted him of 19,600 square meters in which the chapel should have been built with a great many annexes and sepulchers besides the cemetery. The neighboring ground, 100 meters square (in all 10,000 square meters), was to have been filled with sepulchers.

According to the proposed management and plans the number of sepulchers to be constructed was to have been 7,930, without counting 120 little chapels, which were anticipated being sold at 10,000 francs each.

There was therefore a matter of importance under consideration, and not merely a chapel of which the Venezuelan Commissioner speaks.

RALSTON, Umpire:

The above entitled claim has been duly submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela. The claim, which is for the sum of 2,158,807 bolivars, grows out of the expulsion of Oliva from Venezuela, and the facts in connection therewith seem to be as follows:

In the month of November, 1900, Oliva went as a passenger from Santiago de Cuba to San Juan, Puerto Rico, at which point he changed his steamship for one going directly to La Guaira. At San Juan he received a passport from the consul of Venezuela. He reached La Guaira on the 27th and Caracas on the evening of the same day. In the afternoon of the day succeeding his arrival he was arrested upon the order of the governor of the Federal District in consequence of a telegram sent by the prefect of La Guaira, resulting from a denunciation made by the Venezuelan consul in Puerto Rico, declaring that he was an intimate friend of General Andrade, and was going to Venezuela in the capacity of revolutionary agent. He was taken to the prefecture, where he was detained until 7 o'clock in the evening. He was then returned to his hotel, but kept under guard until the President should order his restoration to liberty, which, it was believed by the police officers, would be immediate. He was placed in comunicado for a number of hours, and was not allowed to speak to his counsel or seek relief in the courts of justice. All of his commercial books, correspondence, and letters were examined without the discovery of anything of an incriminating nature. His companions in jail were French criminals who had escaped from Cayenne. He was then taken to La Guaira, and under circumstances of contumely sent out of the country.

In the month of July, 1900, Oliva had entered into a contract with the municipal council of the Libertador Department of the Federal District, obliging himself to construct a family pantheon in the cemetery of the south, and he had immediately thereafter gone to Habana, where he had been engaged in business, closed up his business, as it is said, at a loss, arranged to raise the money necessary to construct the pantheon, and when arrested was about

to commence the work. His expulsion rendered it impossible for him to proceed with the concession so obtained, and he was compelled to abandon it, together with all prospects of future profits.

The umpire does not find it necessary to again discuss the principles governing the right of expulsion. The existence of this right was recognized and the dangers incident to its exercise were sufficiently pointed out in the case of Boffolo, in which an award of 2,000 bolivars was given. It is sufficient in the present case to say that the expulsion of Oliva appears to have taken place without legal right, although it is recognized that the Government at the time felt itself authorized to exercise its power. The mere idle suspicion of a consul should not, however, in an international commission be received as a sufficient justification for the infraction of an international right.

In the Boffolo case, the umpire, in granting but 2,000 bolivars, was influenced by what seemed to be the unworthy character of the man. In the present case the claimant appears to have been a man of standing and character and recognized by a branch of the Venezuelan Government as a worthy concessionary. The honorable Commissioner for Italy now asks 40,000 bolivars for the expulsion, and this amount is not, under the circumstances, considered as excessive.

Large damages are asked for the practical loss of the concession above referred to, and elaborate calculations have been made as to the probable number of deaths in Caracas during the period of the concession, the number which would have been interred within this pantheon, and the probable profits arising from each sepulture. In the opinion of the umpire this method of computation must be entirely rejected. It is first to be borne in mind that the concession was not exclusive in its nature. Any number of concessions might have been given, the effect of which would have been to render this one valueless. Furthermore, the number of interments in this pantheon and the possible profits on each interment are so absolutely uncertain that they could not be accepted as a basis of calculation in an ordinary civil tribunal, much less in an international one. We have only to refer, so far as international tribunals are concerned, to the Geneva arbitration; some of the reasons for the conclusions arrived at being stated by Mr. Frazier, on the part of the United States, in the American and British Claims Commission, as follows (4 Moore's International Arbitration, p. 3926):

The allowance of prospective earnings by vessels was denied by the tribunal at Geneva unanimously. It is not, so far as I am aware, allowed by the municipal law of any civilized nation anywhere. The reason is obvious and universally recognized among jurists. It is not possible to ascertain such earnings with any approximation to certainty. There are a thousand unknown contingencies, the happening of any of which will render incorrect any estimate of them, and hence result in injustice.

The municipal law of the United States is to much the same effect. Thus in *Hodges v. Fries* (34 Florida, 63) it was held that profits which are speculative or conjectural are not generally regarded as elements in fixing damages in actions for breach of contract between lessor and lessee, not because there is anything in their nature per se which demands their reduction, but because they can not be estimated with reasonable certainty.

Again, in *Newbrough v. Walker* (8 Grattan, 16) it was held that the same rule applied to breach of covenant to lease a mill, and evidence in an action for the breach as to what the lessee could have cleared from the use of the mill was speculative and conjectural, and furnished no legitimate basis on which to estimate damages, and the same rule has been followed in a very great number of like cases.

It is not to be inferred, however, that Venezuela has the right, either directly or indirectly, to break the concession, or that no recovery therefor should be allowed against it. A nation, like an individual, is bound by its contract, and although it may possess the power to break it, is obliged to pay the damages resultant upon its action. In the present case, what was the value of the contract? This value is not determined by prospective profits, for the reasons above indicated. In this case, and referring only to the particular facts involved in it, we may concede that the value of the contract is the amount expended to obtain it (plus a reasonable allowance for the time lost by the claimant in connection therewith), and while the proof upon these points is not as clear as might be asked, we may accept as the amount recoverable the figures given in the profit and loss account of Oliva, as expended in his first voyage to Venezuela in the cemetery matter, to wit, \$675.54, or 3,512.81 bolivars. For his time, evidently covering several months, the sum of 5,000 bolivars may be allowed.

There is also to be allowed in favor of the claimant the expenditures of his second voyage, amounting to \$357.03, or 1,856.56 bolivars.

The umpire is asked to allow the loss to which it is said Oliva was subjected, because of being compelled to dispose of his stock of goods in Habana at a reduced price, to enable him to go to Caracas and enter upon the cemetery concession. So many elements enter into a matter of this sort that the umpire can not accede to this suggestion. The goods may have been sold at a reduced price, because of a falling market, because of their age, or for other reasons he is incapable of appreciating, all the surroundings not being presented to him. He would not be justified in charging this loss, therefore, against Venezuela, even were it otherwise proper, with relation to which he expresses no opinion.

An award will therefore be signed for the amount of 50,369.37 bolivars, with interest on 10,369.37 bolivars from October 28, 1903, to and including December 31, 1903.

CORVAIA CASE

(By the Umpire:)

This Commission only has jurisdiction over "Italian claims," meaning thereby claims which were Italian in origin and Italian when the Commission was formed.

In the present case the original claimant, born a subject of the Two Sicilies, lost his citizenship, according to the code of that country, by accepting diplomatic employment from Venezuela, and never regained it, and the claim of his heirs must, therefore, be rejected.

Venezuela knowing that when Corvaia entered her diplomatic services he abandoned Sicilian citizenship, Italy is now estopped from claiming him as a subject.

Semble that a man (and consequently his heirs as well) who accepts, without permission of his government and against her laws, such public and confidential employment from another nation is estopped from claiming his prior condition to the prejudice of the country whose interests he has adopted.

Sambiaggio case¹ affirmed in its interpretation of "most-favored-nation" clause.

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

Contrary to the position taken by his learned colleague of Venezuela, the Commissioner for Italy holds that Baron Fortunato Corvaia did not, by the

¹ *Supra*, p. 499.

fact of his having accepted charges and missions from Venezuela (in the absence of evidence of his having previously obtained the consent of his own Government) lose his Italian citizenship, and, true to the principle he has always maintained that the original nationality of a claim should be considered as the absolute rule and guide in determining its admission before this tribunal, invokes from the umpire a decision which will recognize all the heirs of Corvaia as entitled to share in the liquidation of the estate in just and due proportion, and without distinction based on their actual citizenship.

But should the umpire consider the Baron Corvaia as having lost his primitive nationality, the Commissioner for Italy begs to insist that the deceased had not thereby acquired citizenship in Venezuela, and could not have contracted any bond of allegiance to this Republic.

It is therefore his opinion that this claim should, even under the least favorable hypothesis, be considered foreign with respect to Venezuela, and that consequently the umpire should, without prejudice to the rights of such of the heirs whom he intends considering as invested with Venezuelan or other nationality, in consonance with the principles he has himself proclaimed, award a due share of the indemnity claimed to such of the heirs of Corvaia as are to-day enjoying Italian citizenship.

As regards the nationality of Baron Fortunato Corvaia, the Italian Commissioner again calls the attention of the umpire to the arguments addressed to him in the Giordana claim, No. 116, which was allowed as a claim for salary due for services rendered as engineer for the Venezuelan Government. It is indeed true that the services performed by Baron Corvaia in the United States and at Paris were vastly more important than those of Giordana, but when it is considered that they were rendered in a time of absolute peace between this Republic and other nations, particularly the Kingdom of the Two Sicilies, it must be admitted that the deceased was never in a position to defend foreign rights and interests in conflict with those of his country, and that he did not resort to extremes which, according to rule, are considered necessary, when services rendered a foreign government, without the consent of the home government, involve a loss of nationality.

For the rest, it appears from documents submitted to the Commission that the Corvaia family, out of favor with the Bourbon Government on account of its liberal sentiments, had been driven from the Kingdom of Naples. Could Baron Fortunato Corvaia, who had followed his father Joseph in exile, turn to the clemency of his sovereign with a request for a permission which would most certainly have been denied him? We have among the papers of the claim a copy of the petition with which the deceased, finding himself, in January, 1854, passing with his family through Naples, and receiving from the police a new order of expulsion, had had recourse to his King for a revocation of that odious measure, which was denied him. To assume, therefore, that Baron Corvaia, son of a political refugee, and himself driven from the Kingdom of the Two Sicilies and considered as an outlaw, should, shortly after his expulsion and during the most rigorous period of Bourbon tyranny solicit from his Government the above-mentioned authority, or make him fall under the incubus of failing to obtain it, seems contrary to all rules of justice and equity.

Corvaia never solicited any permission, for it would have inevitably exposed him to a refusal which would have placed him in the attitude of disobedience to his King, whose faithful subject he still considered himself, as is abundantly proved by his above-mentioned petition of January, 1854, in which he styled himself a "good citizen." The umpire should particularly note this expression "good citizen" occurring in the petition written by Corvaia himself and addressed to his King.

The Italian Commissioner holds that any tribunal called upon to decide whether the deceased baron had, under the circumstances, lost his nationality through this omission, the consequences of which it is sought to exaggerate in order to cause a rejection of the entire claim, would give a negative answer. In this sense particularly would tribunals of Italy decide it, who are truly competent in this respect, if we consider that that provision of law, *which had never been applied*, according to the solemn declaration in the Italian Senate of the minister of pardons and justice himself, Emanuel Gianturco, was subsequently abolished by the act of January 31, 1901, it having been recognized that the acceptance of foreign service lacks in general those conditions which warrant the assumption of an intention on the part of a citizen to renounce his original citizenship.

In every case the law which abolishes a provision having a penal character is retroactive, and Corvaia, against whom the loss of citizenship had never been pronounced by the magistrate, should be given the benefit thereof, and through him to his heirs and descendants. The Commissioner for Italy observes besides that the services of Corvaia in behalf of Venezuela had not the true and proper character of an employment, but were missions. The Venezuelan minister of foreign affairs, Giacinto Gutierrez, in a letter to the minister of hacienda, of March 18, 1856, declared having appointed him to a mission to France as envoy extraordinary and minister plenipotentiary. Corvaia, in Washington as in Paris, acted as confidential agent; that is to say, in a capacity in which we must recognize the essence of a mission or extraordinary charge, and not an employment.

If afterwards other titles were conferred upon him, as those of envoy extraordinary and minister plenipotentiary in France, when he was in Paris endeavoring to foster emigration, which was in fact the principal object for which the Republic had sent him, it was only because under such title he could more readily place himself *en rapport* with the Imperial Government and be officially recognized by the French minister of foreign affairs.

Whenever the Italian code speaks of employments, it is in the sense as understood in the Kingdom, those into which one enters as a career at modest compensation with a view to future advancement into more important undertakings. The mission assumed by Corvaia carried with it no assurance for the future, not even so much as a retired pension, and did not constitute an "employment" according to our law.

It never occurred to Baron Corvaia that his operations in Europe and North America in behalf of Venezuela could involve a forfeiture of his original nationality or set up a legal bond of a permanent character between himself and the country for whom he was acting. He lent his services in deference to the President of the Republic, Joseph Thadeus Monagas, whose intimate friend he was, and as a personal favor, as well as to render himself useful to the land to which he had come in his youth, where he had raised a family, and increased his private fortune.

No sooner had his functions of minister from Venezuela to Paris ceased, they having been terminated by the retirement of Monagas from the Presidency, than Baron Corvaia accepted the post of minister from Ecuador to the same capital. As he had no intention of changing nationality by the acceptance of missions under Venezuela, so also he could have had no thought of endangering it by undertaking similar functions for the Government of Ecuador.

These operations imposed upon him living expenses far in excess of the moderate salary granted him by the Venezuelan Government, and which, as proved by documents in the claim, was never fully paid.

The court of cassation of Belgium, by its decree of June 25, 1857, about the

time Corvaia was acting as Venezuelan minister in Paris, laid down the following maxim:

* * * la naturalisation est acquise. Tant qu'elle ne l'est pas il n'y a point de changement de nationalité.

Besides that of Cogordan, the umpire will doubtless remember the opinion of the eminent Italian jurist, Fiore, cited by the writer in his memorial in the Giordana case; that opinion is the synthesis of the rulings in Italy whenever there was application of article 20 of the Sicilian code, afterwards replaced by the eleventh article of the Italian code now in force, and that prevail in principle. Says Fiore:

Even if it were established that according to the internal law one should find himself bereft of one nationality without having acquired another, as we must, in accordance with international law, always eliminate the condition of a lack of determined nationality, so we should hold, as more in consonance with just principles, that such person is in the meantime a citizen of the country in which he was born (until he becomes a citizen of another) during the period intervening between the loss of one citizenship and the acquisition of another. (Fiore, *Droit International Privé* (Antoine), sec. 345.)

The same author observes:

The loss of original citizenship should not be held as an accomplished juridical fact until it is proven that a new one has been acquired. (Ibid., sec. 344.)

We will see in proceeding that Baron Fortunato Corvaia never acquired Venezuelan nationality.

In the work recently published entitled "La República Argentina y el Caso de Venezuela, por el Doctor Luis M. Drago, ex-Minister de Relaciones Exteriores," there is quoted in Spanish an article which appeared in "The Nineteenth Century and After," of April, 1903, from the pen of Mr. John Macdonnel, member of the supreme court of Great Britain, of the Institute of International Law, etc. At page 168 of said article in the aforementioned publication we read that the Ecuadorian Congress passed a law which contained (art. 5) the following provision:

Foreigners who may have filled positions or commissions which subjected them to the laws and authorities of Ecuador can make no claim for payment or indemnity through a diplomatic channel.

And Mr. Macdonnel observes:

It is almost needless to say that the diplomatic corps at Quito protested against this legislation. The United States Secretary of State denounced it as *subversive of all the principles of international law*.

In this affirmation of the Secretary of State aforesaid is found the proof that in the councils of the North American Government there prevails the principle advanced here by the Italian Commissioner, to wit, that the acceptance of missions and charges abroad, and particularly in South American countries, where there has been and is frequent recourse to foreign collaboration, does not involve a loss of nationality, since it is considered that there persists in the individual accepting such posts a right to claim, *per via diplomatica*, against the government which availed itself of his services, and that therefore his nationality persists as before.

The contrary theory is justly styled "subversive."

The honorable Commissioner for Venezuela has manifested his intention of sustaining also the following points: (1) That Fortunato Corvaia forfeited

his Italian citizenship because he left his country with no intention of returning, and (2) because he violated his neutrality.

To these exceptions the writer objects that Corvaia left his country by reason of the proscription of his family from the Kingdom of the Two Sicilies, and therefore by no spontaneous act creating any juridical situation whatsoever; that he established himself in Venezuela at the age of 18, and when, by reason of his minority, he could not, either by implication or directly, decide his nationality; that the intention of returning to the mother country must be assumed as persisting in the bosom of an exiled family; that when in 1854 Corvaia not only manifested the intention of repatriating, but desired to settle with his wife and family in Naples, he was expelled by the Bourbon police, against which measure he unavailingly protested; that, finally, it is freely admitted that he who emigrates for the purposes of trade and commerce, as had been the case with the deceased, can not without further evidence be viewed as having the intention of definitely abandoning his original domicile, particularly as in the present case Corvaia had not on arriving in Venezuela any settled purpose of establishing himself therein. He came to these shores seeking health. Only the force of circumstances decided his residence here, though with frequent and long absences.

The intention not to return should exist at the time of expatriation. The non-return may be brought about by a multiplicity of causes quite independent of the will of the emigrant, and has of itself no legal value.

The Italian Commissioner observes further that it does not appear that Corvaia ever participated in the political affairs of the Republic in such a way as to constitute an infraction of neutrality, since his operations were always in behalf of the constituted government, from which alone he accepted offices. If the following of such a course toward the legal government of the country which then sheltered him were held to imply a violation of the duties of neutrality, then must the foreigner be compelled to refuse any assistance to the authorities of his abiding place and manifest both insensibility and ingratitude in not preoccupying himself with interests not identical with his own.

Fortunato Corvaia favored Venezuela to the extent of his abilities, and now, when many of his credits toward the Government remain unpaid, there is hurled against him the charge of having violated his neutrality -- a charge which from every legal and moral point of view should be rejected as unsustainable. Never did Corvaia participate in the political struggles of the country or associate with the revolutionists. He always remained a foreigner, and though he loved this country well enough he never consented to become Venezuelan, and Doctor Zuloaga can not produce a single act of his during his long sojourn here from which may be deduced his intention to become a citizen, and much less that he had done so.

Fortunato Corvaia was the last scion of a family that had suffered for its country. His father lived exiled from his native land; his ancestors had filled public offices in the Kingdom of Naples. For centuries the Corvaia's had figured among the aristocracy of Sicily. Such a man will not readily abandon his nationality, to which he must of necessity be profoundly attached, and in him such an act can not be presumed in the face of a complete want of precise and explicit renunciation or the formal act of naturalization. Besides, the Corvaia's have always considered themselves Italians, and were recognized as such, not only by the representatives in Caracas and elsewhere of the Royal Government, but by the authorities of the Republic. In proof of this there is submitted an authentic extract from the register of the notarial acts of the Royal Italian legation in this capital, from which it appears that in 1877 Enrico Corvaia caused to be legalized the diploma of the Equestrian Order of

Venezuela of Bolívar, conferred upon him for services rendered to the Republic, and in the legalization referred to the royal chargé d'affaires of that period, the Chevalier Massone, styled Corvaia a royal subject.

There is likewise submitted an authentic extract of the general power of attorney conferred on the Baron Fortunato Corvaia the 30th of October, 1877, by his son of the same name, for the transaction of divers affairs in Italy. In this document, the original of which is to be found in the same register of notarial acts, the royal Italian chargé d'affaires thus declares: "Appeared before the legation the *royal subject* Corvaia Fortunato, of Fortunato, *native of Caracas*," etc.

Fortunato Corvaia, *native of Caracas*, was styled an *Italian* citizen by the royal legation in 1877, and since he was a native of Venezuela, the quality of Italian citizen could not have been attributed to him, save and except as he *was the son of the Italian Baron Fortunato Corvaia*.

The royal legation recognized Baron Corvaia, ex-minister of Venezuela to Paris, as an Italian citizen, and the proof of this is evident and undeniable.

It is well known that Venezuelans can not, under their laws, assume titles of nobility. Now, the deceased had not relinquished his, nor did any of his male descendants. (See certificate of birth of Giuseppe Isacco Enrico Corvaia, the certificate of decease of Lucio Corvaia, the power of attorney of Teresa Campbell, of Fortunato, and Ricardo Corvaia to the Signora Luisa, widow De Lara, and the copy of the dispatch of the Italian minister of foreign affairs, all contained in fascicle No. 2.) We might conclude from all this that never did the deceased or his descendants contemplate being local subjects. But there is more. In the same fascicle the honorable umpire will find a document emanating from the prefect of the department of Bravo, in the state of Guarico, Venezuela, under date of June 2, 1880, in which Enrico Corvaia is styled an Italian citizen.

The Signora Luisa Corvaia, widow of the Venezuelan general, Eladio Lara, was not pensioned by the Venezuelan Government, as she should have been, because she was a foreigner. It would therefore seem that the Corvaias have been considered Italians, even by the authorities of the Republic, evidently because it was notorious that their father was originally Italian, and so remained to the day of his death.

The writer believes he has convinced the honorable umpire of the equity and substantial foundation of his argument. But in the event that the umpire should decide that Baron Corvaia had ceased to be Italian, he would not for that have become Venezuelan. It is not deemed necessary to enter into a long discussion in support of this proposition. The conditions by which Venezuelan nationality is acquired are tacitly indicated in the fundamental laws and codes of the Republic. The members of the Corvaia family never complied with the formalities necessary to that end. We may add that it does even appear, and until proof to the contrary is submitted by the Commissioner for Venezuela, it may be absolutely denied, that he ever took the oath of allegiance or any other toward this Government, and from this we may deduce his firm intention of remaining true to the nationality of his origin. A bond of allegiance between him and this Republic could not arise, because neither in the Venezuelan nor in the Italian legislature is such a juridical condition foreseen and contemplated. By the law of either country, one is a citizen or one is not. The very word "allegiance" can not be exactly translated into either Spanish or Italian.

Besides, allegiance seems to be due solely to the sovereign, and the loyalty of the subject is to his king, his natural protector — a thing almost inconceivable in a country governed according to republican principles; but even were it

admitted that there were such a bond between an individual born in a monarchy and a country under republican rule, there would still be required the formal and essential oath of allegiance, which we know, and as will more clearly appear further on, he never took.

Ernest Lehr (*Elements of English Civil Law*, par. 38), referring to this, says:

To within quite a recent period England was a country of perpetual allegiance. Whoever was born on British soil was a British subject, and could not cease to be such without the consent of the prince.

Calvo (*Dictionary of Public and Private International Law*, p. 35), speaking of the word "allegiance," says:

It is the name which is given in England to the obedience which every subject owes to his prince and his country. Any individual born a subject of the British Crown can never, by a mere act of his will, dissolve this obligation and break the bond of allegiance which unites him to the sovereign of Great Britain.

This doctrine of allegiance is thus summed up by Blackstone and Stephen:

Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. * * * An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principal of universal law, that the natural-born subject of one prince can not by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former, for this natural allegiance was intrinsic and primitive, and antecedent to the others, and can not be divested without the concurrent act of that prince to whom it was first due.

These definitions and opinions confirm the principle that the bond of allegiance can not be conceived except as due a sovereign, and obviously that of the country of birth, not to be contracted toward another prince, and in every case with a solemn oath of fidelity.

Instead of this, we see Corvaia, in 1854, when he had already filled the post of confidential agent of Venezuela in the United States, and on the eve of accepting a mission to France, making an open act of submission and devotion to his legitimate king. Let it be noted, besides, that the first law, in the order of time, according to which employees of Venezuela were obliged to take an oath—not carried into effect, as we know from the *Giordana* case¹—was promulgated May 29, 1865, that is, at a time considerably after Corvaia had accepted the mission referred to, which completely excludes the idea of his having taken any oath whatever.

The Italian Commissioner must therefore insist upon his position that the Corvaia claim can not in any case be held to be an originally Venezuelan claim. He believes it to be Italian, since the deceased baron must have had a nationality, if we assume with Folleville (*Studies of Private International Law*, p. 285) that the legal status of a person without a nationality is "a more singular and unjustifiable anomaly than would be a duality of fatherlands;" but in any conceivable hypothesis, he maintains that this claim must constitute for Venezuela an essentially foreign claim.

The honorable Doctor Zuloaga has declared to the writer that other exceptions will be submitted, and will sustain the forfeiture of the right of the Corvaia heirs to claim before this international tribunal, either because the damages upon which their claim is based were suffered by the deceased in a period long since passed, or because he does not appear among the Italians indemnified under

¹ Not reported.

the provisions of the protocol of La Ville-Jiménez, of October 7, 1868, or because the heirs did not have recourse to the royal Italian legation in 1894, when, under Count Roberto Magliano de Villar S. Marco as minister to Caracas, it drew up an agreement in regard to claims with the Government of the Republic. In rebuttal, the Italian Commissioner recalls, in the first place, his arguments in the Gentini case, with reference in general to the subject of prescription in international relations, and observes, in addition, that all the credits of the Corvaia heirs are of such character that the Venezuelan Government can not have ignored their existence, and that therefore, in conformity with the principles admitted by the honorable umpire in the claims of Giacomini¹ and Tagliaferro,² prescription could not in anywise operate against them. It appears, besides, from various documents found in the papers of the Corvaia claim, that neither the deceased baron nor his heirs ever had the least intention of abandoning the rights which to-day, under more propitious conditions as to time and tribunal, they propose to defend, which intention has, on the contrary, been repeatedly manifested by them.

The protocol of La Ville-Jiménez was subscribed for the purpose of effecting an amicable settlement of all Italian claims up to that time presented to the royal Italian legation. It contains no declaration on the part of the chargé d'affaires indicating the abandonment or exclusion of any claim not comprised among those contemplated in this international act. The words "with the addition of this sum the total amount of all the claims is 1,154,686 pesos," and "the Italian claims," on the meaning and scope of which the honorable Commissioner for Venezuela bases his argumentation, would be superfluous unless accepted as referring to the claims presented, known, or liquidated at the time the above-mentioned protocol was stipulated.

To give an unlimited interpretation to those words would be equivalent to prejudicing legitimate interests, and certainly the chargé d'affaires would never have assumed the responsibility of shutting out claims of which for obvious reasons he could have had no knowledge, without special authority from his Government, which he surely never had. If the Venezuelan Government had intended that every anterior claim should be liquidated by the above protocol, it would undoubtedly have insisted upon an explicit clause or declaration therein to that effect — something it did not do then or during the preliminary discussions.

As a matter of fact, in the report of this protocol furnished by the legation to the minister of foreign affairs at Rome, an authentic extract of which is herewith inclosed, mention is made of "the claims of royal subjects which had been recognized and admitted by the Venezuelan Government." There is no mention of all claims, and it is permitted to be implicitly but clearly understood that there existed other claims for which diplomatic action remained reserved.

In the partial settlement of claims obtained by Count Magliano in 1894 only those were examined which arose from damages and requisitions of the revolution resulting in the elevation of General Crespo to the presidency. This is established by the tabular statement of claims for indemnity of that period submitted in the original to the examination of the honorable umpire, written by Minister Magliano himself, special attention being invited to page 4 of the statement marked "B" in red, in the column of remarks, in which may be read, opposite the entry of claim of Stefano Giajer del fù Giovanni, these words:

This not being a case of damages occasioned by the civil war, but by an alleged

¹ *Supra*, p. 594.

² *Supra*, p. 592.

abuse, the royal legation has decided that it can not be accepted, and the claimant should appeal for redress to competent authority, in conformity with existing law.

Therefore if the Corvaia heirs did not present their claim to the legation at that time, it was undoubtedly because it would not have been received thereby. For the rest, has not the Mixed Commission liquidated claims arising out of the war of 1892, notwithstanding the rule laid down by Count Magliano?

Claim No. 199, of Giuseppe A. Menda, accepted by the Venezuelan Commissioner himself, was for requisitions made in 1892, and others of the same nature have likewise been accepted.

Did not the Commission, notwithstanding the opposition of the Venezuelan Commissioner, settle claims of the period of 1898-1900, though not included in the ultimatum of 1902, and in the sum of 2,810,255 bolivars obtained by the protocol of Washington of February 13?

It were well to recall the claim of Massardo, Carbone & Co., which entailed a long discussion and a decision of the honorable umpire sustaining the contentions of the Italian Commissioner.

Have we not awarded indemnity in claims for damages arising in the period 1871-72, in spite of the rulings of Magliano and Riva?

The above-mentioned protocol of Washington makes no such restrictions, and admits all Italian claims without distinction to the examination of the Commission, excepting only those already liquidated and those of holders of bonds of the foreign debt.

To demonstrate how unjust and contrary to law and equity is the theory opposed to that advanced by the Italian Commissioner one example will suffice.

Recently the Italian citizen, Biagio Lamberti, presented himself before the royal legation and exhibited absolute and undeniable proof that in 1899 he supplied military musical instruments to the Venezuelan Government to the value of 1,430.55 bolivars. Lamberti, who holds an order from the war office in his favor for the sum named, signed by Gen. Diego Bautista Ferrer, on the minister of hacienda, has not, in spite of repeated efforts, been able to obtain payment. The said Lamberti, who resides in Caracas, did not want to have recourse to this Commission, and only now comes to seek the aid of the royal representative to obtain his due, delayed until now with no apparent motive. Can it be said that because Lamberti very patiently refrained from formulating a claim before the Commission, he has forfeited the right to invoke the assistance of the legation, and that it must refuse to protect him?

The Washington protocols do not peremptorily declare that claimants shall either submit their claims or forfeit them. They have simply provided for the installation of tribunals in equity, before which claims may be judged, and opened a way by which claimants may obtain speedy justice; but if any among them have not desired to avail themselves of these means, or thought it inopportune to do so, they have surely not on that account renounced any of the means of redress to which they are entitled by common law.

The conclusion to which the Italian Commissioner arrives is that while the protocols furnish a mode of liquidating claims for indemnity, in the absence of a clear and explicit declaration to the contrary, they were never intended to exclude future diplomatic action, or preclude the possibility of claimants whose cases have not been considered of having recourse to the authority of their country. Now, this clear and explicit declaration the protocol of 1868 does not contain.

The reasons why Baron Corvaia did not press his claim in that year are unknown to us, but to argue from that one fact that he no longer considered

himself an Italian, while all else proves the contrary, or that he, and therefore his heirs, should have lost the right to claim, is unjust.

This abstention may be explained, rather by the affectionate regard he had for this country, or the important personal relations which always induced him to hope, even to the day of his death, that he would be able to bring about an amicable settlement of his numerous credits against the Government, or by his frequent and prolonged absences in Europe. At that time his credits did not really constitute a claim, because the measures he and those interested with him had instituted for a direct reimbursement were still pending, and besides, while other royal subjects were presenting claims, he had still so much faith in the strength of his relations with the Government that in that same year (1868) and subsequently, he continued to advance it money.

Let it be noted further that prior to 1868 Italy had never had a settlement of claims with Venezuela; that the kingdom of the Two Sicilies had never had a diplomatic representative in Venezuela, and that that of the King had only existed since 1864, with frequent interruptions; to say nothing of the fact that while other nations had secured settlements through mixed commissions, Italy had never had a commission until after the blockade, so that, generally speaking, there had been no opportunity for Italian citizens to have recourse to the justice of international tribunals.

If Baron Corvaia had formally pressed his claim through diplomatic channels he would have been charged with ingratitude. Having shown himself moderate, courteous, and forbearing he is rewarded in having heirs told that because their ancestor had made no claim (which is not strictly true) they had forfeited their right to do so.

This is a style of argumentation and judgment that does not appear to be inspired by those principles of absolute equity which should constitute a guide for the Mixed Commission.

This being premised, it is pertinent to examine, from the point of view of citizenship, the status of each of the Corvaia heirs, as much in the warranted supposition that the honorable umpire will admit that the deceased never abandoned his nationality of origin as in the scarcely probable hypothesis that this quality will be denied him, while admitting him to be no Venezuelan, it being out of the question to consider him a citizen of this Republic.

Maria Teresa Corvaia, first-born child of the deceased baron, married an Italian, Signor Pasquale Muccio, living, and is therefore certainly Italian.

Margherita, fourth daughter of the deceased baron, married to Baron Carlo Bottini, an Italian citizen, and therefore she, too, is an Italian.

Giuseppe Isacco Enrico, sixth son, was born in Naples. If his father is held to be Italian there can be no doubt as to the nationality of the son. If his father is held to have lost his original citizenship, Enrico should nevertheless be considered as Italian, as he was born in Italy after his father had lost his citizenship, and all the more so in that his father had not acquired another nationality. A careful study of article 5 et seq. of the Italian civil code will result in an absolute conviction that Enrico Corvaia is not and can not be other than an Italian.

He has, in any case, a true and undoubted legal status as an Italian citizen, recognized, as has heretofore been said, as well by Venezuelan authority as by the royal Italian legation. His name is inscribed in the proper register of the legation itself, to which he exhibited, not many months since, a certificate of the census of Paris, where he customarily resides, in which he declares himself Italian, and a passport of August, 1903, from the royal embassy in that city, in which he is likewise styled an Italian. What nationality would the honorable Commissioner for Venezuela ascribe to Enrico Corvaia?

Irene, deceased, born in Caracas, married Gen. François Ernest Le Plus, became French by said marriage, and left heirs who are all of French nationality.

Fortunato, third son, and Ricardo, fifth son, are Italians, according to the law of Italy, because they are the sons of a citizen. The first, it has been seen, was so considered by the royal legation up to 1877. For the honorable umpire will no doubt take into account the certificate of identity drawn up at the royal Italian embassy at Paris, from which it appears that both are recognized as royal subjects, contained in book No. 2 of the claim, as well as the circumstance that they have not since many years lived in Venezuela and had never established a domicile therein.

Lucio, eighth son of the deceased baron, was an Italian, because he was born in Paris of an Italian father. He died, leaving two children, Fortunato and María Louisa, both born at Barquisimeto, Venezuela, and a widow, also born in the Republic, now married to a Venezuelan. The two children are Italians by the laws of Italy — article 4 of the civil code. It is not denied that they were born and reside in Venezuelan territory and the former decisions of the umpire are not lost sight of, but we reserve our opinion on that point.

The Signora Luisa Carmela Corvaia, who presents the claim, widow of the Venezuelan general Eladio Lara, was born in Paris. There can be no doubt as to her Italian nationality, if the same nationality be accorded her father.

Besides, according to article 14 of the Italian civil code, the native woman who marries a foreigner becomes a foreigner, since always by the fact of matrimony she acquires the nationality of her husband.

Article 18 of the Venezuelan civil code provides that the foreign woman who marries a Venezuelan acquires all the civil rights of a Venezuelan and retains them during her husband's lifetime.

Article 17 of the same code provides that foreigners shall enjoy the same civil rights as Venezuelans.

The Signora Luisa Corvaia De Lara has not, therefore, by the fact of her marriage with a Venezuelan, acquired in fact Venezuelan citizenship, but only the *civil rights* proper to Venezuelans — those rights which are generally enjoyed by foreigners in Venezuela. She has not on that account lost her Italian nationality.

Even if by an interpretation too sweeping, and to our mind unwarranted, it were desired to make these rights — the civil rights referred to in article 18 of the Venezuelan civil code — equivalent to nationality, which seems absolutely contrary to Article VIII of the Venezuelan constitution, which does not number among Venezuelans the foreign women married to local subjects, this quality would have been lost to her by the fact of her widowhood, and would therefore *ipse jure* have resumed her former nationality, either on the principle that one can not be without citizenship, or by a logical and pacific application of article 14 of the Italian civil code, and this notwithstanding that she, having lived in Italy after the death of her husband, as shown by documents in No. 2 of the claim, had not made the requisite declaration before the proper official (not considered necessary for the reasons above set forth) of her intention of living there.

If it is not admitted that Baron Corvaia preserved his Italian citizenship, it will be somewhat difficult to establish the nationality of his daughter. It might be contended that being born in Paris she must be French.

Teresa Campbell, widow Corvaia, was born of English parents in Caracas, and married Baron Fortunato Corvaia in 1846, being now a widow, as shown by certificate above mentioned as having been recorded at the royal embassy in Paris, and having resided in Europe since the death of her husband. If the latter be considered as Italian she must likewise be so considered, since according

to principles admitted by the umpire, and given her prolonged residence abroad, article 19 of the local civil code could hardly be applied to her case, whereas she might very properly invoke article 9 of the Italian civil code which provides:

The foreign woman who marries a citizen acquires citizenship and retains it even as a widow.

If, then, the deceased husband is regarded as having lost his Italian nationality, it will be for the umpire to decide whether or not his widow, under the circumstances, may appear as a claimant before this Commission.

Summing up, then, under the most favorable hypothesis, if the Italian origin of the claim of the deceased baron be admitted, all his heirs should be admitted to share in the indemnity here claimed. If this view is not to prevail, but it be recognized, as we confidently believe, that Baron Corvaia never lost his Italian citizenship, according to precedent decisions of the umpire, then only the heirs of Lucio, the only ones born and living in Venezuela, and the heirs of General Le Plus, who are French, would be excluded from participating in the award.

Under the most unfavorable hypothesis (we will not even suppose that the baron will be considered as being Venezuelan) in which the deceased will be judged to have lost his Italian citizenship, there would always remain, as undeniably Italian, Giuseppe Isacco Enrico Corvaia, María Teresa Corvaia Miccio, and Margherita Corvaia Bottini. These three descendants could not in any case be shut out from participating as Italian subjects in the liquidation of a claim which was foreign from its very origin.

The Italian Commissioner expects from the umpire a decision founded on the highest rules of justice and equity; and in calling attention, with regret, to the steps taken by the interested parties, with no practical results, for a direct settlement with the Government, he urges that in rejecting the claims of such of the heirs as may not be deemed recognizable before this Commission, it be without prejudice to their interests before any other tribunal, as, for instance, before the local courts, and in the case of the heirs of General Le Plus, and possibly of the Signora Luisa Carmela, widow Lara, through the intermediary of the French legation in Caracas.

Extract from the register of the notarial acts of the royal Italian legation at Caracas for the year 1877.

Legalization of the signature of Dr. Andueza Palacio on the diploma of the Order of Bolívar, with which was invested the royal subject Enrico Corvaia for services rendered to this Republic.

Caracas. * * *
[L. s.]

CAV. P. MASSONE

N. B. — The royal chargé d'affaires omitted the date in the foregoing certificate, but this, in the register of notarial acts, uninterruptedly kept from December 12, 1864, to January 21, 1889, is found between an act made June 2, 1877, and another made the 26th of the same month. It therefore is certain that the legalization referred to was made in the period elapsing between the first and second dates above named.

The royal chargé d'affaires.

C. ALIOTTI

Extract from the register of the notarial acts of the royal Italian legation at Caracas for the year 1877.

This day, 30th October, 1877, at Caracas, in the office of the royal Italian legation, before us, Cavaliere Pasquale Massone, chargé d'affaires of His Majesty the King of Italy, in this residence, etc., appeared the royal subject Corvaia, Fortunato, of Fortunato, a native of Caracas, freeholder, who declares as follows, etc.:

(Here follows the full power of attorney to his father, Fortunato Corvaia.)

A true copy:

The royal chargé d'affaires.

C. ALIOTTI

Extract from the register of correspondence of the royal Italian legation at Caracas with the Italian minister of foreign affairs.

CARACAS, January 30, 1869

MR. MINISTER: As a supplement to the report No. 47 of this series, dated October 20, by which there was sent to your excellency a copy of the protocol of the claims of royal subjects which have been acknowledged and admitted by the Venezuelan Government, I have the honor to inclose herewith an analysis of the claims themselves, to the end that your excellency may know the nature of them, and what were the rules determining the awards made to these claimants, etc.

G. GALLI,

In Charge of the Legation

A true copy:

The royal chargé d'affaires.

C. ALIOTTI

ZULOAGA, *Commissioner*:

The heirs of Mr. Fortunato Corvaia claim the sum of 16,438,661.23 bolivars, which they say the Government of Venezuela owes them for various negotiations which their predecessor in interest Corvaia had with the Government, and for interest accruing upon the sums owed. The claims are until now generally unsubstantiated, or they have informal proofs; but the preliminary question of the nationality of Corvaia arises, and even the question of the nationality of the claimants themselves, and these are the questions which are now submitted to the honorable umpire.

Mr. Fortunato Corvaia, as appears from the biography presented by the claimants, came to Venezuela in the year 1838, immigrating with the intention of establishing himself in the gold mining regions of Guayana. He did not come to Guayana, but remained in Puerto Cabello, where he was for three or four years, and afterwards removed to Caracas, where he established himself as a printer and engaged in other business. In the year 1846 he married, in Caracas, Miss Teresa Campbell, a Venezuelan, and on the 24th of January, 1848 (which is a celebrated day in the political history of Venezuela, because of the *coup d'état*, which upon that day the chief of the Government performed), the biography to which we refer says that Corvaia was in Congress, performing the duties of political and literary reporter; that there he discovered the plot against the life of General Monagas, and that, exposing his own life, he went out to give notice of it to the wife of the President of the Republic. (This really has never been known in Venezuela, or was there any such plot.) In the same year, 1848, Gen. Hosea Antonio Páez, representative of the so-called conservative party, and who already had been twice President of the Republic, took up arms against Monagas by virtue of the events of the 24th of January, and Corvaia left for the United States of America to seek armament and ships of war for General Monagas, leader of the liberal party.

In the following year, 1849, the Government named Corvaia in order that he might confidentially negotiate with the minister of the United States of America, with the object of strengthening relations with the American nation. In June, 1850, it appointed him confidential agent to said Republic. In January, 1851, the minister of foreign relations of Venezuela addressed himself to the Secretary of State of the United States to tell him —

that the President of the Republic, after receiving notice that Páez and his partisans were attempting to form an exploitation in the United States, in order to renew their attempts against the institutions and the legitimate government of this country, has seen fit to send there a diplomatic agent, who, observing the conduct of the Venezuelans expatriated because of their political crimes, might give opportune notice of this monstrosity of their plans, and prevent their being put into effect; that with these objects and that of promoting the friendly relations which exist between both countries, has accredited Mr. Corvaia in the character of chargé d'affaires to the United States.

A little later Mr. Corvaia goes to Europe with various missions, and among others a mission to the Holy See. In March, 1855, the Government appointed Corvaia confidential agent to various courts of Europe, with the object of promoting immigration, and in March, 1856, he was appointed envoy extraordinary and minister plenipotentiary of Venezuela to several courts of Europe, the consuls in said countries, in conformity with the law of 1824, being, therefore, under his supervision, and he was minister until June 1, 1858, when he ceased to hold this office because of the revolution which had triumphed in March of that year.

In the year 1860 Corvaia goes to Venezuela and is put in jail. At that time Gen. Hosea Antonio Páez was dictator; he ruled the conservative party, and the imprisonment of Corvaia was only the political imprisonment of the constant servant of Monagas against the conservative party. In 1863 the liberal party again triumphed, and Corvaia again goes to Venezuela and enters anew into favor, and negotiates with the Government. If he had not returned since 1858, it was as he himself says, in a note of December, 1866, which is found in Record I, "by reason of said revolution," because of the fear of persecution by his political opponents. In this same record (I) a statement of Corvaia of his services as minister appears. He enumerates them thus:

I believe that I can assert without fear of contradiction that my assiduous efforts and labor have brought advantageous results. Among these the recognition of the nation by the Russian and Ottoman empires, by the * * * of the Two Sicilies and Portugal, especially in the capitals and important cities of Europe; * * * I negotiated treaties of friendship, commerce, and navigation with Prussia and the other states of the "Zollverein;" I concluded another with Sardinia, * * * the present Government of your excellency (1863), ratified the second of these treaties, and have signed with *Italy*, which is the same one as has just been published as a law of the Republic, in which there were established two principles of the greatest importance for this country: 1. That which designated the only sort of damages and injuries for which both parties would be liable in case of revolution; that is to say, those caused by the legitimate authorities, excluding, therefore, those arising from any other sources. 2. That which makes arbitration obligatory as to the disputes which arise between the two countries. On the other hand, I succeeded in obtaining a very advantageous adjustment of the claims of the French Government on account of the efforts of the law of suspension, and almost paid what was owed by this Government. I did the same thing with the English Government in the matter of the claim of Fitzgerald, and in all these negotiations I have only borne in mind the good name of the nation. * * * Finally, upon giving up my diplomatic functions on account of the events of 1858, I was honored by Ecuador. * * *

Corvaia from the time of his return to Venezuela remained in the country,

and died in 1886 in the village of Maiquetia, situated on the coast very near La Guaira.

This is the life of Corvaia, as appears from the proofs presented by the claimants. From it, it appears in a clear manner that Corvaia constantly intervened in the political affairs of Venezuela; that he was a high official of state from 1848 to 1858; that in 1848 he sought arms for Monagas, and later was a secret agent of the liberal party to watch the acts of Páez, leader of the conservative party; that in all the liberal administrations he enjoyed very special favors, and carried on lucrative negotiations with the Government; that during the administration of the conservative party he was persecuted as a political enemy, and that in order to avoid this he remained abroad during this period. That these facts established it follows: 1. That the heirs of Corvaia can not claim before this Commission, because it is a national recognition, and under the principles of national law diplomatic protection is not accorded to individuals who mix in the political affairs of another nation. 2. That Corvaia, born in the Two Sicilies in 1820, has lost his nationality, since in the Two Sicilies the Napoleonic law, with very few modifications, was in force, and among the articles referring to the loss of nationality there were articles 17 and 18 of the Napoleon code, which provides his loss of nationality by the fact of absenting himself in another country without the intention of returning, and also by accepting public employment from a foreign government. As is seen, these two circumstances apply to Corvaia, the first because it is evident that a man who as he did came to Venezuela in his youth and without resources, married there, made his fortune there (almost entirely by political negotiations), who there raised his family, who was there honored by distinctions, and there died, had considered Venezuela his true country, without the intention of returning to his native land, to which nothing called him.

Because of the code of Napoleon, which in the premises is in accord with the Italian code, and provides for the loss of nationality by one accepting public employment from a foreign government, there is no stronger case in which to apply it than in that of Corvaia, who was for the space of ten years the confidential agent, *chargé d'affaires*, and minister plenipotentiary of Venezuela; who had been received in this capacity in the country which it is now attempted to claim as his fatherland, and had obtained from the Governments of the Two Sicilies and of Sardinia political advantages of paramount importance.

The question as to the loss of nationality was discussed in this Commission in the case of Giordana ¹ but he was an assistant engineer in the service of the minister of public works, and the honorable umpire of this Commission was of opinion, bearing in mind the humble character of the employment, that it might be considered that he had not lost his nationality; but he said that he reserved his opinion with respect to a case in which the employment was of more importance. After the office of the President of the Republic, I do not see what authority can be higher or more important than that which Corvaia for many years exercised, as representative of the Republic in the United States and the courts of Europe, entering into agreements, and having the consuls subordinate to him.

The theory of the loss of nationality by the acceptance of employment does not admit of any exception, according to the commentators on the code of Napoleon, and it is applied rigidly. The excuses which may have been made can not influence a matter now of fifty years ago. In this question of the loss of sovereignty I do not see how discussion is possible. The law of the Two

¹ Not reported.

Sicilies is definite in declaring that Corvaia was not a Sicilian, and it is not to be supposed that a state claims from another state for the benefit of anyone whom its own laws declare is not a citizen. This is a matter of strict right and as to which the Commission ought to strictly apply the law of the case. The citation of authorities which the honorable Italian Commissioner makes are therefore out of place, since they refer to personal opinions and assumptions, more or less founded for the solution of the conflict of nationalities. Besides, some of the citations of my honorable colleague might be considered as opposed to his opinion, and I might cite paragraphs of Fiore which are. Based, therefore, on the three reasons mentioned, that Corvaia had taken part in the affairs of the country, had lost his nationality by establishing himself in Venezuela without the purpose of returning to the Two Sicilies, and because he accepted public positions in Venezuela, he claims the Corvaia claim is inadmissible. With respect to Corvaia, moreover, there is a very serious circumstance, and it is that he, when the Two Sicilies were annexed to Italy, was not a Sicilian, nor was he domiciled in the Two Sicilies, an indispensable requisite in order that the annexation might affect his nationality. The Hon. Mr. Agnoli, Commissioner for Italy, has insinuated that although Corvaia had lost his nationality (had never been a subject of the King of Italy), this does not hinder his heirs from claiming internationally. This would be an absurdity in law. No one can transmit to another more than what he has, and if Corvaia could not have claimed the protection of a foreign nation against the Government of Venezuela, it is not possible that his heirs should have that right. I am not aware that the Hon. Mr. Ralston would give a contrary opinion, as my honorable colleague asserts. It is to be observed that Corvaia never thought of asking protection from the Government of Italy for any claim. The fragment of a *copy* of a letter which is presented in order to show that Corvaia believed he had the right to a claim has reference to a French claim.

Since Corvaia was not an Italian, this is sufficient to exclude the claim, and it is useless to enter into a study as to the nationality of the actual claimants. Nevertheless, these are not Italians.

Teresa Campbell, widow of Corvaia, is a Venezuelan, born in Caracas in 1831, and if by the fact of her marriage she may have changed her nationality, as a widow, she recovered her original citizenship. The case would already have been decided in that of the widow Brignone,¹ but in the present case it is my opinion that the wife of Corvaia never has been an Italian.

Irene Corvaia, deceased, married Gen. Francis Le Plus, and was born in Caracas; she was, therefore, never an Italian, and her heirs are French.

Fortunato Corvaia was born in Caracas in 1849. He lived in Venezuela for many years, and to-day resides in Paris. He is, therefore, an Italian.

Ricardo Corvaia was born in Caracas in 1851, lived in Venezuela for many years, and to-day resides in Paris. He is therefore a Venezuelan. It is to be noted that the fact of residence in France does not even give the character of residence to those who live there.

Henrique Corvaia was born in Naples in 1853. He has always lived in Venezuela, and he has a wife and children here, and at the time of his birth, it appears that Corvaia was acting in the capacity of confidential agent of Venezuela. At the time of the birth of Henrique Corvaia his father had lost his nationality, and he could not, therefore, be claimed by Italy as a national. (See art. 11, Italian code.) It is to be borne in mind that these claimants who call themselves Italians have never shown by any direct or legal proof that they

¹ *Supra*, p. 542.

desire to be Italians, and it does not appear that they have rendered military services in Italy.

Luisa Corvaia, widow of Lara, was born in Paris in the year 1857, her father being minister plenipotentiary of Venezuela. She was born in the legation; she is the widow of a Venezuelan general, and has always lived in Venezuela. She is therefore a Venezuelan. Italy can not claim her as an Italian. Margarita was born in Caracas, married in 1879 Carlos Bottini, a Frenchman. Her husband was naturalized an Italian in 1888, and if this naturalization had any influence, in no case could it give her the right to appear as an Italian claimant, because of an act long preceding the naturalization. Moreover, Margarita Corvaia, French, because of the nationality of her husband, did not acquire Italian nationality by his naturalization, since, according to the French rule, naturalization is personal. (Fiore, *Droit International Privé*, p. 379.)

Teresa Corvaia was born in Caracas in 1847; married Pasquale Miccio, an Italian; legally separated from her husband in 1873, and resides in London. If she preserved the Italian nationality by virtue of the citizenship of her husband, in reality very weak ties bind her to her country.

An order of expulsion from the Two Sicilies has been made use of as proof that Corvaia retained his nationality. I do not see why. This order might also have been made against a stranger or a man like Corvaia who could not rely upon the nationality of the Two Sicilies. Nothing in these documents leads us to suppose that Corvaia had thought that he preserved his nationality. Besides, we do not know the antecedents of this matter. The fact that Corvaia or his family were not friends of Bourbons and therefore had to ask permission to hold a public office in Venezuela, since it would have been denied it, is an argument adduced which is turned against the claimants, since it leads us to believe that Corvaia was appointed against the desire of the Government of the Two Sicilies.

For the reasons set forth, I am of opinion that, without entering into the merits of the case, the claim of the heirs of Corvaia should be rejected.

On this occasion only the nationality as a previous question has been considered. Every other question, including that of prescription, I shall consider upon their merits.

In order to answer the last paragraph of his honorable colleague the undersigned has to say that, from information which he has obtained in various public offices, it appears that at no time have the heirs of Corvaia taken any sort of action, or made any sort of claim, and that the first notice which has reached the Government of Venezuela of the existence of the claim came to it when it was made known that it would be presented to this Commission.

AGNOLI, *Commissioner* (additional opinion):

The Italian Commissioner takes cognizance of the abandonment on the part of the Commissioner for Venezuela of the prejudicial exceptions previously formulated by him relative to the forfeiture of the right of the Corvaia heirs to defend their interests before this Mixed Commission, these exceptions being based on the circumstance that neither the deceased Baron Fortunato, in 1868, at the time of the stipulation of the protocol of De la Ville-Jiménez, nor the heirs themselves subsequently, prosecuted their claim against the Government of the Republic through the intermediation of the royal Italian legation.

Therefore the undersigned holds it as useless now to submit to the umpire a list of the claims for indemnity which had occupied the attention of the Italian

minister, Count Magliano, and mentioned in my memorial of the 12th instant, on page 19.¹

The objections raised by the Commissioner for Venezuela in this Commission can therefore affect but one point — that of nationality. The Italian Commissioner presents, as complementary to the arguments used by him in sustentation of his opinion concerning the acceptability of the present claim, and in reply, to the objections of the Venezuelan Commissioner, the following observations:

1. It is not established that Baron Corvaia ever went to Naples as minister for Venezuela, that he presented his credentials, or that, finally, his appointment as a diplomatic representative of this Republic to the Bourbon court exceeded the limits of a simple designation not followed by an effective accomplishment of plenipotentiary duties.

There is, on the contrary, a strong presumption that Corvaia never did actually perform them officially, given his status as a Neapolitan subject, descendant of political exiles, and himself expelled from the Kingdom of the Two Sicilies.

There is in fact a proposed treaty with the Two Sicilies, but this document is simply a project — it bears neither date nor signature, does not give the names of the negotiators, and is not in the writing of the deceased baron. It need not even have been submitted to the Commission, and from it one proof alone can be drawn — that of the utter sincerity of the claimants.

2. The letter addressed under date of June 26, 1885, by Baron Fortunato Corvaia to the minister of the King of Naples at Paris, Marquis Antonini, concerns a simple exchange of publications. At that time the baron was not minister, and was not considered as a member of the diplomatic corps; as a matter of fact, the reply of Marquis Antonini is addressed to Signor F. Corvaia, without official qualification whatsoever.

3. Concerning the acknowledgment of the Republic of Venezuela on the part of the Neapolitan Government, the credit for which was claimed by Corvaia in a document, the importance and authenticity of which will be hereafter referred to in this paper, it is to be understood as resulting from his private negotiations, and nowhere does it appear that it was brought about officially. We do not even know at what time this transaction took place.

4. The document contained in book I, a letter of the deceased to the President of the Republic, dated January 14, 1863, in which he requested payment of some of his credits, is not in the handwriting of the deceased, but is a copy, and it is not known whether the original was ever sent. In it the deceased relates his services to the Venezuelan Government, and with all due respect to his memory be it said, appears to indulge in momentary exaggeration. As a matter of fact there has never been, so far as can be learned from a research of the old Italian treaties, a treaty between the Kingdom of Sardinia and the Republic of Venezuela, and Corvaia had never been a subject of the King of Sardinia, and his relations with that Government, whatever they may have been, could have had no influence on the nationality of the deceased.

As regards the treaty between Italy and Venezuela of June, 1861, it may be admitted that the deceased baron had privately collaborated in its preparation. I say, "it may be admitted," because there is nothing definite with regard thereto. It can not be denied, though, that this international agreement was stipulated nearly three years after he ceased his functions as minister plenipotentiary for Venezuela; that it was signed in Madrid, where it does not appear that he was present officially or otherwise; that the representatives of the two countries were Mr. Fermín Toro for Venezuela, and Baron Romualdo Tesco

¹ *Supra*, p. 616.

for Italy, both being ministers plenipotentiary at the court of the Queen of Spain. The name Corvaia does not appear therein.

5. The right, so far as regards the Italian heirs, of a person who had, for instance, lost this nationality without acquiring that of Venezuela, to claim before this Commission is certainly not absurd, since the claim would, in such case, be of foreign origin. The umpire has already so decided.

The undersigned holds that the foreign holders of claims against Venezuela, coming to them by inheritance and not purchased with a view to prosecuting them, have a right in law and in equity to have recourse to diplomatic aid in the prosecution of their claim even though it had originally been the property of a local subject, and that therefore this Commission would be competent to pass upon such cases.

This principle has been recognized as just in prior Mixed Commissions as well as by the council of the contentious diplomat in session at Rome.

6. The letter written by Corvaia to his daughter Luisa, dated February 18, 1885, expresses the hope that the diplomatic convention then concluded between France and Venezuela would facilitate the settlement of his claim. I can not see that it would be possible to deduce from the copy of this document that has been shown us anything but the intention on the part of the deceased to avail himself of diplomatic means in securing a recognition of his rights. It is out of the question to argue that it was his intention at the opportune moment to appeal to any legation other than the Italian, since he was not born French, neither had he acquired that nationality.

7. The honorable Commissioner for Venezuela affirms that Corvaia was not a Neapolitan subject at the time of the annexation of the southern provinces to the rest of Italy, and calling attention to the fact that he was not then living in the Kingdom of the Two Sicilies, concludes that the deceased could not have acquired Italian citizenship.

In regard to this it is worthy of note that the question as to whether or not Baron Corvaia was a Neapolitan citizen in 1860 is precisely the point at issue, and that therefore the assertion of the honorable Commissioner would seem to imply a begging of the issue; now with regard to the effect, so far as the citizenship of Neapolitan emigrants is concerned, of the annexation of the Kingdom of Naples to the other Italian provinces, taken from the Monarchy of Savoy, it is well to remember that there was no cession of a part of the territory of said State, but an incorporation of the whole Kingdom of the Two Sicilies with that of Italy; the Bourbon dynasty was deposed, and the Neapolitan State, as a political autonomy, ceased to exist.

It is not possible to admit that all the Neapolitans who, in 1860, were residing abroad should either have been at once deprived of all citizenship or preserved their original one, to form a nationality without government or territory. It must therefore be evident that they became without distinction Italian citizens.

8. The honorable Venezuelan Commissioner thinks the Baroness Margherita Bottini should be considered as without right to claim before this Commission, in that having become French by her marriage she must have remained so, notwithstanding the fact that her husband has for the last sixteen years been a naturalized Italian citizen. The Commissioner for Venezuela has here raised a very nice question, one that might have considerable value and importance were we called to decide French-Venezuelan claims instead of Italian-Venezuelan. Such a question can not come before this arbitral tribunal.

The French code in nowise provides for such a case; but the undersigned recognizes that French jurisprudence has adopted the maxim that a change of nationality on the part of the husband does not affect the status of the wife.

The Italian Civil Code, however, provides (last paragraph of art. 10) that —

the wife and minor children of the foreigner who acquires citizenship become citizens, provided they, too, have fixed their residence in the Kingdom, and by the same article the option of citizenship is granted to the children, but not to the wife.

Now, the Bottinis have for many years resided in Italy, and it is notorious that the Baron Carlo Bottini exercises important functions in Italian railway administration.

There is no real issue between the French and the Italian law on the point under discussion, because so far as regards the former it is in the last analysis a question of interpretation, and the latter has a provision clearly and distinctly conferring citizenship on the wife of the naturalized foreigner. But even if there were a conflict, given the fact of the continued residence of the Bottinis in Italy, the honorable umpire, in conformity with principles by him laid down in other cases and with the general principles of law, should recognize the wife as having Italian citizenship to the exclusion of any other. The fact that this lady has acquired (or reassumed, because the writer holds she was born Italian) Italian citizenship, at a time subsequent to the events upon which this claim is based, does not appear to be a motive for debarring her from the right to prosecute her interests before this Commission against the Republic of Venezuela. It suffices that the claim be Italian at the time it is presented to the Commission, and it would be out of reason to insist upon its never having had another nationality. The Bottinis did not assume Italian citizenship in view of the present Corvaia claim.

Concluding, the Italian Commissioner deems it opportune to remark to the honorable umpire that, in expressing the opinion that the fundamental exceptions with regard to the nationality of the deceased Corvaia and of several of his heirs at present exclusively submitted to his judgment should be set aside, he reserves his opinion concerning the admissibility of the specific proofs so far adopted by the claimants as to the eight points on which is based their demand for indemnity in the sum of 16,438,661 bolivars. These proofs will be taken up one at a time at the proper moment and discussed with moderation and according to equity, as well in regard to their intrinsic merit as in the calculation of the interest on the amount claimed, which must be reduced in accordance with prior decisions of the umpire and with precedents established by this Commission in analogous cases.

RALSTON, *Umpire*:

The above-styled reclamation is referred to the umpire upon differences of opinion between the honorable Commissioners for Italy and Venezuela as to certain preliminary questions, among others, that of the citizenship of Fortunato Corvaia; the honorable Italian Commissioner contending that he was a citizen of Italy within the meaning of the protocol between the two countries, and as such entitled to present the reclamation had an opportunity offered during his lifetime, and the honorable Commissioner for Venezuela denying such citizenship. It will not be necessary to discuss at the present time the remaining questions.

The references contained in the protocols, in so far as this Commission is concerned, to the character of the claims submitted to it are as follows:

Referring to the protocol of February 13, 1903, the preamble speaks of "Italian claims." Article I refers to "claims * * * preferred * * * on behalf of Italian subjects." Article III mentions twice "Italian claims." Article IV speaks of "Italian claims."

The preamble of the protocol of May 7, 1903, refers to "Italian claims against the Government of Venezuela," but gives no other specific characterization.

The only question which will now be considered by the umpire is as to whether the claim submitted was Italian as far as its original owner was concerned, waiving consideration for the moment of the further question, whether a claim before the Commission must be both Italian in origin and Italian at the time of presentation.

Many documents are presented to the umpire bearing upon the life history of Fortunato Corvaia, and from their examination one learns that he was born at Calascivetta, Sicily, in 1820, being the son of Giuseppe José Corvaia. At the age of 18 years, being in infirm health, he voyaged to Venezuela, leaving his mother in Paris; his father, who had been expelled from Sicily as a revolutionist, living from time to time in Malta, London, Paris, Brussels, and elsewhere. Corvaia arrived at Puerto Cabello, intending to go to the gold mines of Guayana, but, being urged to commence business at the point of debarkation, he did so. Some time afterwards he started a printing office on a considerable scale, thereafter translating into Spanish and publishing many of the works of the more noted French authors. In 1846, he married a girl of 14 years, by the name of Teresa Campbell, a child of English parents, who had come to Venezuela at the time of the war of independence. He interested himself in the public and social affairs of Caracas, forming a musical society, which finally constructed the Caracas theater. In January, 1848, he was occupied in the National Congress as a reporter for his politico-literary publications, and it is said had the good fortune to discover a plot against the life of General Monagas. The same year he went to the United States and brought back a complete supply of munitions of war and one or two vessels, fully armed and equipped, arriving at a fortunate time for the Government, which thereafter successfully opposed the then revolution.

Corvaia's fortune went on increasing, his business relations with the Government in 1850 demonstrating this fact. In 1850 and 1851 he represented the Government as its confidential agent in the United States, and in the latter year again brought to Venezuelan waters two completely armed vessels of war. A little later, pursuant to his initiative, there was established the cemetery of foreigners in Caracas. In 1854, he, with some friends, established a packet boat communication between La Guaira and Puerto Cabello; and between 1855 and 1858 instituted the banking establishment known as the "Compañía de Accionistas." With friends, he secured the concession for and installed the electric telegraph throughout the Republic.

After seventeen years of absence from Italy he embarked with his family for Naples, where his mother then lived, with the desire, as it is said, of residing at her side. He was, however, in Naples, we are told, subjected to an insufferable system of espionage, the royal police finally stopping a ball given in his family house to celebrate his return, alleging that such reunions became gatherings of conspirators. He then spent some time visiting various cities of Sicily, presenting his wife to his relatives, who desired him to again inhabit his father's house. The petitioner in this case tells us, however, that notwithstanding the insistence of his Italian relatives, it was not possible for him, with his activity of character, to remain tranquilly in the old peninsula, above all, when he knew that his father was prohibited from entering the kingdom of the Two Sicilies, and he therefore installed himself in Paris.

We have already learned that in 1850 and 1851, Corvaia represented the Government of Venezuela in the United States. It further appears that in 1853, 1854, 1855, and 1856 he was charged by the Government of Venezuela with arranging, in the best manner possible, questions pending between the Governments of England and Venezuela relating to its public debts, loans made since the year 1840, etc.

In the spring of 1856 he was appointed diplomatic agent to Europe, charged particularly with the duty of fostering immigration to Venezuela, and at his suggestion, in the early part of 1857, he was named envoy extraordinary and minister plenipotentiary of Venezuela to various of the courts of Europe, and he continued in this employment certainly as late as the year 1859. In the year last named he presented his letters of recall, but about the same time was charged with the duty of representing Ecuador "*ad honorem*" in Paris as well as other European capitals, some months later receiving a more formal appointment. He appears to have remained in Paris at least the most of the time until about the 1st of July, 1862, when he returned to Venezuela. It is said that in 1864 and 1865 he aided the Government in connection with the making of a loan. Meeting, however, with losses, he opened a house for the sale of letters of exchange. Later he subscribed to a local loan, and on repeated occasions, as we are again informed, he aided the Government by advancements of money. In 1876 and 1877 he went back to Italy to be present at the death of his mother in Naples; his father having died in the year 1860. At that time Corvaia's mother left to the city of Castrogiovanni an income of 6,000 bolivars annually to aid its poor students. He died in August, 1886, at Maiquetia, Venezuela.

In view of the foregoing history, was Corvaia so far an Italian citizen that he personally, during his lifetime, could have successfully maintained before an international commission, controlled, as this must be by the protocols mentioned, a claim for advancements made to or damages suffered from the Government of Venezuela?

Corvaia was a Sicilian by birth, the land of his nativity — the Kingdom of the Two Sicilies — not having been merged into the Italian union until at least October 21, 1860, when the Two Sicilies joined Sardinia, the first Parliament of united Italy assembling in February, 1861. The determination of his nationality must largely, if not altogether, depend upon the code of the Two Sicilies, and invoking one printed in 1842 and at the disposal of the umpire, he finds that in treating of the deprivation of civil rights by the loss of the conditions of citizenship, it (sec. 1, art. 20), provides:

The condition as a national is lost —

1. By naturalization acquired in a foreign country.
2. By the acceptance, not authorized by the Government, of a public employment conferred by a foreign government.
3. Finally, by establishing himself in a foreign country with the intention of never returning.

Entering into commercial business can never be considered as done without the intention of returning.¹

As a matter of historical interest, although perhaps not of great importance in the determination of this question, there is added in a footnote the Italian code on the same subject, as it existed down to about three years ago.²

¹ La qualità di nazionale si perde:

1. Per la naturalizzazione acquistata in paese straniero.
2. Per l'accettazione non autorizzata dal Governo di pubblici impieghi conferiti da un Governo straniero.
3. Finalmente qualunque stabilimento eretto in paese straniero con animo di non più ritornare.

Gli stabilimenti di commercio non potranno giammai considerarsi come formati senza animo di ritornare.

² ART. XI. The right of citizenship shall be lost —

1. By him who renounces it by means of a declaration made before the custodian of a civil register, followed by the change of his residence to a foreign country.
2. By him who may have taken up the citizenship of a foreign country.

It appears from the statement of fact above given that Corvaia was in Venezuela diplomatic service as early as 1850, when he was sent to the United States; that in 1853, 1854, and 1855 he occupied confidential and intimate relations with the Government in the adjustment of its financial obligations to foreign powers; that while he doubtless went to Italy in 1855, it was with no settled intention of remaining there, as is manifest from the statement that his activities could find no proper outlet in the old peninsula; that in 1856 he re-entered the Venezuelan public service as the direct and immediate representative and mouthpiece of the Government, under credentials which in terms accredited him to the French Emperor, who, as we further learn, was to give "entire credit to the words of the envoy, whether spoken or written, as the organ of the Government of Venezuela," and so far did he consider himself and his fortune bound up with Venezuela that we find among his papers the draft of a proposed treaty of commerce between Venezuela and the Two Sicilies, which draft, it seems fair to presume, was prepared by himself as the representative of a nation other than that of his nativity. We note in June, 1862, an exchange of letters between Corvaia and the Italian ambassador in Paris concerning a loan which he desired Italy to guarantee for Venezuela on the security of Venezuelan custom-houses. It is true that the letters to and from Corvaia with relation to the latter affair do not recite any representative capacity, but the inference is very strong that at the period named he did represent the Venezuelan Government.

It seems therefore absolutely clear that he lost his Sicilian citizenship long before the union of the Two Sicilies with Sardinia, provided the conduct recited came within the denunciation of the law as constituting acceptance of "public employments" (*publici impieghi*) conferred by a foreign country.

Upon this point we may refer briefly to the opinions of text writers.

Alauzet in "*De la Qualité de Français et de la Naturalization*," section 35, indicates that by French law acceptance of any public function, administrative or judicial, involves loss of citizenship. (It is to be borne in mind that the corresponding language of the French code is "*Fonctions publiques*.")

Folleville, in his work entitled "*La Naturalization*," sections 449 and 450, takes the position that a Frenchman can not accept diplomatic functions without losing citizenship, but would permit him to accept a position as consul, as such a position is not a "*fonction diplomatique*" for "*ils ne représentent point le pouvoir exécutif du pays étranger; * * * ils sont en un mot de simple mandataires dans l'intérêt du commerce.*"

Folleville, in section 453, says that in the case of a French physician put by a foreign government at the head of a hospital, the controversy is sharp as to whether he is furnished with a public character, receiving government pay.

One of the final criteria, as given by Folleville, section 454, to be used to arrive at a proper conclusion, is stated as follows:

Le juge doit rechercher de quelle nature, politique ou non, est le lien de subordination qui rattache un Français à un gouvernement étranger.

Contuzzi in "*Il Codice Civile nel Rapporti Diritto Internazionale*," on page 61, note, says:

3. By him who, without authorization of the Government, may have accepted employment or entered into the military service of a foreign power. The wife and minor children of those who have lost their citizenship shall become foreigners, except in the case of having continued to reside in the Kingdom.

They shall be able, nevertheless, to recover their citizenship in the case and by means of the forms indicated in Article XIV with respect to the wife, and Article VI with respect to the children.

An Italian who, without the permission of the Government, accepts employment of a foreign government or enters into the military service of a foreign power, loses his Italian citizenship (Civil Code, Art. XI, No. 3), but if contemporaneously he does not acquire the citizenship of a foreign state from the government of which he has accepted the employment, or under which he may have entered into the military service, he finds himself without a country.¹

It seems, therefore, perfectly clear by the French code, by the Italian code as it existed up to three years ago (a change having been made recently), and by the code of Sicily as it existed up to the time of the unification of Italy, that the man who accepted public employment of a diplomatic character lost his ancient citizenship, unless by some affirmative act he thereafter regained it.

As has further appeared from the Sicilian code, the national who has departed without intent to return (save in a certain case in no respect resembling the present) loses his citizenship.

Meanwhile, it is worthy of note that very eminent authorities have reached substantially the conclusions embodied in the Sicilian Civil Code, above referred to, and this without the aid of statutes. In 1873 the President referred certain questions on the subject of citizenship to the Hon. George H. Williams, Attorney-General, whose reply is found in 14 *Opinions Attorneys-General*, page 295. To the question, "Can an election of expatriation be shown or presumed by an acquisition of domicile in another country with an avowed purpose not to return?" the Attorney-General responded:

Residence in a foreign country and an intent not to return are essential elements of expatriation, but to show complete expatriation as the law now stands it is necessary to show something more than these. Attorney-General Black says (9 *Opin.*, 359) that expatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence.

My opinion, however, is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military services, etc., may be treated by this Government as expatriation without actual naturalization. Naturalization is without doubt the highest but not the only evidence of expatriation.

In the answer to another question touching the intent to return, the Attorney-General said:

When a person avows his purpose to change his residence and acts accordingly, his declarations upon the subject are generally received as satisfactory evidence of his intent, but in the absence of such evidence, the sale of his property and the settling up of his business before emigration or removal of his family, if he has one, arrangements for a continuing place of abode, acquisition of property after removal, the formation of durable business relations, and the lapse of a long period under such circumstances are among the leading considerations from which the intent to make a permanent change of domicile is inferred.

¹ Un italiano, che, senza permissione del Governo, accetta un impiego di un Governo estero od entra al servizio militare di potenza estera, perde la cittadinanza italiana (Cod. Civ., capov. n. 3); ma, si contemporaneamente egli non acquista la cittadinanza dello Stato estero dal cui Governo abbia accettato un impiego, o presso il quale sia entrato a prestare servizio militare, egli trovasi senza patria. La moglie e i figlie minori di un italiano che ha perduto la cittadinanza, perdono anch'essi la cittadinanza italiana alla condizione che non continuino a mantenere la loro residenza nel Regno (Cod. Civ., art. 11, capov., n. 3° alinea); ma, se per questa circostanza non acquistano di pieno diritto la cittadinanza novella del rispettivo marito e padre, essi si trovano già senza patria.

Referring further to the question of abandonment of citizenship by permanent residence abroad, we learn from Moore's Arbitrations (p. 2565) that by the decision of the Spanish-American Commission of 1871 a citizen of the United States who, being of lawful age, leaves the United States and establishes himself in a foreign country without any definite intention to return to the United States is to be considered as having expatriated himself. (For other references similar in character see Van Dyne on Citizenship, pp. 275-278.) The references to American authorities are the stronger since no laws of the United States provide expressly for expatriation.

It will be noted that nearly all of the criteria held to evidence abandonment of original citizenship existed in the Corvaia case. Save when absent in the United States or Europe on official business for Venezuela, or for a period of two or three years for Ecuador, Corvaia appears to have passed forty-eight years of his life in Venezuela, and his last twenty-four years seem to have been uninterruptedly spent in Venezuela, except for a very brief stay in Italy occasioned by his mother's death.¹ The umpire, under the testimony before him, is unable to refer this long residence in Venezuela to any sufficient considerations of ill health or poverty, and he can not ignore the fact that, despite the protests of his family, Corvaia declined the less active life of the Italian peninsula for Venezuela and her service thirty-one years before he died, then passing perhaps only a month or two under the Italian sun.

A further point should not be omitted. We may believe Venezuela knew, as she might well have known, that when Corvaia entered her diplomatic service he abandoned all right to call himself a Sicilian. The Government might properly have hesitated or refused to receive into one of its most important employments a man who would be recognized by his original government as still attached to its interests.

Italy is, therefore, now estopped to claim Corvaia as her citizen, standing in this respect as did the Two Sicilies, and may not say that her laws are made to be broken and have no binding force when assumed interests dictate their disregard.

Another consideration: The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another nation is himself estopped from reverting to his prior condition to the prejudice of the country whose interests he has adopted.

The umpire does not ignore the conclusion reached in the Giordana case, which recognized as still an Italian a poor man who had spent but a few years in Venezuela, and who had for a year or so occupied an extremely minor position, not connected with the administration of the laws of Venezuela or being in any way representative. The umpire in that case was disposed to go as far as was permitted to him, and perhaps too far, considering the fuller examination of authorities now possible, to sustain the equitable claim of this man, who in a political sense was not more important to the government than a day laborer, virtually following the suggestion of Folleville, section 454, above cited, that —

Le juge doit rechercher de quelle nature, politique ou non, est le lien de subordination qui rattache un Français à un gouvernement étranger,

and he found no political bond of subordination.

¹ The expediente is not very complete as to the relative portions of his later years he spent in Venezuela and abroad. (Note by umpire.)

Did Corvaia ever regain the Sicilian citizenship lost by him by virtue of his public employment in Venezuela? The Sicilian law provided that:

The national who has lost his status as a citizen can always regain it by entering into the Kingdom, with the approval of the Government, and declaring that he has returned to establish himself there, and by renouncing whatever position may be contrary to the law of the Kingdom.¹

The Italian code is quite similar in character and provides as follows:

ART. XIII. The citizen who may have lost his right by any one of the causes set forth in Article XI may recover them:

1. By his return to Italy, with the special permission of the Government.
2. By renouncing the citizenship or civil or military employment which he may have accepted in a foreign country.
3. By the declaration made before the custodian of the civil register to fix his domicile within the Kingdom, provided always that he carry out this intention within the term of one year.²

Contuzzi treats these three provisions of the Italian code as cumulative, as they plainly are under the Sicilian code, and there is nothing before this Commission to show either:

(a) That Corvaia returned to Italy with the special permission of the Government.

(b) That he renounced the foreign citizenship. (He held foreign office, both before and after his visit to Italy in 1858, and his renunciation does not appear to have been of the voluntary character apparently contemplated by the section.)

(c) That he declared before the custodian of the civil register that he was about to take up his residence or that he did in reality establish his domicile in the Kingdom within one year.

We have therefore the case of a man who had definitely lost and who never regained his citizenship.

The umpire can not believe, therefore, that Fortunato Corvaia during his lifetime could have presented this reclamation as an Italian subject.

A second exception presented by the honorable Commissioner for Venezuela relates to the citizenship of some of the heirs of Corvaia, who are said to be Italians, and it is contended that as the claim is not Italian in origin the Commission does not possess jurisdiction over it, even admitting that some of the heirs are now Italian.

On the other hand, it is earnestly insisted that the language of the protocols, referring as it does to "Italian" claims and claims of "Italian subjects," is sufficiently broad to confer the needed jurisdiction upon the Commission.

If the proposition now presented were one of first impression the umpire would approach its study with a strong disposition to recognize the jurisdiction of the Commission over claims which had by regular course of inheritance now become vested in Italian citizens, for he would recognize that to refuse,

¹ Il nazionale che abbia perduto la qualità di nazionale potrà sempre ricuperarla rientrando nel regno coll'approvazione del Governo, e dichiarando di volervisi stabilire e di rinunziare a qualunque distinzione contraria alla legge del regno.

² ART. XIII. Il cittadino che ha perduto la cittadinanza per alcuno dei motivi espressi nell' articolo 11, la ricupera purchè:

1. Rientri nel regno con permissione speciale del governo;
2. Rinunzi alla cittadinanza straniera all' impiego od al servizio militare accettati in paese estero;
3. Dichiarì davanti l'uffiziale dello stato civile di fissare e fissi realmente entro l'anno il suo domicilio nel regno.

to illustrate, jurisdiction in a French commission because a claim, although French in origin, was now owned by Italian citizens, and to refuse jurisdiction over the same claim in the Italian Commission because, although now Italian in ownership, it was French in origin, would be to perpetrate an injustice. The umpire does not, however, find himself free. A long course of arbitral decisions has emphasized the fact that the claim must be both Italian in origin and Italian in ownership before it can be recognized by an Italian Commission.¹ (See Moore's Arbitrations, pp. 1353, 2254, 2753, 2757.)

Knowledge of this condition induced the signers of the American protocol to arrange its language to the end that certain claims, British in origin but now American in ownership, might be presented before the American Commission.²

In the discussion of this case it was urged upon the umpire that the presence of the "most-favored-nation" clause contained in article VIII of the protocol should be so construed as to give to Italy all the advantages which might be claimed by American citizens under the American protocol. The umpire discussed so fully in the *Sambiaggio* case³ the effect of the favored-nation clause as contained in the protocol, pointing out that it was plainly designed to refer to claims thereafter to originate, that he is unable to accept the suggestion now under consideration.

The exception, therefore, of jurisdiction of this Commission over the claims of those who are now Italian citizens must be sustained, but without prejudice to the rights of any of the claimants to claim against Venezuela before any court or commission which may have suitable jurisdiction, or to take such other action as they may be advised.

DE CARO CASE

(By the Umpire:)

A paper blockade or blockade by proclamation is illegal, and a country declaring it accepts the legal consequences.

Damages refused for acts of unsuccessful revolutionists (following *Sambiaggio* case).⁴
Under Venezuelan law duties can not be collected on exportations of Venezuelan products.

Commission can not correct abuse of process in judicial proceedings which have been closed and in which the claimant might have directly applied to the court for relief, but did not.

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

Daniele De Caro, an Italian citizen and wealthy merchant of Barcelona, claims:

1. For interruption of his import trade by the ineffective blockade of the port of Guanta decreed by the Venezuelan Government, 47,719.30 bolivars.

2. For interruption of his export trade under identical circumstances, 13,807.03 bolivars.

3. For duties on exportations illegally collected by the authorities of the State of Barcelona, 10,595.47 bolivars.

4. For forced loans exacted of the claimant by Gen. Paolo Guzmán, of the

¹ See extensive discussion of this subject in the opinion of Umpire Plumley in the *Stevenson* case, vol. IX of these Reports, p. 494.

² See opinion of Umpire Barge in the *Orinoco Steamship Co.* case, vol. IX of these Reports, p. 191.

³ See *supra*, p. 499.

⁴ *Supra*, p. 499.

" Libertadora " revolution, and Giuseppe Antonio Velutini, of the Government, 19,766.40 bolivars, plus interest on same 2,371.96 bolivars.

5. For damages arising from the seizure of 5,000 hides ready for shipment, 12,972 bolivars, including the expenses for obtaining the release of said hides.

6. For interest paid and interest lost on the amounts of 40,000 and 140,000, at 6 per cent for one year, 10,800 bolivars.

The claimant therefore considers himself entitled in all to an indemnity of 118,032.16 bolivars.

Let us examine in detail if and to what extent this claim may be received under its various heads as presented.

As a rule, damages which appear to be the direct consequences of an unlawful measure should be indemnified.

Such was, in the opinion of the writer because contrary to the principles of international law, the blockade of the port of Guanta and of other ports of the Republic decreed by the Venezuelan Government but not effective — a fact well known and which is established by a document annexed to the claim. (See the certificate of February 10, 1903, of the chief officer of that port and locality.)

The illegality and nullity of a blockade decreed but not enforced, even in the case of civil war, is a question that has often been discussed and that has been decided in previous cases in the sense here affirmed. (See Wharton's Digest of Intern. Law, par. 361; Lawrence in a note on Wheaton, Part IV, chap. 3; Moore on Arbitration, pp. 3404-3406; idem., 3790-3793.)

In the particular case of this claimant it might at first seem that there is a contradiction of fact, because while, on the one hand, he declares and proves that the blockade of the port of Guanta was not effective, he, on the other, seeks to recover because he was prevented from receiving or shipping goods during the same period. But it will be seen that the contradiction is only apparent when it is considered that the hindrance was caused by the execution of an order given to the consuls of the Republic at New York and Amsterdam not to permit the certification of bills of lading of goods for said port of Guanta, which, of course, rendered their shipment impossible and interfered with the regular stoppages of steamers formerly calling there, thus bringing business to a standstill.

There remains, however, to be determined whether the amount claimed by De Caro, because of his not having been able to import merchandise during the period from August 10, 1902, to April 12, 1903, 47,719.30 bolivars, may properly be allowed.

The claimant establishes his account on the following basis: In the first seven months of 1902 he imported goods from abroad on which he paid 87,590.71 bolivars of custom-house, maritime, and territorial duties. This assertion is proved by the list which appears on page 22 of the claim, authenticated by the declaration of the chief customs officer of the port of Guanta, dated April 30, 1903. In order to exclude any doubt that might arise as to the connection between these two documents, the honorable umpire will deign to note that the sum of 19,835.44 bolivars, indicated by the above-mentioned customs officer, is produced by the addition of 15,868.35 bolivars paid by the claimant on August 2, 1902, on goods imported per steamer *Prins Willem I*, and 25 per cent thereof collected as " territorial duty."

The claimant affirms, besides, that the customs duties represent approximately one-half the value of the goods, and that the presumptive gain of the merchant is 12 per cent gross on the amount of value of goods imported.

As to the second of these assertions, it may be considered correct, inasmuch as a gain of 12 per cent gross on imported goods is not excessive. With regard

to the first assertion, its accuracy may be determined by comparing the sum of duties collected by the custom-house at Guanta on the goods received by the claimant per steamers *Prins Frederik Hendrik*, *Prins Willem V*, and *Prins Willem III*, on February 18, March 1, and April 16, respectively, from New York and Hamburg, i.e., 16,876.86 bolivars, with the amount of the value of the goods themselves (see doc. "M," pp. 7-8, and doc. "N," both legalized), which is 32,257.04 bolivars.

On this basis the claimant, who paid in the first seven months of 1902 for goods from abroad 87,590.71 bolivars, found himself in possession of foreign products to the amount of triple the value of the sum named, or 262,762.13 bolivars.

The profits would have been, according to the calculation of claimant, 31,532.12 bolivars, or 4,504.66 bolivars per month. He affirms that the ineffective blockade lasted about eleven months, and the loss in consequence is estimated by him at 49,551.28 bolivars, from which sum must be subtracted 1,831.98 bolivars profit on a small quantity of merchandise which it was possible to land in the second half of December at Guanta from the steamers *Prins Willem IV* and *Prins Willem V*, which had been compelled, from August of the same year, to deposit them (the goods) at Curaçao and Trinidad, afterwards availing themselves of the ineffectual condition of the blockade to reship them to their actual destination.

It is to be observed that these goods had been passed upon by the Venezuelan consulate in Amsterdam before the declaration of the blockade. The calculations made by the claimant seem to the writer to be susceptible of modification as to fact, but acceptable as to principle.

If, on the one hand, an indemnity is due the claimant, on the other we can not take into account the period of duration of the blockade of the allied powers, nor of other brief periods, as he has done, during which commercial traffic was impossible, either because of the notice of the raising of the blockade not having been published abroad, or because of lack of sufficient time for the sailing of steamers from Europe or North America, and the port remaining inactive.

Assuming that the duration of the ineffective Venezuelan blockade was five months, which seems correct, and deducting 1,831.98 bolivars of profit on goods received in December, 1902, it results that the indemnity under this head may be reduced to 20,691.33 bolivars.

Let us now take up the question of damages on account of stoppage of exportation.

In so far as the principle is concerned, the case is identical with the preceding, and it would be useless to indulge in a repetition of the arguments.

In order to justify his demand for an indemnity of 13,707.03 bolivars the claimant bases himself on these facts, to wit: That during the first four months of 1902 (see certificate of United States consular agent in Barcelona, of April 3, 1903) he exported goods to the value of 46,023.70 bolivars, and affirms that he realized a profit of 10 per cent, or 4,602.37 bolivars — a monthly profit of 1,150.59 bolivars. Assuming that this estimate is moderate and fair, the Italian Commissioner must observe that the claimant had full liberty to export his goods, and especially hides, in which he dealt largely, up to the day of the declaration of the blockade, that is to say, to about August 10, 1902, and that therefore his profit of 4,602.37 bolivars should be divided into about eight months instead of four, which would reduce the monthly profit to 575.74 bolivars. On this basis the sum to which he would justly be entitled under this head would not exceed 2,878.70 bolivars for the given period of five months of Venezuelan blockade.

Concerning export duties illegally collected by the governmental authorities

who were Messrs. Briceño Martin (p. 42), Pedro José Adrian (pp. 46 and 48), J. Bello Rodriguez (pp. 110 and 111), H. Calcaño (p. 112), and F. Lopez Baguero (p. 113), for the State of Barcelona, these are amply documented and their illegality is unexceptionally demonstrated by the circular of Gen. José Antonio Velutini (p. 50), Venezuelan ex-minister for the interior. The order therein contained was not made effective by the Government of the Republic, which was fully aware of the abuses complained of by the claimant, but took no steps to abate them, and therefore and thereby assumed full responsibility for their existence. Under this head is claimed the sum of 10,001.05 bolivars, which admits of no reduction, and interest thereon 594.42 bolivars. This interest is calculated at 1 per cent per month, but should be stated at one-fourth or 148.60 bolivars, according to the rule governing interest in this Commission.

The forced loans were imposed by Gen. Paolo Guzmán, of the "Libertadora" revolution, in the sum of 18,779.40 bolivars, and by Generals Velutini and Bravo, of the Government, in the sum of 2,000 bolivars; but the receipt of these latter to the amount of 1,013 bolivars was accepted in payment of export duties, the reimbursement of which forms another part of this claim. Therefore setting aside, and with reservation (accepted by the Italian Commissioner), of the right to recover the amount represented by General Guzmán's receipt, and hence of forced loans imposed by the revolutionists, the claimant asks under this head an indemnity of 987 bolivars.

Let us pass now to the seizure of the 5,000 hides.

The claimant was indebted to the custom-house at Guanta for imports received August 2, 1902, in the sum of 19,835.34 bolivars (see certificate of chief customs officer, pp. 21 and 22 bis). According to the custom rules then in force he had seven days in which to pay this amount. Just at that time, however, both Guanta and Barcelona fell into the hands of the revolutionists, who imposed upon claimant the forced loan of the amount above mentioned.

After November 25, 1902, and the recapture of Guanta and Barcelona by the federal troops, the Governmental authorities insisted that claimant pay again the sum indicated for duty on imports, which he refused to do. Thereupon the judge of hacienda ordered as a guarantee of payment the seizure of the 5,000 hides in question and which were in his storehouses in Barcelona. Claimant states their value to have been in Guanta or New York 120,000 bolivars. He subsequently obtained the release of the hides by a "resolution" of the minister of hacienda (p. 105) of December 22, 1902, giving satisfactory guarantee for the payment of the sum claimed, but afterwards compromising with the Government on payment of 9,917.72 bolivars — i.e., half the sum originally claimed.

This transaction took place before the honorable umpire ordered, by his decision in the Guastini case, the refundment of duty collected by the Government after the same had already been collected by the authorities of the revolution. But the claimant does not ask the repayment to him of said duties in view of the intervening transaction (see doc. "O" and particularly the marginal note in red ink), which, however prejudicial to his interests, he will respect. The Italian Commissioner has here given this detailed statement solely to clear up the antecedents of the claim for the seizure of the hides. According to Venezuelan commercial laws actually in force, a judge may not, for the purpose of securing the payment of any given sum, confiscate goods in excess of said sum, plus the requisite judicial costs.

It is customary that the goods seized shall not exceed double the amount sought, the excess to this extent being considered sufficient to cover the costs mentioned.

In this case the judge of hacienda, to insure a payment of 19,835.44 bolivars, ordered the seizure of 5,000 hides, worth, according to estimate of the claimant, more than six times the sum claimed, and therefore three times more than he was allowed by law and custom to seize. The measure was consequently illegal in a double sense, in that the claimant was required to pay the same duties a second time, and in that the judge had largely exceeded the proper amount of the seizure.

It is true that on December 22, 1902, the hides were released, but on account of the closing of the port of Guanta they could not be exported until after the raising of the blockade, or next April, whereas had the judge kept within the legal limits in his seizure, the claimant might have been able to ship a part of his goods on the steamers *Prins Willem IV* and *Prins Willem V*, which touched at Guanta from the 17th to the 30th of December, 1902.

It will be observed that the notice of the release of the hides on the condition of furnishing a guarantee could not reach Barcelona until a considerable time after the close of the year, on account of the interruption of all telegraphic and postal communications, which explains why the guarantee was not furnished until April 20. (See doc. O.)

Now, it being well known that hides which are not shipped at the proper time lose in weight, and that they are sold by weight, it follows that they lose in value. This loss is by the claimant put at 6,992 bolivars. It is to be noted, also, that on the hides remaining unshipped an increase of duty was laid under the guise of a "war tax," which may be considered a further result of the illegal act of the judge above referred to, as was also the expense incurred in sending one of his employees, one Antonio Vestri, as ascertained by the writer, to Caracas for the purpose of obtaining an order for the release of the hides mentioned. This it required a month to accomplish; but in consequence of the then disturbed condition of the country, three months elapsed before Vestri could safely return to Barcelona. Summing up, the claimant, from these various losses in connection with the seizure of his hides, considers himself entitled to an indemnity of 12,972 bolivars; but the Italian Commissioner, while admitting the equity of the principle involved in the demand for such indemnity, holds that it should be reduced, as shown in the following considerations:

The value of the hides as stated by the claimant seems exaggerated; according to impartial and exact information this should not exceed 100,000 bolivars. The action of the judge of hacienda can not be called into question except in so far as it exceeded law and custom in going beyond the limits of two-fifths of the goods seized. The indemnity claimed under this head should be reduced to three-fifths, or 7,783.50 bolivars.

The last motive for demand of indemnity by the claimant is based on the fact that, not having been able to sell his 5,000 hides at an opportune moment, he was, in the first place, not able to meet certain obligations toward his correspondents (in proof of which see his account current, pp. 96-100), and thereby was charged for sums of accrued interest; and in the second place was prevented from profiting by the sale of the hides valued by him at 120,000 bolivars, and by another sum of 20,000 bolivars for a certain lot of hides which he affirms he was prevented from exporting on account of the blockade.

The Italian Commissioner holds the first of these demands justified, but considers the second deficient in proof. He therefore believes that under this head there should be awarded an indemnity of 2,400 bolivars.

Recapitulating, while having in view the decisions of the honorable umpire, and reserving the right of the claimant to indemnity for injuries inflicted by the revolutionists, the Italian Commissioner is of opinion that the present

claim should be allowed in the aggregate amount of 42,490.18 bolivars, with interest thereon from the date of the introduction of the claim to the Commission to the 31st of December of the year last past.

ZULOAGA, *Commissioner* :

This individual claims certain amounts for injuries which he says he suffered, because in accordance with the decree of the Government blockading the port of Guanta, which according to his statement was not effective, he could not carry on exporting and importing. The time referred to is from August 3 to November 25, during which the revolutionists occupied Guanta, and later, from February 16, 1903, to April 12, 1903, when they were also occupying it. The claimant also makes demand for the time of the blockade of the allied powers, but the Italian legation does not support this part of the claim. The time fixed, therefore, is about five months.

The damages asked are the unrealized profits in mercantile operations which he imagined or satisfied himself he could have made, in accordance with calculations based on the former course of his business. From these calculations it will at once be seen that they attempt to compare a period of tranquillity and peace with another completely disturbed, during which a revolutionary government was in force, which in accordance with the statement of the claimant himself was one of violence and arbitrariness of every kind; that from the 5th to the 10th of August, 1902, in the city of Barcelona, a disastrous and fatal struggle took place, by virtue of which almost all the inhabitants were ruined; that under these conditions it is not credible that Caro could have thought of making extensive importations, nor could he have had anything to export; that if Caro suffered because of the suspension of his business during this period of disturbances, on the other hand, the legitimate authorities having been reestablished, the subsequent importations and exportations must have been greater because of this suspension and the one thing compensated the other.

This with respect to the amount of the claim, since with respect to its juridic validity, it is my opinion that the Government of Venezuela had a right to prohibit commerce with these revolutionary ports, especially when the vessels that carried on the commerce also touched at other Venezuelan ports; that the observation to the effect that the Government, not holding actual sovereignty over these places in revolution, it could not oppose commerce with them, is not conclusive as to this claim, since, if it could treat them like the enemy's country, I do not see why the inhabitants of that territory could not have taken direct action against it because of this treatment.

I reject this portion of the claim, not only in fact but also in law.

De Caro claims 8,876 bolivars (p. 38) for duties on exportation paid for hides and pelts, according to a receipt which he presents (pp. 42, 46, 48), which could not be collected, because they were unconstitutional, and he demands, moreover, interest on these sums. It is true that the collections of these duties is unconstitutional, but the law gives a right to the citizens to go before the court and denounce as unconstitutional the decree which levies them, in order that it may not continue in force. Besides, in reality, in the course of the transaction the merchant computes the duty in his calculations and it does not fall on him, either because the article (the hides in this case) are bought cheaper from the producer, or because they are sold at a higher price. There is, therefore, no direct damage. I reject this claim.

De Caro, moreover, claims 19,766.40 bolivars for loans to the revolution and the Government. They are not recoverable, except those made to the officers of the Government amounting to 987 bolivars, besides interest from the 24th of October, the date of the presentation of the claim.

He claims 12,972 bolivars more for the expenses of an injunction proceeding which the judge of the hacienda brought against him, in a suit which he prosecuted through the government attorney, for failure to pay certain export duties, the claimant maintaining that the attachment was illegal. The affair terminated, as appears, by an agreement between the government attorney and De Caro. It is, therefore, a completed transaction, and it is not for this Commission to review the provisional decisions which the judge may have rendered in the suit. The statement of De Caro that it was not possible to lay an attachment on his hides, the value of which was much more than twice the amount claimed (which does not appear), is not true either. The judge could have issued the attachment, and he, proving the value of the goods attached, could demand that it be limited to double the value of the amount claimed. I reject the claim.

M. De Caro wishes that there be paid him interest on the sums which he owed his creditors. I reject the claim.

RALSTON, *Umpire*:

The above entitled claim was duly referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

It appears from the expediente in this case that for many years past the claimant, De Caro, a subject of Italy, has resided in Barcelona, Venezuela.

His first demand is for the sum of 47,719.30 bolivars, for injury to his business consequent upon the paper blockade of Guanta (the port of Barcelona), proclaimed in August, 1902, Guanta then being in the possession of revolutionists. The amount of this claim is, by the honorable Commissioner for Italy, for various reasons not necessary to the discussion, reduced to 20,691.33 bolivars. The claim evidentially is only supported by proof of the fact that in October, 1902, the claimant ordered from Neuss, Heslein & Co., of New York, a cargo of kerosene, rice, flour, etc., the value of which is not stated, but which the firm in question refused to forward, assigning as the reason that the consul-general of Venezuela at New York would not authenticate invoices for Guanta; the firm, however, promising that as soon as affairs should take a favorable turn and the port be opened, it would forward cargoes. In exchange for the goods above referred to, the claimant proposed to ship 6,000 hides and 150 packages of skins.

Some proof is offered for the purpose of showing the amount paid in the shape of duties upon importations made by De Caro during the seven preceding months, as well as the value of such importations, and the probable profit thereon is calculated at the rate of 12 per cent; the Commission being asked to accept the theory that but for the blockade, De Caro's importations would have been, during the months it lasted, of the same average amount, with the profits calculated as indicated.

A further branch of the claim, which is for the interruption of the claimant's export trade because of the paper blockade, and for which he asks 13,807.03 bolivars (this amount being reached by a similar course of reasoning), may be considered in this connection.

That a noneffective or paper blockade is illegal, and can not constitute the foundation of rights on the part of the government declaring it, but may create liabilities against such government, is well established; many of the authorities demonstrating this position being collected in the opinion of Plumley, umpire of the British-Venezuelan Mixed Claims Commission in the case of *Compagnie Générale des Asphaltes de France*.¹

¹ See vol. IX of these Reports, p. 390, and *infra*, p. 665 and note.

Illustrations of this doctrine in principle, suggestive of the one now under consideration, will be found in the cases of the *Boyne* and the *Monmouth*, cited in Moore's Arbitrations, page 3923, and it remains only for the umpire to apply it.

The umpire can not accept the idea that the claimant is entitled to average business profits for the months of the blockade, reckoned upon possible importations and exportations and based upon the imports and exports for any preceding period, as he would be compelled to ignore the fact that during a large part of the time of the noneffective blockade there was continuous fighting in and about Guanta and Barcelona. Historically, he notes that on the night of August 9, 1902, Barcelona was taken from the Government by troops of the revolution and new civil authorities named by them; that on November 26, 1902, Barcelona was reoccupied by the Government; that on February 17, 1903, the governmental forces retired, and on February 19, 1903, the revolutionists took possession of the town, retaining such possession until after a bloody conflict, lasting from April 5 to 10, they were ejected. The above account takes no note of frequent skirmishes. To assume business profits for such a period at all analogous to those obtained during the time of business quiet would be to grossly violate the probabilities of the situation. It is not to be supposed that during a period of destitution, plundering, and destruction of all sorts De Caro would have successfully carried on any business whatsoever.

The umpire, therefore, finds it impossible to accord to the claimant any profits, even upon the goods he ordered from Neuss, Heslein & Co., and these are the only goods that the proof shows were ordered at all by De Caro from abroad during the time in question. He would find difficulty in awarding, even under favorable circumstances, speculative profits upon goods which had never been forwarded to or received by the claimant.

The situation as to the 6,000 hides and 150 packages of pelts proposed by De Caro to be exchanged for the goods in question, is somewhat different. He was entitled to sell or exchange these goods without interference and he had the opportunity of doing so. This opportunity was lost and he was not able to sell or exchange them until many months after. He is entitled to the difference, as nearly as it can be estimated, between the value of the goods in October, 1902, and their value at the time of the final sale, plus charges for taking care of them in the meanwhile. The amount of this difference and of these charges is not clearly proved in the testimony submitted, but by reference to the testimony connected with a later item of De Caro's claim it may be approximately ascertained. By calculation we find that the probable loss in value of the hides were 8,390.40 bolivars, and there was paid out by him on account of interest, which we may regard as a carrying charge, 2,400 bolivars, making a total of 10,790.40 bolivars.

Another head of plaintiff's claim relates to certain forced loans executed by the revolutionary and governmental generals. For reasons sufficiently discussed in the *Sambiaggio*¹ and other cases, the Government can not be held responsible for loans exacted by revolutionists, but is responsible for loans required by General Velutini, and this exaction, deducting for "vales" duly received and accepted by the Government, amounted to the net sum of 987 bolivars, for which an award must be made.

A further head of the claim is for taxes on exportations. This tax was exacted in direct violation of the provisions of the constitution of Venezuela, which in the second title "Bases de la Unión," article 6, reads as follows:

¹ See *supra*, p. 499.

ART. 6°. Los Estados que forman la Unión Venezolana son autónomos é iguales en entidad política, y se obligan: * * *

ART. 11°. A no imponer contribuciones sobre los productos nacionales destinados á la exportación.

A full allowance must therefore be made for taxes so collected, and these amount to 8,876.17 bolivars.

An additional claim arises from the seizure of 5,000 hides (apparently the larger part of the hides whose exportation was prevented as above described), and the circumstances with relation thereto may be detailed as follows:

Claimant was indebted on August 2, 1902, to the custom-house at Guanta in the sum of 19,835.34 bolivars, and had seven days within which to pay this amount. By the 10th of the month Guanta and Barcelona both fell into the hands of the revolutionists, and the claimant was required to pay this sum to them. After the capture of Guanta and Barcelona by the Government, its authorities insisted that the claimant should again pay the sum indicated for duty on imports, which he refused to do. The judge of hacienda thereupon directed the seizure of 5,000 hides as a guarantee of its payment. These hides were said to have been of the value of 120,000 bolivars. Subsequently, upon his giving satisfactory security, the hides were released and at a later time the Government compromised with the claimant, he paying 9,917.72 bolivars, being one-half the sum originally claimed. It is now contended on behalf of the claimant that even if the action of the Government had been entirely legal, the judge should not have directed the seizure of property in excess of twice the amount of the Government's claim, and that, having directed the seizure of property, worth five or six times the amount of the claim, the Government should be held responsible for any loss attendant upon the embargo of the excess amount, and it is also contended by the claimant that he was compelled, because of the seizure of the property, to borrow money at a high rate of interest, which borrowing would not have been necessary had the judge of hacienda acted within the usual limits of his authority. Furthermore, it is said that the hides, because of the delay, became less valuable, and the Government should be charged with the difference in value consequent upon the delay.

The umpire has already sufficiently indicated in the Guastini case¹ his strong conviction that when taxes had been once collected by a de facto government, the government de jure could not enforce a second payment, and but for the compromise between the Government and De Caro, which compromise antedated his decision in the case referred to, he would have no difficulty in awarding to the claimant any sum he might have paid on this behalf, but, as is admitted by the honorable Commissioner for Italy, it is now impossible for him to reopen this matter. He feels compelled to regard the compromise as a complete and final settlement of any issue growing out of the acts to which the compromise related, whether such issue had reference to the original dispute or the proceedings taken to enforce the original claim. He can not recognize that De Caro accepted the benefit of the compromise of the original claim and at the same time reserved a right of action for steps taken to enforce it.

While the terms of the compromise entered into between De Caro and the Government do not appear at length in the record, we may believe that both parties considered that the dispute, with all the attendant consequences, was at an end when 50 per cent of the original claim was paid by De Caro.

The claim for moneys necessarily borrowed has apparently been allowed under another head, and as the hides were only detained from December 1 to December 22, 1902, it would under this heading call for little attention. Besides,

¹ Page 561.

if De Caro believed that the judge of hacienda had directed the seizure of an excessive amount of property, he had the right under the code of civil procedure of Venezuela to appeal to the court for the release of the excess, in this respect enjoying the remedy to which he would be entitled under similar circumstances in a common-law country. It does not appear that he availed himself of his rights, and it is not within the power of this umpire to grant damages to a claimant who, by a seasonable reliance upon his rights in a case in court, might have suitably protected himself. Certainly before he can appeal to an international tribunal, the suit in court having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject-matter of his appeal.

A sentence will therefore be ordered in favor of De Caro in the sum of 21,788.62 bolivars, with two months' interest to December 31, 1903, at the rate of 3 per cent per annum.

MARTINI CASE

(By the Umpire):

The right of the sovereign power to submit all claims of its citizens to a mixed commission is superior to any attempt on the part of a subject or citizen to contract away such right in advance.

This Commission is, as between Venezuela and Italy, substituted for all national forums which, with or without contract, might have had jurisdiction over the subject-matter.¹

Venezuela is responsible for attempts to enlist in her armies, in violation of her contract, Venezuelans employed by the claimant, and also for interference with foreign workmen employed by the claimant.

Venezuela is responsible for profits which claimant might have obtained had she not broken her contract where such profits are not uncertain or remote, or where it may reasonably be presumed they were within the intent and understanding of the parties when it was entered into.

Where the damage is continuous in its nature, an award may be made covering the loss up to the date of such award, although, under other circumstances, it seems damages after August 9, 1903, the last date for the presentation of claims, would not be recoverable.

A contract is to be interpreted in the light of the surrounding circumstances, and the port of Guanta being open to foreign commerce at the time the contract was signed, and such condition being a material element in the value of the contract, the government is responsible for damage incident to its subsequent closure by executive order.

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

In the memorial presented by the firm, at page 68, are enumerated the various items that the claim is composed of, and it is here proper to explain and sum them up.

(a) Thefts. Detailed at pages 72 and 73, and they amount to 9,104 bolivars. The proofs are to be found at fascicle B.

The firm call attention to the fact that it has not been possible to furnish proofs for some of these, because at the time of the taking the station master at Guanta, Marsilio Catelli had gone to Italy (December, 1902), but the more important amount of 8,334 bolivars is supported by the testimony of witnesses. It is to be noted at the outset that the firm relinquish their right to the sum of 750 bolivars because of the possibility that this sum may have formed a portion

¹ See note attached to this opinion on p. 664.

of the indemnity awarded to A. Bonnon by the French Commission, which granted his claim in the sum of 6,000 bolivars for damages caused for the most part by revolutionists.

(b) Requisitions. At page 72 of the memorial is indicated the total amount requisitioned in different ways by General Marcano, of the Government, to the sum of 60,600, and the corresponding documents are in fascicle C. The firm, however, renounce all right to the repayment of this money, as they have explicitly declared to the writer, since the same is included in the account between the Venezuelan Government and the firm in compensation of the annual payment due the former by the latter. On this point it will be well to forestall a possible objection. From original documents shown by the honorable Commissioner for Venezuela, copies of some of which had already been presented by the firm (see fascicle N), it appears that Engineer Lanzoni, in the name of the firm, declared, under date of September 6, 1900, that in view of certain concessions obtained from the President of the Republic the firm renounced whatsoever claim they might have at that time against the Government. But on examining the previous correspondence, and especially the firm's letter of May 23, 1900, the original of which might be produced by the Government, it appears that among said claims therein enumerated in detail Lanzoni had not included the recovery of the requisitions of Marcano, which at that time did not possess the character of a claim, and the interested parties could not therefore regard it as such, since it was their intention to include it in the account with the Government, as was, in fact, done.

Such inclusion was foreseen, agreed to, and, so to speak, authorized by Marcano himself, as may be seen by the sentence in his own hand, contained in the receipts dated September 30 and October 15, 1899, which states that

dicha suma será pagada con las pensiones que deben satisfacer dichos señores al Gobierno Nacional por arrendamiento de la Empresa ya mencionada.

It is clear, therefore, that not only had the firm no interest in making this credit the subject of a claim, but that they were exercising an already recognized right when they inscribed it in the account current as a part of the rent for the mines.

On the other hand it could not be explained why Lanzoni, Martini & Co. were induced to abandon a credit of 60,600 bolivars for a compensation of 52,000 bolivars, which sum represented the reduction to one-half of the yearly rent, while this advantage, which the Government was according, finds a sufficient *raison d'être* in the renunciation of the other items mentioned in said letter.

From all this it appears that the credit on account of requisitions or loans enforced by Marcano, although anterior to September 6, 1900, was not an object of the transaction, and it is therefore equitable that it should figure as a partial discharge of the annual obligation owed by the firm to the Venezuelan Government.

It is moreover just that the sum of these credits be taken into account, since they are all supported by documents in the most unexceptionable manner, and caused, in part, by forced loans exacted for the support of the army, in part by requisitions for animals, and in part for repairs of arms of the troops; that is, for various and distinct items.

A somewhat ambiguous phrase in the Martini memorial — the one which terminates page 71 and begins page 72 — may have induced the honorable Commissioner for Venezuela to doubt that the "vales" had been given as an equivalent of the amount of the invoices ("fatture") signed by Marcano. This doubt, however, will appear wholly unwarranted when it is considered,

first, that the word "vale" was also used by the firm (see p. 72, line 5) to indicate "fatture" or invoices; and second, that the "vales" are of a date prior to that of the "fatture" themselves. Thus is explained the ambiguity of the phrase mentioned, and therefore of the one which reads, "to render his extortions legal, Marcano left receipt with us," and thus is excluded absolutely the idea that "vales" and "fatture" should mean one and the same thing.

(c) Destruction of 5,697 tons of coal stored at Guanta. The details of this fact are found at page 74 et seq. of the memorial, and the corresponding loss is fixed at 256,365 bolivars.

Before entering upon a consideration of this item the Italian Commissioner is in duty bound to call the attention of the honorable umpire to the fact that the Martini Company have acknowledged in effect (as has been stated by Gen. Pablo Guzmán) that 150 tons were excluded from this destruction and were used for and in the service of the railway. The value thereof, 6,750 bolivars, being necessarily subtracted from the previous amount, the firm have reduced this item to 249,615 bolivars. This destruction was ordered by the revolutionary general, and therefore, according to the rules laid down by the honorable umpire, would not in principle be susceptible to indemnity. But it must be observed that had it not been for the ineffective blockade of the port of Guanta the coal which was afterward destroyed might well have been sold, because at that time the strike in the United States had considerably increased both the price and demand (a fact which explains why the firm had fixed the price at 45 bolivars per ton), as will appear from two orders, which are found in fascicle F, and which it was impossible to fill, without adding that, given the agreement made between the firm and Del Buono, the coal could have been consigned to the latter and realized upon at an opportune moment, if the blockade had not prevented.

It must hence be admitted that if the Venezuelan Government had not resorted to this unlawful and, so far as the general interests of business in that section were concerned, injurious measure, and one particularly harsh with regard to the firm, which by reason of their contracts had special rights, the said firm would not have suffered the injury of which they now justly complain.

With regard to this destruction, the Venezuelan Government has submitted written evidence from which it appears that it took place in the presence and with the consent of Engineer Antonio Martini; that the order therefor was issued by Dr. Manuel Rodriguez Armas, formerly the attorney for the firm, and that in order to hasten and facilitate the destruction there were employed tins of petroleum brought there for the purpose by the same train which brought the revolutionary troops thither from Barcelona, as also it is said of Martini, who, it is further alleged, superintended the partial tearing up of the wharf to expedite the dumping of the coal into the sea.

From the evidence adduced it would seem as though the Government were endeavoring to create the impression that the destruction of the coal was the result of a tenebrous and dishonest collusion between General Guzmán and the firm, with the object on the part of the latter of either establishing the basis of a claim for an exaggerated loss, or of disposing at a high price of a quantity of coal of little value and of culm not otherwise merchantable.

Assuming that the coal was equal to that extracted from the mines — that is to say, good — and that the culm which the firm had accumulated in Guanta for the supply of its compressing plant (which reduces the culm to blocks) was not burned, since it could not have been used by the Government vessels, but remained there awaiting more favorable conditions, and was therefore not included in the account of 5,697 tons really destroyed, an examination of

the correspondence had between General Guzmán, then governor of Barcelona, and the firm proves beyond question that the latter not only was not in connivance with the enemy, but sought by all the means at hand to avoid a fact which could not but have most seriously prejudiced it, and which amounted to a disaster, given the very difficult situation to which it had already been reduced.

On being questioned by the writer as to the reasons for his (Martini) being present at the destruction, and as to the accuracy of the evidence submitted by the Government, the claimant furnished such explanations as to establish beyond doubt the inacceptability and the puerility of the counterproof. The Italian Commissioner sums up these explanations in his own words:

The firm has charge, according to its contract, of all the movable and immovable property of the concession, which it is bound to preserve, and which it must render an account of and restore in good condition at the expiration of its term. Having received the order for the destruction of the coal, and exhausted to no purpose all efforts to have same countermanded, the claimant thought very properly that his presence might be useful to the interests of the firm and of the Government as well, since while directing the operations the destruction of the wharf upon which a part of the coal had been deposited might be avoided, as well as of the station, the custom-house, the warehouses and the compressing plant, about which was piled the larger part of the coal, and this sufficiently accounts for his presence there. In order to obviate the complete destruction of the wharf he caused openings to be made in the flooring thereof that the coal might the more readily be thrown therefrom into the water, and in order that this might be done in the least injurious manner he furnished the troops with the necessary tools from the company's own stock — a circumstance which he fully explains, while the evidence furnished by the Government makes no mention of it. In order to secure from the troops a certain amount of good will and obedience he offered them rum, and this detail is likewise passed over in silence. The claimant admits that, generally speaking, the narration of events in that document is correct, but calls attention to the fact that they have been set forth in a somewhat disingenuous and biased manner. Judging from the attempt to impute a false and absurd meaning to the presence of Martini at the destruction mentioned, it may be noted that while it is true that De Armas had been the attorney for the firm he certainly was not aiding them at this time, when, as secretary-general of the State of Barcelona, and therefore of the existing Government, he was transmitting the order for the destruction of the coal. This would seem to fully account for *his* presence at the place and time of this unfortunate occurrence.

It is not true that Martini arrived at Guanta with the troops and on the same train, because on being informed of the order by telephone he took a trolley in all haste from Barcelona and arrived fully a hour after the troops had reached the scene of operations. He does not, however, attach any importance to the assertion that he came on the same train with the troops; it might have been better had he been able to do so, for then some of the damage might have been prevented.

The reasons for his presence in Guanta are so obvious that had he remained in Barcelona he might properly be charged with having been negligent. With regard to the coal oil, the evidence seems to imply that it was furnished by the firm, because it came on the train with the troops, and as alleged, with the claimant. This is not true. The oil was not supplied by Martini & Co. But suppose it had been; what then? Since the order had been issued and could not be rescinded the sooner the destruction was accomplished, and the less dangerous the points at which the fire was applied, the better for the surrounding

buildings. But what he does explicitly deny is that his presence should have been due to wrong motives, or that he was so inexperienced as to burn his property in the hope of subsequently obtaining an indemnity therefor, which, had it not been for the blockade of the powers, there was not the slightest chance of his getting, and which, based as it is in part on the question of revolutionary damages, may possibly not be agreed to in this Commission, notwithstanding the blockade and the provisions of the Washington protocol.

(d) Damages to shops and materials. The particulars in regard to this item are found at pages 79 et seq., and the amount of indemnity claimed therefor is 1,500 bolivars. The corresponding documents are in fascicle B, and are substantiated by the evidence of witnesses. In consideration of the small sum involved it is not deemed necessary to enter into a more detailed exposition.

(e) For violence and offenses to persons, amply set forth at pages 84 et seq. of the memorial and established by testimony and various documents, an indemnity of 500,000 bolivars is claimed.

It seems to the writer more appropriate that any indemnity allowed under this head be included in the sum total awarded by the honorable umpire to the firm. The firm of Martini & Co. claim, as reparation for the violence and offenses above referred to and as an indemnity for damages occasioned by the nonobservance by the Venezuelan Government of the agreements made with the firm — collected under three heads, according to the principles sanctioned by the Italian law in matters of renting (see arts. 1575 and 1579 of the civil code) and analogous to those admitted by the Venezuelan civil code, which are:

I. Change in the thing rented and failure to preserve same to the use for which it was intended.

II. Nonobservance of the special obligations of the contract.

III. Nonobservance of the guaranty of the pacific enjoyment of the thing located —

an indemnity amounting in all to 8,737,396.34 bolivars, which is believed to correspond to the sum of resulting damages, comprising those occasioned by the suit of Del Buono and the loss of future profits; that is, of those which the concessions of the mines and their operation would have enabled the firm to realize if their activity had been allowed free and peaceful development.

Before discussing this question of demand for indemnity it would be well to point out the value of two documents submitted by the Venezuelan Government to the examination of this Commission, to wit, the report of the consul of the Republic at Genoa, of August 13, 1903, and the partial account rendered by the custom-house authorities at Guanta of the coal exported by the firm during a period of ten months.

From the first of these two documents we learn that the functionary by whom it was compiled acknowledges that Mr. Pilade Del Buono, the moneyed partner of the firm, "an intelligent, active man with great ideas," has invested "large sums in the exploitation of the mines," and that this affair may be the "source of riches, not only for the contractors, but for the country as well," and that the firm, "by reason of the war, were compelled to suspend their operations and discharge their workmen."

This is precisely what Martini & Co. affirm, and these data enumerated by the consul figure among those on which the claim is based, at least in part. But the conclusions drawn by him from these premises are certainly illogical. He says that it is *evident* that Del Buono has not sufficient capital, even with the aid of his partner, Tonietti, to "undertake such an enterprise as that of the mines, of the railway, and of the port of Guanta."

Whence does he draw this information? If Del Buono, an adept in mining

matters, since he had advantageously superintended those of the island of Elba, is an intelligent man, how could he, without giving evidence of a lack of perspicacity, have dared to undertake an enterprise too great for him?

If he invested a large capital in Guanta, and if to procure other large sums (these are the words of the consular report succinctly) he mortgaged his property, and if he has a partner whose financial resources are unknown to us and presumably to this confidential agent of the Government of the Republic, how can the consul allege the foregoing?

It would appear that the consul's reasoning is not altogether consistent, and we may properly infer instead that Del Buono ceased to advance funds when he became aware that on account of the obstacles confronting him, it would have been sheer folly to continue doing so. This is probably why he no longer had recourse to that credit which, given his competency, his energy, and his economic position, would certainly not have been denied him.

The consul has long sought, and perhaps may still be seeking, the firm's headquarters in Italy. Consulting la *Gazetta Ufficiale del Regno*, No. 167 of 1901, he would have found it, and Del Buono, in bringing his suit against the firm, knew very well where to send the summons. Did the consul suppose that the firm, paralyzed in their operations for nearly two years, were maintaining at Rome and at Partoperraio an office with numerous employees awaiting the resumption of the work in the mines, suspended for reasons already stated? He accuses the firm of an intention to speculate on the Government of Venezuela. If he refers to the future, it is an hypothesis or worse which is not worth discussing. If he refers to the past, it suffices to observe that the firm have so far lost time, money, and labor. "Speculation," in so far as regards the firm, may be excluded from consideration.

Lastly, the oft-quoted functionary formulates this query: "On what do these gentlemen base their claim? On the *reimbursement* of that which they *hoped* to realize, but so far have not realized?"

Exactly; when a contracting party, failing, as in this case, to fulfil the stipulated agreements, arrests or neutralizes the activities of an enterprise to its serious prejudice, the other injured party has a right to demand, not merely an indemnity for the damage actually suffered, and the reimbursement of lost capital, but also the payment of profits which it might justly have realized on the basis of the contract itself.

If the consul had consulted either the Italian or the Venezuelan civil code, he would have seen formulated the principles invoked by the firm and admitted by all tribunals.

Without going further, it must be evident that the report of the consul is only a tissue of puerilities and contradictions.

We come now to the other document, the object of which would be to demonstrate that the firm had produced very little coal, since, dividing the total tonnage of 1,765 into the time during which this amount was exported, the work of extraction appears utterly insignificant. But the document expressly refers to coal *exported*, not to coal *mined*, which changes the conditions of the question.

Let us begin by noting that the firm, precisely on account of the disastrous state of the mines at the time of consignment, were compelled (as appears in the memorial of the firm) to spend much time in the reorganization of the shops etc., foregoing the work of extraction, and that said firm had made no contracts for the delivery of coal until about the last of their dealings with Del Buono, and just at a time when operations were suspended on account of disorders.

What is complained of by the firm is that they were hindered in the manner set forth in the claim from exploiting the mines, as it was to their main interest

to do. It is alleged that in the brief period of peace and activity the firm spent more time in the preparation of the mines and the uncovering of new veins than in extracting coal for commercial purposes. This latter had not more than begun when all operations were paralyzed. So much for a general statement. Let us now come to details and figures.

The firm, by an account current, have reported a total extraction of 14,771 tons, on which a royalty of 7,385.50 bolivars was paid to the Government.

We see how all this agrees perfectly and with all the statements of the firm, as well as with that of the Government.

	<i>Tons</i>		<i>Tons</i>
Total production from the beginning of operations to July 12, 1902, date of suspension of operations, a period of two years and nine months . . .	14,771	Exported, as per custom-house report, Guanta, to September, 10, 1902	1,765
		Sold and consumed by work-shops and Barcelona-Guanta railway from September, 1901, to July, 1902	2,735
		Destroyed by the revolutionists in Guanta	5,547
		Total	10,047
		Difference	4,724
Total	14,771	Total	14,771

Of these 4,724 tons there are, as culm, partly at Guanta and partly at Naricual 3,562 tons, more or less, because, after exposure to the elements for two years, a part must have been destroyed by wind and rain, there remains to be accounted for 1,162 tons, as follows:

1. The amount used by the railway and shops since the suspension of operations, i.e., from July, 1902, to the present time.

2. The total consumption of the mining machines during two years and nine months' work, as follows: One boiler for the ventilating apparatus, one hoisting engine, a pump for supplying the village of Naricual, and the 120-horsepower boilers used in the compressing plant.

All this is shown by the few documents saved from destruction by troops and included in the papers of the claim, and the depositions of witness (see question No. 6). The firm would agree to submit these statements to any expert in such matters who would visit the spot in order to establish their truth.

The true value of the two documents submitted by the Government being thus determined, let us sum up the reasons in general upon which is based the firm's demand for an indemnity, in order that we may ascertain if and to what extent such demand may be received.

Lanzoni, Martini & Co. at first, and subsequently Martini & Co., invested considerable capital in the mines, as well as their personal energy for nearly five years and their credit — a fundamental element in all enterprises, whether industrial or commercial. The contrary proofs brought before the Commission are not based on severe and dispassionate criticism. The "justificativo" drawn up at the instance of Vittorio Cotta, a presumably not very impartial individual, as he had been employed by the firm but was discharged in 1891, can not only have no value as a counterproof, but should be totally rejected on account of its having been made in the absence of one of the interested parties. But in any case what does it seek to prove? That the firm had some accounts unsettled, and that the members thereof have individual debts — as for instance, one of them owes a bread bill; that the firm sold some cement

and a few utensils — for the purpose of morally discrediting the management.

As regards the sales, it is to be observed, as has already been stated, that if these took place, even in the small amounts mentioned in the document referred to, they were in the nature of a necessity created by the disastrous conditions confronting the firm. As regards the debts, either of the firm or the members thereof, they are not only specifically denied, but constitute in this circumstance an additional support for their claim, and it is well to note that the unsettled accounts to which the document refers are of the period in which every commercial and industrial activity of the firm was paralyzed. Martini & Co. admit having other debts than those mentioned by their ex-employee; were their condition flourishing they would not be counted among the Italian claimants.

A greater importance has, at first sight, the fact that the bill of John Davis was not paid in 1901, as well as the invoice of John Davis & Son; but this is but an isolated instance which it would seem more equitable to attribute to an irregularity arising out of a change in the administration of the company occurring shortly after that time and within the same year, rather than to a lack of funds ever since, or, worse still, to a lack of good faith — things clearly contradicted by numerous circumstances established from the documents of the claim.

Is it possible that a firm which paid in cash, or otherwise compensated for its annual royalty of more than 100,000 bolivars to the local government by equivalent services which it could not have furnished without undergoing heavy expenses; that settled its account with Marcato, amounting to 60,600 bolivars; that promptly met its checks on the house of De Caro, of Barcelona, for more than 400,000 bolivars; that purchased a steamer at a cost of 567,000 bolivars, including the necessary repairs, etc.; that had through the Bank of Venezuela (as it could readily prove were it not that that institution had again and again delayed the rendition of the account) deposited and subsequently employed in the works several hundred thousand bolivars; that had engaged in Europe and transported to Venezuela numerous detachments of workmen; that according to the agreement of March 22, 1902, was indebted to its partner, Del Buono, over 2,000,000 bolivars, evidently employed in the mines, and that by a document found in fascicle O is shown to have expended more than that in the works themselves — that such a firm, we repeat, could have gravely and intentionally jeopardized their credit for the petty sum of £155 sterling? Is it not much more consistent to suppose it to have been due to an oversight as above suggested?

This supposition seems natural enough, even when it is considered that though the firm have a heavy indebtedness of recent contraction, which is the result of the financial disaster into which they have been thrown, they have no known debts whose origin antedates the beginning of their claim to this Commission. It may be observed, incidentally, that the Lanzoni management did not settle with the other partners, in favor of which he withdrew in 1901.

It may be urged that the agreement between Del Buono and the firm, in virtue of which the loan of 2,000,000 bolivars was negotiated was not recorded, and that this fact diminished its value from the point of view of the proofs which have been sought to be deduced therefrom. This objection can not well be raised by the Venezuelan Government, which not only had knowledge of said agreement but agreed to the clauses therein regarding the delivery of coal. In fact, while up to April 12, 1902, the date when the agreement was made known to the Government, the receipts from coal supplies were credited to the firm, those of subsequent deliveries were credited to Del Buono.

The importance of this agreement is besides shown by the citation before

the civil tribunal of Rome (see fascicle I), by which Del Buono summoned the firm in order to obtain a judgment against them for the sums borrowed of him and a settlement of damages. The citation was regularly served upon the firm's office in Rome through Sig. Giuseppe Tarabella, upon the special agent for the representative of the firm, the Hon. Francesco Fazi, whose domicile is near that of his attorney, Felice Gualdi, at the Circo Agonale, No. 14.

It is here opportune to note that the amounts stated by Del Buono in his citation are not those employed by him in the working of the mines, but those which he advanced the firm as silent partner and banker. This observation should be given due weight, in order that the data resulting from the citation itself may not be stigmatized as contradictory with regard to those arising out of the agreement between Del Buono and the firm concerning the supply of coal (fascicle L).

In the citation it is explicitly stated that for the *acceptances alone*, Del Buono's credit amounted to nearly 800,000 bolivars.

Before proceeding farther with the examination of the claim, it would be well to state that on August 31 of the past year, as appears by documents in fascicle O, the balance between royalties due the Government by the firm and the sums paid in cash or by coal, services, and otherwise, showed a credit in favor of the firm amounting to 15,185.64 bolivars. From that date to the present time there have been no more settlements, either because the claim was already submitted, or because, with the exception of a partial operation of the railway, the firm had been reduced to entire inactivity.

This form of settlement between the firm and the Government was the result of a tacit understanding by which convenience and economy was secured to both parties, since it obviated the forwarding of funds often prevented by the conditions of the country, without taking into account that any other form of settlement would have been difficult, because of the refusal to examine the books during the war, as established by documents in fascicle M. It would, therefore, be contrary to equity to object against the firm that the amount of the royalty had not actually been paid to the Venezuelan Government, and raise an objection before this tribunal which said Government had not previously deemed possible.

It will be said, perhaps, that the firm took credit for services rendered the revolution, but when it is considered that the revolution was the government *de facto*, it would seem that the same rules that were adopted in the Commission in regard to the double payment of duties (see the Guastini claim¹) should apply here, and that the firm have kept within due limits of right in including those amounts likewise, in every way acting therein in good faith. Besides, the amount charged for services to the revolution being 32,286 bolivars, and its credit on August 31, 1903, being 15,185 bolivars, the difference would at most be only 17,091 bolivars — a relatively negligible quantity.

Let us pass now to the consideration of other fundamental reasons, as a whole and interlinked, which operate in favor of Martini & Co. Such an examination would demonstrate that the action of the contracting government was the principal, if not the sole cause, of the ruin of the company, and how from this fact arises the right of the firm to an indemnity.

From the evidence of witnesses presented by Martini & Co., it seems clear that the revolution, as well as the Government, but mainly the latter (see especially the deposition of the witness Riva Verni and documents contained in fascicle B), by manifest infractions of contractual agreements, recruited at various times the native workmen of the company, and principally those

¹ See *supra*, p. 561.

assigned to the railway service, which could not well suffer interruptions and obstacles of any sort. General Marciano, president of the State, insisted upon having the complete list of the workmen, declaring publicly that he considered them as being wholly at his disposal. (See fascicle B.) It may here be objected that these recruitings in various instances did not go beyond mere attempts and threats; but the effects of these acts were otherwise injurious to the firm in that the workmen, not being able to foresee to just what extent these acts might proceed, fled and hid themselves to avoid any possible danger. Now, when we reflect that the work of the mines and of the railway must proceed in unison, and that their regular function depended entirely upon the harmonious collaboration of the two services, it must be admitted that the failure of one necessarily entailed the failure of the other, so that, for example, whenever the laboring element was lacking the technical or mechanical department of the enterprise remained in whole or in part useless. It is hence clear that a general disorder followed, involving grave damages to the firm, which was still compelled to pay and subsist the foreign element thus forcibly condemned to inactivity in the factories.

To this state of affairs and to other causes fully set forth in the Martini memorial, must be attributed the abandonment of the railway, shops, and factories in satisfaction of which the firm claim equitable indemnity, and which might erroneously be charged to the nonobservance on the part of the firm of its contractual obligations toward the Government.

The aggressions, arbitrary orders, stoppage of trains, seizing of goods, damages to real property, forced requisitions — in short, all the violence of which the firm complain, and which reduced their affairs to such a state that they were finally compelled, at a time when all communications were interrupted, to sell at a ruinous price materials imported from Italy, for their individual use, not for profit, seeing their exemption from import duties, but to procure means of subsistence, and to accept in charity from the Italian war vessel *Elba* gifts of flour and biscuit to satisfy the hunger of the operatives — were, indeed, partly the work of revolutionists; but from the documents submitted it is equally clear that the Government was pursuing a similar course, and this attitude on its part was doubly vexatious, since setting aside the actual damage to the firm, it induced in the rebels a conviction that everything was permissible against Martini & Co., the contract with whom was now practically a dead letter.

It is therefore not against the unavoidable consequences of war that claim is made, but against that accumulation of wrongs that under cover of this abnormal state were for so long a period unnecessarily perpetrated against them.

Most grave, in view of its consequences, was the aggression suffered at the siege of Naricual, in May, 1902, by General Mejia, of the Government. The circumstances thereof, which have been wrongfully sought to be excused under the plea of military necessity, are set forth in detail in the Martini memorial and in the testimony of the witnesses. The effects were truly disastrous because the foreign workmen, stricken with fear and convinced of the danger to their lives, since no protection was to be expected even from the Government authorities, became clamorous and demanded of the firm that they be sent back home. This completed the interruption of the work, and the enterprise, henceforth completely demoralized, was driven to new and serious pecuniary sacrifices, among which may be included the payment of 631 francs to each operative, to which the firm was compelled by the arbitral sentence contained in fascicle T.

The sacking of the station and warehouses at Guanta, the destruction of movables, and the aggression of General Mejia at Naricual, all of which are proved in the testimony, are events due entirely to the Government, and their

moral effects, particularly, have an exceptional importance. It was then that occurred the destruction and dispersion of documents, registers, and accounts, the loss of which fully explains the incompleteness of the claim in certain respects.

The ineffective blockade of the port of Guanta must be included among the measures which damaged the firm, not merely from a commercial point of view, in so far as it prevented exportation and the collection of duties at the port, but also from an industrial one, since it rendered impossible the replacing of the lost operatives by others, whether native or foreign. The duration of the blockade is shown from documents contained in fascicle P, in which is the decree of the governor of Trinidad, declaring that measure null and void from the beginning. As to its illegality the Italian Commissioner refers to his argument in the De Caro claim, No. 50,¹ which contains quotations from writers on international law and other authoritative opinions. He believes it opportune to add here that the question was discussed in the German-Venezuelan Commission,² which decided that, admitting the illegality of the noneffective blockade, damages should be awarded a claimant who based his demand for indemnity on damages produced thereby.

Among other culpable omissions of the Government there is that of not having stopped the abuse of power by the State authorities in imposing, contrary to provisions of section 11 of article 6 of the constitution of Venezuela, a duty on goods intended for exportation. This illegal exaction hinders commerce and drives it from the port of Guanta, necessarily prejudicing the firm by the consequent diminution of the port and railway rights, according to its concession.

By the decree of May 27, 1903, the Venezuelan Government violated its contractual concession by reducing the port of Guanta to a coast-trade port, thereby at once changing the very object of the concession. Aside from the direct damages arising from the reduction of the general export and import trade of that port, and the resulting diminution of railway business, it is clearly proved in the memorial above named that the exploitation of the mines is wholly impossible without perfect freedom of export from Guanta, because the transfer of goods to an authorized international port would impose a burden of 24 bolivars on each ton of coal, as shown by documents in fascicle S. Now, this measure can not be justified by an appeal to the faculty which the Government has of changing the character of a port for reasons of its own, because, so far as the port of Guanta is concerned, the contract made with the firm implies a renunciation on the part of the Government of the exercise of this very right. This measure was revoked, however, perhaps in consequence of the protest of the firm's home office in Italy, a copy of which was furnished the Mixed Commission by note of the royal Italian legation in Caracas of November 14, 1903. This tardy act of reparation of the local Government having been of no avail to the firm, now permanently incapacitated from resuming its labors, cannot constitute a guaranty of peace for the future.

The fact that the firm may suffer similar risks and the direct evils flowing therefrom seriously prejudices the enterprise from another point of view, as the concession is in fact negotiable, as shown by article 15 of that instrument. Now, what capitalist would think of investing in such a contract, in the face of a precedent which demonstrates the absolute instability of its relations with the Government and the looseness of the agreements in its behalf? It may be argued that the transfer of a concession is subject to the consent of the Govern-

¹ *Supra*, p. 635.

² Orinoco Asphalt Co. Case, *supra*, p. 424.

ment, but it cannot in equity be held that the Government should have agreed to this clause with the preconceived idea of refusing such a transfer in the event of the future holder of the concession being a person of consideration and means.

In short, the closure of the port shows that the Government in its relations with Martini & Co. may at any moment withdraw from its contractual obligations. Following this order of ideas, the firm call attention to the monopoly granted to one Feo of the shipment of cattle from Guanta. Feo is a Venezuelan, and either for this reason or because vessels flying the Venezuelan flag enjoy a reduction of 50 per cent on port duties, he finds it to his interest to sail his ships under the national colors; moreover Feo was bound by the Government to not cede his concession to foreign companies or individuals. Thus one of the principal resources of the port was for the firm reduced one-half.

The Italian Commissioner observes that it is here a question of a recent fact, and the firm recognize it as such in not making it the subject of special indemnity, but it merits being recorded as a proof of the hostility of the Government toward them, the more so in that the Feo concession constitutes an infraction of the provisions of article 9 of the Italian-Venezuelan treaty of 1861, still in force.

If such is the conduct of the Venezuelan Government toward the firm, it is no wonder that the revolutionists, following its example, cooperated in the work of destruction by which the company find themselves reduced to their present deplorable state. The Commission has adopted, against the opinion of the writer, the rule that no indemnity can be awarded for revolutionary damages; but this rule is counteracted by the other, which holds that when the Government has been guilty of apparent negligence damages should be considered as susceptible of indemnity. In the present instance the diligence of the Government appears to have been highly problematical. Its interventions not only have never been of assistance to the company or of a protective character, but, on the contrary, were pernicious to their interests. It is beyond doubt that the firm would have suffered much less from the revolutionists had these latter been permitted to operate undisturbed in the State of Barcelona during the last years. It is not believed that a single instance can be given where the Government adopted a protective measure in behalf of the firm, and even General Mejia, he who had captured the shops at Naricual, remained in his functions up to the time of his imprisonment by the revolutionists and held himself overbearingly and threateningly at the interrogatories of the witnesses, a transcript of which is submitted by Martini & Co.

It would therefore seem beyond question that the Government never exhibited the least desire to protect the interests of the company, and when it is considered that, in addition to its general obligations toward citizens and foreigners residing in Venezuela, there was incumbent upon it the further duties of a contracting party, and that it was recreant thereto, it must be evident that such negligence rightfully imposes upon it the payment of the indemnity claimed by the firm.

It has several times been pointed out in this Commission that if the firm not only failed to reap the benefits expected from the concession, but actually sunk their capital in the enterprise, this should not be charged to a nonobservance of the stipulations on the part of the Government or to damages suffered, but to the fact that the enterprise was essentially a nonprofitable one. Were this statement correct, it would follow that little faith could be placed on the Venezuelan reports, official in their nature, which magnify the productiveness of the mines and the quantity and quality of the coal. The firm will hold the Government blameless as to this, as before undertaking this enterprise they had fully investigated the conditions, as amply set forth in their memorial at

pages 2 et seq., and their reports accord substantially with that of Venezuela, the correctness of which they recognize and which the Government should not and can not deny.

The coal at Guanta and in the portions of the mines not yet developed is in sufficient quantity to supply the Caribbean Sea market for a great many years to come. As to its quality, the attention of the honorable umpire is invited to the dispatch of the minister of foreign affairs of Italy of December 1, 1899, and to other documents contained in fascicle R.

It has also been asserted that the Guanta coal is liable to spontaneous combustion, and testimony has been adduced to prove this, but where is the coal which will not under given conditions of weather or storage show similar tendencies? The coals of Pennsylvania and Cardiff are subject to like danger, as are all others. Are not fires on board steamers of frequent occurrence from this very cause, even where using coal other than that of Guanta? Is it likely that the Italian Government, as indicated in the above-mentioned dispatch, after the experiment of the Naricual coal, would have ordered the *Etruria* of the royal navy to fill its bunkers with said coal if it had been more dangerous in this respect than other varieties? Besides this, Venezuela has herself used it on her ships in recent years without thought of possible accident therefrom.

The Italian Commissioner flatters himself that he has in the foregoing summed up the chief reasons militating in favor of Martini & Co., and to enter into further details would be simply repeating what has been already well set forth in the memorial and what appears fully in the documentation of the claim. The demand for indemnity should be considered in its entirety, while holding in view the fundamental elements, to wit, the capital employed, a credit seriously compromised if not wholly lost, the energy spent by the members of the company, the impediments and injuries suffered as much from the Government as from the revolutionists, the nonobservance of agreements, the constant apathy manifested in preventing or obviating obstacles of various kinds, opposing the peaceful development of the enterprise, and the special nature of the relations and obligations existing between the lessors and lessees.

To judge this case upon the restricted and narrow ground of direct and material damages suffered by Martini would be illogical and unjust. The ruin of the company is palpably the result of an abnormal state of affairs, justifying the demand for indemnity here presented, because it has been abundantly proved that one of the contracting parties was not diligent in the performance of his duties.

The firm, taking into account the deductions from the original demand mentioned in the course of this paper, claim a total of 8,997,441.34 bolivars, including the judicial expenses indicated in fascicle Q. This demand is undoubtedly susceptible of further reduction, but between the extremes of the total claimed and the complete rejection of all demands, which the Venezuelan Commissioner hopes to obtain, the honorable umpire will doubtless find a mean which will satisfy the requirements of that equity which should control the conduct of the Commission, according such an amount to the firm as will compensate its direct and indirect losses, while alleviating the disastrous consequences arising therefrom, and providing a means of renewing its activities in the near future, and renew an important but now paralyzed industry, with manifest advantage not only to the company but also to the Republic.

ZULOAGA, *Commissioner* :

The Italian company Lanzoni, Martini & Co. leased from the Government of Venezuela, on December 28, 1898, the Guanta Railroad and the coal mines called Naricual, Capiricual, and Tocatoro, situated in the State of Bermudez,

for the annual rent of 104,000 bolivars, besides 50 centimos for each ton of coal extracted. This contract was approved by Congress on May 4, 1899, and ran for a term of fifteen years counting from that date. In order to carry out the contract the company Lanzoni, Martini & Co. was organized, which had a capital of 125,000 bolivars, Pilades Del Buono being a silent partner therein to the extent of 70,000 bolivars. (The latter seems to have furnished the cash capital for the company.) On July 19, 1899, the corporation augmented its capital on behalf of Del Buono to the extent of 375,000 bolivars. On July 7, 1901, Antonio Lanzoni withdrew from the company, which continued under the name of Martini & Co. Del Buono was not only the only partner who had money, but he was the only capitalist who gave credit to the corporation. By order and for the account of the company it appears that Del Buono purchased the steamer *Alejandro*, but this latter remained mortgaged for a portion of the sum advanced. Del Buono also paid some drafts drawn by Martini & Co., although with some difficulty. By February, 1901, the company was in such a state of insolvency and disrepute that, having given an order to the English firm of John Davis & Son for £155.14 of oil these gentlemen, fearing that it would not be paid, sent the goods to Messrs. Dominici & Sons, of Barcelona.

The employees of the custom-house at Barcelona appear because of an error or because of the petition of Martini & Co. to have delivered them the goods, and the English house lost the value of them, since they sought in vain at Rome and Barcelona to obtain payment from their debtors. (The English firm made a claim against the Government of Venezuela because the custom-house had delivered the goods to Martini & Co.)

In May, 1900, Lanzoni, Martini & Co. had addressed themselves to the Government of Venezuela, petitioning it to declare the mines exploited and insinuating that having suffered because of the war they would ask that the annual rent which they should pay should be reduced. The Government answered them on September 5, 1900, agreeing to declare that the mines were in operation; and to reduce to one-half the yearly rent which was due from June, 1900; that the rent for the months of May and June should be paid completely, and that Lanzoni, Martini & Co., upon accepting these propositions, should declare "that they had no claim against the Government of Venezuela by virtue of the contract nor any other reason." The cessionaries answered this note on September 6, "gratefully accepting the concessions which the supreme chief of the Republic had made them" and "any claims which they might hold against the Government being considered as satisfied." The development company has only paid the Government on account of the lease the sum of 21,666.25 bolivars in September, 1900, which was the rent for the months of July and August of that year (as will be seen from the account in file O). Martini & Co. have presented their account with the National Government until August 31, 1903. In the account they charge sums owed by the Government which they say the latter owed by reason of railroad, harbor, and other charges, and 60,600 bolivars which they said they delivered to Gen. Martín Marcano prior to May 1, 1900, for various reasons, according to the account which appears in the file called extortion by Martín Marcano. But it will be observed, first, that these extortions of Marcano are prior to the declaration of Martini & Co. of September 6, 1900, that they held no claim against the Government on any account; and consequently if they occurred in reality they were released by the claimants in consideration of the concessions which the Government made them, and Martini & Co. so understood it, as has been said in September, 1900, that they paid a draft against the *Crédit Lyonnais*; second that 32,286 bolivars appeared to be charged to the Government during the period from the 10th of August to the 25th of November, 1902, and during this

time the government of Barcelona was a revolutionary government, and third, that none of the other sums charged to the Government are accompanied by any proof. Martini & Co. are therefore debtors to the Government for rent due for the mines from September, 1900, and they have paid nothing for the coal extracted; that by February, 1901, they had neither capital nor credit sufficient even to pay for a shipment of oil to the value of £155.14, and nevertheless, according as they themselves say in their petition, page 13, in order to realize their plans it was necessary to spend at least £2,000,000 in the first two years.

Martini & Co., lessees of the mines of Naricual claim from the Government of Venezuela the sum of 9,064,965.42 bolivars, which they compute in their memorial at page 166, in the following manner:

	<i>Bolivars</i>
Material injuries and moral offenses, damages, requisitions, confiscation of moneys and other things	326,069.00
Direct damages to the quarries and implements	1,000.00
Violences and offenses against the foreigners who compose the firm	500,000.00
Failure to perform obligations of the lessor:	
Changes in the property leased and neglect to preserve it	1,027,440.00
Failure to perform the special obligations of the contract of lease	696,288.75
Failure to maintain the lessee in peaceful possession	6,513,667.58
Total	9,064,965.42

In the 326,069 bolivars there are included the 60,600 bolivars of the so-called "extortions of Martín Marcano," which, as we have already said, were not demandable; but it is to be noted moreover that this is composed of two receipts of Martín Marcano for the value of 12,000 bolivars, each dated September 30, 1899, and October 15, 1899. and of various accounts admitted by Marcano as *compensation* for the sale of certain cattle and stacks of arms. The receipts of Marcano appear to be the amount of these accounts, since Marcano himself confesses when he says at folio 71 of the petition "that Marcano in *compensation*, and in order to give legal form to his extortions, signed these receipts." Martini, therefore, seeks to recover twice the quantity one time on the accounts and the other time upon the receipts. Besides, the total amount of these 60,600 bolivars on the one hand are credited as against the payment of rent, and on the other hand they are sought to be recovered as damages. Martini & Co. therefore seek to recover four times the amount of the supposed extortions of Marcano. The other damages which make up the 326,069 bolivars are attributable to revolutionists, and this is sufficient reason for their disallowance, but it is worthy of note that special reference is made to the value of some tons of coal which the revolutionary leader, Pablo Guzmán, ordered to be burnt at the custom-house of Guanta.

The agent of the Government of Venezuela has presented a deposition from which it is clearly proved that the destruction of this coal was with the consent of Martini; that he personally directed the operation, ordering that a part of it be burnt by making use of cans of coal oil, and that another portion of it be thrown into the sea; that it was known by all that the operation was gotten up by the lawyer of the company, and that the greater portion of the coal thrown into the sea was of a very poor quality, since it was only dust; that all the coal was not destroyed, and that Martini & Co. had since disposed of a portion of it for the use of the railroad and by selling it to individuals. By the destruction of the coal the cessionaries thought, as would appear, to carry out a profitable undertaking, collecting from the treasury of Venezuela for coal that was not marketable.

Martini & Co. seek to recover 500,000 bolivars for violence inflicted upon

the persons of those who constitute the firm, and these persons are Martini & Fazi, since Del Buono is not in Venezuela.

In the allegations which Martini & Co. make with respect to this point there are many injurious imputations cast upon the Government of Venezuela and upon the country; but nothing concrete and to the point. In the charge alone which treats of the supposition that an official of the Government by the name of Carmen Mejias entered into Naricual committing assaults upon the foreigners appears to be discredited by all the witnesses who are presented, who affirm exactly the contrary of what Martini says. The witness Casimiro Pinelli says —

that the soldiers committed some wrongs, and that they themselves said that the Italians were no good, but that these latter suffered no personal injuries.

The witness Juan Caprara says —

that with respect to the recruiting of workmen, the troops took one Venezuelan laborer that he had under his charge, but that they did not recruit any Italians, nor did they interfere with them.

The witness Nicolás Amore says —

that the soldiers of Mejias took the horses of the company, but that he and other persons having spoken with Mejias, the latter decided that the animals should be returned, as was in fact done.

The witness Bartolo Tononi says —

that an attempt was made to recruit Venezuelans from the works of Martini & Co., but that this was given up by the mere friendly intervention of the engineers, Antonio Martini and Francisco Fazi; that they took a saddle horse from Mr. Martini, but that they returned it to him afterwards.

Martini & Co. seek to recover 1,027,440 bolivars for injury to their credit by reason of a decree of the Government of Venezuela, dated May 27, 1903, in which by virtue of its powers, in accordance with article 10, law 14, of the code of the hacienda, it temporarily suppressed the custom-house of Guanta. Those who had no credit in 1903 could hardly suffer therein — they were bankrupt since 1901. The partners were in that state of penury that the partner Fazi was not able, about September, 1902, to pay his baker an account of 165.45 bolivars, for which he made Martini & Co. responsible, and which they did not pay, either (p. 3 of the deposition of Victor Cotta).

The decree of the Government of Venezuela is perfectly lawful.

Martini & Co. seek to recover 696,288.76 bolivars under the name of "failure to perform special obligations of the contract of lease," because the Government recruited the Venezuelan laborers, violating article 13 of the contract; and thereby they seek to secure the return of the amount of rent from April, 1902, to May, 1903, amounting to 120,155 bolivars, or, say, the return of a sum which they themselves have not paid; and second, the delivery of imaginary sums which they say were necessitated to repair the railway to the mines, which, according to Martini & Co., is in the most deplorable state, since no repairs have been made. The repairing and improvement of the line were by an express stipulation of the contract to be at the cost of Martini & Co. If they have not fulfilled this obligation, as they declare, they have fundamentally failed to perform the contract, and it is a singular idea to seek to recover a sum which in any case they themselves owe.

The last item of the claim of Martini & Co. is 6,513,667.58 bolivars for "the failure to carry out the guarantee of peaceful possession of the property leased." The items which make this up are as inconsistent and absurd as those already considered, and it appears useless to make any specific observation

upon them, since they are in truth the same as those already considered and rejected.

The examination of this claim shows, moreover, that the alleged failure in this covenant, with respect to Martini & Co., is false, and that, on the contrary, the authorities have always protected them as far as was compatible with the disturbed state of the country. It moreover appears that Martini & Co. have not fulfilled the obligations which were imposed upon them by the contract; that they have not paid the rent; that they have not only not preserved the property leased to them, but they have allowed it to deteriorate for the want of the most simple repairs; that they have committed fraud against the Government of Venezuela, selling the Roman cement and other goods which they introduced free of duty for the use of the enterprise; that they have sold things belonging to the railroad, which is the property of the Government.

The claim should be totally disallowed.

Every claim arising out of the contract ought to be prosecuted before the courts of Venezuela. Martini can not claim before the Mixed Commission for supposed breaches of the contract, since the Government can oppose thereto objections arising out of the contract.

RALSTON, Umpire :

The foregoing reclamation has been referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela. Briefly stated, the facts are as follows:

On December 28, 1898, by contract approved by the Federal Congress on May 29, 1899, the Venezuelan Government granted to Lanzoni, Martini & Co., of whom the claimants are the successors, for the term of fifteen years from the date of the approval of the contract by Congress, a national enterprise known as Ferrocarril de Guanta y Minas de Carbón, denominadas Naricual, Capiricual y Tocaropo, situate in the Bolivar district of the State of Bermudez, including in the lease wharf for the embarkation of coal, warehouse, workshops, railways between Guanta and the mines, with rolling stock, material on hand, bridges, the said mines and the other rights and the actions belonging to the National Government in the said enterprise.

The territory so rented embraced 810 kilometers superficial area, and the railroad from Naricual to Barcelona was some 17 miles long, and from Barcelona to Guanta some 19 miles.

In consideration of the foregoing lease the company undertook to pay annually to the National Government in cash the sum of 104,000 bolivars, which was to be delivered in monthly quotas of 8,666 bolivars, 66 centimos. The company was further to deliver to the Government in lieu of other taxes 50 céntimos for each ton of carbon exploited.

The company was to have the right to charge the then existing tariff for passengers and freight and wharf rates, without the right to augment them in any case; the Government undertaking to preserve closed the port of El Rincón, or Guzmán Blanco, except for vegetables and certain small articles.

The National Government was to enjoy a reduction of 50 per cent upon the tariff ordinarily charged for its employees on business and for freight upon goods consigned to the Government.

The company was obliged at its own cost to make all improvements, repairs, and enlargements which were necessary for exploitation on a large scale, as well as to perfect the railway and rolling stock; all of which work was to be commenced within four months after the approval of the contract by the National Congress, and to be terminated eight months after such date, which might, however, be extended for four months more in case of force majeure.

The company undertook to give preference in employment to the laborers of Venezuela over foreigners.

If the company had fulfilled its contracts for the term of the lease, the Government was obliged to extend its concession for ten years more, at the end of which time the lessees obliged themselves to deliver to the National Government, under inventory and in perfect state of preservation, and without any right of idemnity therefor, all the stock given by the Government, with its improvements. The Government was obliged, even in case of war, to exempt from all military service the personnel employed in the mines, railways, or service of the enterprise.

It was further provided that the doubts and controversies which might arise upon the meaning or execution of the contract should be decided by Venezuelan tribunals in conformity with the laws of the Republic, without it being possible that they should be made in any case ground for international reclamation.

Inventories were had of the property leased the company, which inventories were accepted by Lanzoni, Martini & Co., September 9, 1899, and the work under the contract was officially declared commenced September 18, 1899. We may at this point remark that some of the complaints of the company are addressed to the fact that the property delivered to it was in much worse condition than it had expected at the time the contract was originally entered into, but the company having accepted the inventory, one is compelled to disregard all that is now said upon this point.

The company complains of various grievances occurring in the years 1899 and 1900, but these also must be dismissed with a word, because by its letter of May 23, 1900, the company applied to the Government for a rebate of rent on account of the injuries referred to, and under date of September 3, 1900, in response to this application, the company was notified that its annual rent would be reduced one-half for the year from July 29, 1900, to the same day in 1901, provided the company in accepting this concession should declare that it had no claim against the Government by virtue of the provisions of its contract, or for any other reason, and upon the following day (September 6) the company accepted gratefully the concessions made to it by the Chief of the Republic, recognizing as satisfied whatever claim it might have against the Government under the contract on account of the events in question. It is not, however, the opinion of the umpire that this settlement extended to the claims of the company under "vales" to the amount of 60,600 bolivars, issued by President Marcano, of the State of Bermudez.

Historically, it may be noted that on the night of August 9, 1902, Barcelona was taken from the Government by troops of the revolution, and the civil authorities were named by them; that on November 26, 1902, Barcelona was reoccupied by the Government; that on February 17, 1903, the governmental forces retired; and on February 19, 1903, the revolutionists took possession of the town, retaining such possession until after a bloody conflict, lasting from April 5 to 10, when they were ejected. In addition, there were many skirmishes in and about Barcelona within the dates mentioned, and the history of Guanta was much like that of Barcelona.

A paper blockade of the port of Guanta was proclaimed in August, 1902, Guanta then being in the possession of the revolutionists, and this blockade continued during all the time of the revolutionary possession. It is to be noted that for about two months, in December and January, 1902, and February, 1903, Great Britain, Germany, and Italy maintained a blockade by force. In addition, it may be remarked that on May 27, 1903, the Government reduced the port of Guanta to the third category, so that thereafter, and until February 1, 1904, it was not open to foreign commerce.

We may now enumerate the various heads of claims as set out in the memorial, as follows:

Material injuries and moral offenses:	<i>Bolivars</i>
1. Injuries, requisitions, appropriations of money, etc	326,069.00
2. Direct damages to its quarries and implements	1,500.00
3. Injuries and offenses against foreigners composing the under-taking	500,000.00
Failure under the obligations of the lessor:	
4. Impairment of the thing rented and lack of its preservation, including return of rent and lost gains	1,027,440.00
5. Lack of performance of the special obligations of the contract of rent, including lost profits	696,288.76
6. Failure in the guarantee of the pacific enjoyment of the thing rented	6,513,667.58
Total	9,064,965.34

It is manifest from the above statement that the same items have been repeated several times, and that properly analyzed the claim should amount to about one-third of the above.

Before proceeding to study more in detail the various headings of the claim, we must bear in mind that the claimants are still in possession of the property rented to them, and that if the Venezuelan Government had fixed its rent upon the basis of a return of 5 per cent upon the value of the thing rented, the entire valuation of the subject-matter would be but 2,080,000 bolivars. It will also be borne in mind, before commencing a detailed examination, that as early as July, 1901, the company, through its offices, either in Venezuela or in Italy, was unable to meet the claim of John Davis & Son, of Derby, England, for the sum of £155, and besides was indebted to various individuals in different amounts, and in March, 1902, owed its limited partner, Del Buono, some 2,000,000 bolivars, with outstanding acceptances estimated at 800,000 bolivars.

Let us make a succinct summary of the various injuries of which the company complains, eliminating offenses committed by revolutionists and trivial offenses, such as personal insults to employees, and limiting ourselves as to the rest to proven offenses.

Early in the morning of May 29, 1902, the revolutionary troops passed through the town of Naricual, where were located mines and shops of the claimant. Two hours later Government troops, under the command of General Mejias, reached Naricual and fired several volleys into the town from different points, the shots piercing the habitations and injuring or destroying property, no lives being lost. At this time the general referred to attempted to carry off workmen, but after Martini's intervention recruited but one man.

The following day the Government troops returned and again attempted to recruit Venezuelans in the employ of the company, who, however, fled with one or two exceptions. The forces took some food and small articles. It is further stated that at various times Venezuelans were recruited even from the quarries of the company. As a consequence the Venezuelan laboring force was completely disorganized and its members terrified and dispersed. On many occasions Naricual was occupied by governmental troops who took hens, hogs, etc.

During the war the towns between Barcelona and Naricual abandoned care of the roads, and as a consequence the railway line was used as a means of transportation by men and animals and railway traffic was abandoned.

On September 16 and 17, 1902, the revolutionists threw into the sea or set on fire, to prevent national vessels from using it, some 5,697 tons of coal, worth

from 25 to 30 bolivars a ton, and it is said that the Government was responsible therefor, because, having closed the port of Guanta and prevented its exportation, it necessarily fell later into the hands of revolutionists.

It is further stated that during fights between revolutionists and the Government workmen were compelled to give up repairing the wharf, and the train officials were insulted and interfered with in their management of the trains.

On November 28, 1902, Venezuelan vessels of war fired on the Guanta custom-house and station. The proof upon this point is not uniform; some witnesses saying that there were 70 revolutionists who commenced the firing, and others fixing their number at 25, and some witnesses placing the responsibility for the beginning of the firing upon the Government. According to part of the testimony, both custom-house and station were occupied by the revolutionists. When the Government troops landed, it is said that they entered the custom-house and station and destroyed much property of the company, including all their books of account, and also destroyed the cattle corrals and injured the wharf.

We further find that on June 6, 1902, workmen were recruited and others could not be obtained, while President Marcano prevented the delivery of merchandise for eight or ten days in the same month. In many cases the consul at Barcelona sought a release of Venezuelans who had been recruited, often successfully and again unsuccessfully, while President Marcano at all times maintained his right to recruit them.

In the counter proof it is shown, among other things, that the company sold part and used another part of the coal said to have been burned by revolutionists, and it is contended that the company is heavily indebted on its account of rent to the Government, having only paid 21,666.65 bolivars.

The honorable Commissioner for Venezuela submits, as a preliminary question, objection to the jurisdiction, based upon article 16 of the contract, which reads as follows:

Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato, serán resueltas por los Tribunales de la República, conforme á sus leyes, y en ningún caso serán motivo de reclamaciones internacionales.

Even if the dispute now presented to the umpire could be considered as embraced within the terms "*Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato,*" in the judgment of the umpire the objection may be disposed of by reference to a single consideration.

Italy and Venezuela, by their respective Governments, have agreed to submit to the determination of this Mixed Commission the claims of Italian citizens against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the Mixed Commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire can not accept an interpretation that by indirection would change the plain language of the

protocol under which he acts and cause him to reject claims legally well founded.¹

Let us now consider the various branches of the contentions, which, for convenience, may be divided as follows:

1. Assaults upon Italian workmen and interference with Venezuelan laborers employed by the claimant.

2. Interference with the contract rights of the claimant arising out of the paper blockade and the closing of the port of Guanta.

3. Various injuries to claimant's properties.

The first two grounds of the claim are so far interwoven with respect to the damages consequent upon the events complained of that it will be convenient to discuss them together.

Let us first consider for a moment in this discussion the assaults upon Italian workmen and interference with Venezuelan laborers employed by claimant.

As appears from the foregoing, on May 29 and 30, habitations of workmen at Naricual were fired upon ruthlessly by the Government troops, and as a consequence Italian laborers to the number of 54 protested before the Italian consul at Barcelona, and afterwards demanded their immediate repatriation, being in fact sent back to Italy on July 12. Fifty of these laborers afterwards submitted to arbitrators their claim against the company, and the arbitrators in their judgment dated September 3, 1903, said that:

The political situation of the country, troubled for many years by constant and ceaseless civil wars, rendered it impossible to carry on peacefully the work of the mines. * * * Things got worse around May, 1902, so that the mining properties, the employees, and even the owners were exposed to very great dangers and threats by the Government troops without any cause or justification. * * * The jury finds, moreover, that on May 29, 1902, the regular troops of Venezuela, without any justification, invaded the mines of Las Minas near Naricual, firing on the mining properties, factories, offices, and buildings and railroad stations, all belonging to the firm. Some of the Italian laborers ran the risk of being killed. The houses of some others were looted. Even Mr. Martini was in grave danger, while some of the native laborers were forced into the army in open violation of contract. These events caused a panic among the workmen, inducing them to what was described "a justifiable decision to leave Venezuela" in the protest filed by the firm with the minister of Italy at Caracas on July 10, 1902.

The members of the firm spared no care in defending their countrymen and employees, as was their duty as defendants of the men they had engaged, but the political situation was getting rapidly worse, as appears by the above-mentioned consular document; food was scarce and supplies were not to be had; banking transactions were impossible even on usurious terms; the native laborers all around Naricual caught by the panic fled, so that railroad service was severely crippled, and the work incidental to mining entirely stopped. Next the sanitary service, which the firm had been organizing, ceased operating; wages which theretofore for the same cause had been paid irregularly were now entirely suspended, and the transmission of money by the laborers to their families in Italy became rare and difficult. The workmen, who two days after May 29, after the actual panic had passed, had resumed their work found themselves face to face with the situation which the jury agrees with the complaints made by the firm in terming unbearable. This was rendered even worse and more painful by the letters received by the laborers from their families in Italy, setting forth the suffering at home from lack of the support they had been used to receive.

It further appears from the arbitral decision that not until September 1

¹ For full discussion of the points here decided see Orinoco case, vol. IX of these Reports, p. 181, Rudloff case, *idem*, p. 244; Turnbull, etc., case, *idem*, p. 261, and Selwyn case, *idem*, p. 380.

were the complaining laborers paid for work actually done at Naricual up to and including July 9, they sailing for Italy from La Guaira on July 17.

As the result of this arbitration the claimants were held liable for —

lack of the clear foresight regarding the work offered which is obligatory upon every employer of laborers, and especially upon one seeking men for work in places far from the mother country and which takes them away from the material comforts and moral comforts which are found in the bosom of the family and in the protection of the mother country.

The arbitrators allowed a total of 631 liras, equivalent to the same number of bolivars, to each one of the fifty complainants.

The umpire is disposed to accept the view that Venezuela is, to an extent, which he will endeavor hereafter to fix, responsible for assaults committed upon Italian laborers — assaults of such a nature as might well have deterred any others from taking their places — and is also responsible for the repeated acts of its military authorities in attempting to enlist in its armies Venezuelans employed by the company — acts which were in express derogation of the terms of the contract of rental hereinbefore recited.

Let us now, before considering the measure of damages, turn to the matter of the paper blockade and the closing of the port of Guanta by governmental order.

From about August 10, 1902, until April 10, 1903, save during the period of actual blockade by the allied powers, and the time of its possession by the Government, Guanta was blockaded by proclamation. No naval force, however, was maintained in the vicinity to enforce the blockade, and such blockade was therefore illegal under the authorities referred to in the case of *De Caro*¹ already decided.²

Shortly after the termination of the paper blockade, and on May 27, 1903, the Government reduced the port of Guanta to what is known as the third category of ports, and in so doing cut off its foreign commerce, and this condition lasted until the port was reopened by Executive order, dated February 1, 1904. In the opinion of the umpire, this closure, while entirely legal and within the power of the Government as against the world at large, rendered the Government liable to an extent hereafter to be discussed, under its original contract with claimant's predecessors. It will be borne in mind that by that contract, claimant's predecessors received possession of the wharf of Guanta, with the right to charge and collect port duties. It must be assumed that this right was obtained, and that the whole contract was signed upon the theory that the port of Guanta was to be maintained as a port of at least the same degree of importance it then possessed. The contract is to be interpreted in the light of the surrounding circumstances, and one of the most significant of them was the importance of Guanta as a port of entry. It is not to be supposed that Lanzoni, Martini & Co. received the contract with the idea that the Government retained the power the following or any subsequent day to change its provisions, destroying or impairing the usefulness of the points of ingress and egress to and from the railways and mines. To allow the existence of such a power in the Government as a contracting party would be to give one of the parties to the contract the right to destroy all the interest of the other party in it.

We arrive, then, at the very important question as to the measure of damages

¹ See *supra*, p. 635.

² The Convention of Paris, 1854, provides:

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire maintenus par une force suffisante pour interdire réellement l'accès du territoire ennemi. (*Revue de Droit International*, 1869, p. 157.)

for which the Government is responsible because of these several acts — that is to say, interference with the foreign workmen, with the native workmen, with the port by paper blockade, and with the rights of the contracting party by closure of the port.

As has already been demonstrated, the Government materially interfered with the labor of the foreign workmen, the natural result of its action being to prevent the employment of others. It interfered with the native workmen by a system of repeatedly attempted recruitings in plain violation of the contract. It (by paper) blockaded the port, and consequently diminished the value of the railroad concession for about five months, and it almost completely paralyzed operations under the concession by closing the port for a period of eight months.

It appears in proof that at the time the habitations of the foreign workmen were fired upon in May, 1902, the mine was capable of a daily production of 150 tons of the usual value of 25 bolivars per ton, upon which the company might ordinarily have expected a profit of about one-half, and the first question arising is whether the Government should be held responsible for this loss of profit during the period of twenty months from about the 1st of June, 1902, to the 1st of February, 1904.

It is the opinion of the umpire, several times expressed, that Venezuela is not to be held responsible for speculative profits, but the profits in the present case are not entirely speculative. In a question of contract presented to the Supreme Court of the United States, in *Howard v. Stillwell, etc., Manufacturing Company*, 139 U.S., page 199, it was said:

It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

While this language is not absolutely in point, it indicates that if a clear measure of damages exists with relation to future business, it may be invoked.

We find that by a contract entered into between Del Buono and his associates in March, 1902, the company agreed to furnish coal to Del Buono for the first year thereafter at the rate of 30,000 tons, and for the second year 50,000 tons, with an additional amount in subsequent years, which, however, does not concern us. To this extent the company had an assured market, with a reasonably well-established profit on its business. We are informed that this contract was notified to the Government April 12, 1902.

Bearing in mind the proven capacity of the mine, this amount of coal could have been furnished — that is to say, from June 1, 1902 (about the time the troubles of the workmen commenced), to April 1, 1903, 25,000 tons; and from April 1, 1903, to February 1, 1904, 41,666.66 tons; or a total of 66,666.66 tons for the twenty months. From this may fairly be deducted for the two months of blockade of the allied powers 5,000 tons, leaving a net total of 61,666.66 tons, upon which it could have made an average profit at the rate of $12\frac{1}{2}$ bolivars per ton, or 770,833.25 bolivars.

It would, however, be manifestly unfair to hold the Government responsible for this amount, because a very large part of the difficulty in working the mines was due to the direct action of revolutionists, with whom the Government was at war, and another considerable percentage must be attributed to the fact that the mines could not have been worked with thorough success even had the

Government properly performed its duties, because of the existence of a state of warfare in the neighborhood of the mines and railway, as well as at the port of Guanta, a condition for which the Government can not be held to contractual or other responsibility. The umpire, therefore, feels that he would be performing his full duty in solving this very troublesome question if he were to allow in favor of the company one-third of the amount it could have gained under the Del Buono contract, or the sum of 256,944.42 bolivars.

The umpire does not ignore the fact that the mine might have sold its coal to others than Del Buono, but he attaches little importance to possible sales of this character, because, as appears in the proof, from the opening of the concession to the 20th of February, 1901, only 7,271 tons had been extracted, and from the last date up to July 12, 1902, including about a month's work of the Italian laborers, only 7,500 tons additional were supplied, making a total from September 18, 1899, to July 12, 1902, of 14,771 tons, or a daily average of about 18 tons.

In the foregoing calculation, and in another to be subsequently made, the umpire estimates damages in favor of the claimant up to February 1, 1904, not ignoring, however, the fact that the last date upon which claims could have been presented before the Commission, and therefore, in his opinion, the last possible date to which, under ordinary circumstances, damages could be claimed, was August 9, 1903, but he is influenced by the legal principle stated in the American and English Encyclopædia of Law. 2d edition, volume 21, page 732, and expressed as follows:

When a court of equity grants relief by injunction for the abatement of a nuisance, it may award damages also if prayed and proved. In such case the usual practice is to assess the damages up to the rendition of the decree, in order to prevent further litigation.

To the above proposition many American and English cases are cited, and the damage in question, being continuous in its nature, is believed to fall within its clear reason.

By reason of the paper blockade and the closure of the port of Guanta, as well as interference with laborers, Italian and Venezuelan, the contract was broken by the Government, as hereinbefore set forth, and this breakage of contract forms an element of damage quite distinct from that involved in interference with the working of the mines. For if gangs of workmen employed in the maintenance of the railway were driven off and freight of all kinds could not longer be received at Guanta from abroad or carried to that port for exportation, then to perhaps an absolute point the concession became valueless. Such was the case, as we have seen, during the five months of paper blockade and eight months of closure of port, the interference with laborers bringing up the total time during which the contract was affected by governmental acts to twenty months. The rent due by the firm to Venezuela for this period would be 173,333.33 bolivars.

The umpire finds by the statement of account between the company and the Government presented by the company, made to September 1, 1903, that allowing the "vales" of General Marciano for 60,600 bolivars, which seem not properly embraced in the settlement of September, 1900, the Government was indebted to the company in the sum of 15,185.74 bolivars. In this account, however, credit is asked for 33,957 bolivars for services rendered the revolution. This must be rejected, leaving the company indebted to the Government on September 1, 1903, 18,771.26 bolivars. The account may, therefore, be stated as follows:

CREDIT

Rent allowed by this opinion and sentence based hereon from June 1, 1902, to February 1, 1904	<i>Bolivars</i> 173,333.33
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DEBIT

Balance due September 1, 1903, to Government	<i>Bolivars</i> 18,771.26
Rent to Government from September 1, 1903, to February 1, 1904	43,333.33
	<hr/> 62,104.59
Balance due lessees on this account	111,228.74

This award must be made, however, without prejudice to the rights of the company to recover in other tribunals for services rendered after September 1, 1903.

Let us now refer to the third head of damages, to wit, the various material injuries to claimant's properties.

The most important of these is stated to be the throwing into the sea or the burning up by the revolutionists of 5,697 tons of coal on September 16 and 17, 1902. Responsibility is charged on the Government for this loss, the theory being that the Government, by its paper blockade of the port of Guanta, had prevented the exportation of the coal, thereby permitting its loss at the hands of the revolutionists. On the other hand, it is argued that at least 150 tons were sold to private parties or burned by the company itself, while it is suggested that much of the coal was doubtless worthless through long exposure prior to the blockade.

The umpire believes that the Government is responsible for the loss of the coal, having prevented its exportation, but he can not ignore the fact that some of it was used as stated, and that much of it in all probability, because of exposure, had slight value. He believes he will do full justice if he allows for the destruction of 2,500 tons, at 25 bolivars a ton, or a total of 62,500 bolivars.

Other damages than those above enumerated (including thefts) may be referred to, but although dwelt upon at length in the memorial, the proof does not show that the material loss involved was great. The umpire believes that for them an allowance of 10,000 bolivars will be ample.

No account is taken of the injury to the railroad track, consequent upon its being turned into a passageway for animals, the authorities being pecuniarily unable during the war to keep up the roads. This was an unfortunate consequence of war for which the company can claim no personal indemnity.

Many of the other claims for damage rest upon the existence of war, for which Venezuela can not be specially charged, however regrettable the facts in themselves may be.

It is strongly urged upon the umpire that large damages should be awarded under the head of lack of pacific enjoyment of the thing rented, and aid is invoked of the principle embodied in section 1575 of the Italian, and section 1529 of the Venezuelan Civil Code, making it the duty under any contract of the owner renting property to maintain the lessee in the peaceful enjoyment of the thing rented during the time of the contract. This simply means that such enjoyment shall be preserved as against the owner and others claiming title, but is no covenant against the action of trespassers. As far, therefore, as the Government may thus be legally responsible, the umpire has, in this opinion, sought to hold it to such responsibility.

An award will therefore be signed for 439,673.16 bolivars, with interest at the rate of 3 per cent per annum from October 30, 1903, to December 31, 1903,

without prejudice to the claimant to demand payment from the Government in any forum having jurisdiction for services rendered after September 1, 1903.

POGGIOLI CASE

(By the Umpire:)

The widow and children of an aggrieved Italian, who were all born in Venezuela and have always lived in that country, can not claim as Italian subjects before this Commission (affirming Brignone and Miliani cases).¹

Venezuela is responsible for damages inflicted upon the property of a foreigner where she has allowed serious offenses to be committed against him personally and the offenders, although known, to go unpunished, and where the authorities, in conjunction with such offenders and with others, have depredated his property and driven off his employees, and no relief been afforded, although frequent complaints were made.²

A general claim for loss of credit is too indefinite and uncertain to be taken into consideration.

¹ Pp. 542 and 584.

² In addition to the authorities upon this point cited in the decision, attention is called to the Ruden case (Moore, 1653-1655).

It was shown that on January 14, 1868, the inhabitants of Motupe invaded the claimant's plantation of Errepon and burned the buildings and fences; that on February 14, 1868, Ruden appealed to the executive power and demanded an indemnity, at the same time charging guilty omission on the part of the authorities: that the executive power two weeks later asked the prefect of the department for a report, and that the prefect ordered the subprefect to make one; and that the latter, on May 22, 1868, reported that Errepon had been burned, but that he could not then go to the plantation and ascertain the value of the property burned, as the roads were bad. No further steps were taken by the authorities till, three months afterwards, the prefect, urged on by Ruden, directed the subprefect to make another report; but in reply to this order the first report, which was deficient and passionate, was merely repeated. In July, 1868, the executive power, without having come to any decision, sent the papers to one of the government attorneys. A third petition of Ruden met the same fate, having been held without action for fourteen months. The facts were not investigated, nor were the guilty parties prosecuted. An order was indeed given for an investigation, but it was avoided. The judicial authorities, when appealed to for an investigation of Ruden's claim, refused to entertain it, on the ground that an executive order had forbidden the trial of suits against the treasury. And while justice was thus denied, it was charged that the local authorities were concerned in the attack on the plantation. A report of the consular body, drawn up at the place, declared that the burning of estates, both native and foreign, at the time and place in question, was committed by armed forces under the command of officers. On all these grounds the umpire held Peru liable for the burning.

The case of Johnson (Moore, 1656-1657) was similar to the Poggioli case in many respects, it being borne in mind that the laws of Venezuela only recognize responsibility for the acts of officials working in a public capacity. In the case now referred to the claimant's

property was destroyed, and he was personally and permanently injured by armed bands, headed by the governors of adjacent towns, instigated by the superior authorities of the province, who were dependent upon and immediately represented the supreme government. The supreme government issued a decree to the effect that the injuries should be redressed, but nothing substantial was done, nor were any of the malefactors punished. The Peruvian Commissioner had contended that it was necessary that Johnson should have had recourse to the courts and have been denied justice. But it was known that the judges of the province of Lambayeque were menaced and controlled by the mob, and, if not in sympathy with them, in a panic; and that it would have been useless to appeal to them. Mr. Elmore (the umpire) declared, however, that there had been an actual denial of justice. By the circular of the minister of justice of Peru of September 13, 1853, the judges were forbidden to receive expedientes affecting the law of December 25, 1851, closing the consolidation of the public debt. By that circular the courts were closed against the sufferers at Lambayeque. Mr. Elmore cited two cases of the actual denial of petitions of persons injured in Lambayeque on the ground of the circular referred to. One of these was the case of Ruden & Co., who applied April 2, 1868, to the judge of Lambayeque and were denied a remedy on that ground. The claimants were thus without hope. If they applied to the courts they were told they had no remedy. If they applied to the commission they were told that they must apply to the courts. Mr. Elmore therefore awarded the claimant the sum of 11,480 Peruvian silver soles.

No allowance will be made for the closure of a port, whatever reasons may have induced it, when no contract relations between the government and the claimant are in question.¹

Allowances will be made for loss and destruction of crops consequent upon violence and depredations inflicted by agents of the government, together with unpunished malefactors.

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

The claim which Silvio Poggioli, for himself and the heirs of his deceased brother, has submitted to this Commission, excels in accuracy and efficiency of proof. The writer supports it warmly, and by way of preamble will cite the opinion of Fiore (*Treatise on Public International Law*, Vol. I, sec. 651), on which he bases his own, regarding the responsibility of the Venezuelan Government toward the claimants. Here are the words of the eminent jurist:

Let us suppose that, having examined the circumstances, it is found that the public officials who by their own act injured the interests of foreigners while operating with a common intent in such a manner as to justify the assumption that they were under the orders of higher authority; or let us imagine that a government has neglected to take timely steps to avert certain acts, or that it has directly or indirectly approved the doings of its officers. In these and all similar instances justice and equity require that the state be held diplomatically responsible therefor, and be obliged to repair the damage.

Before entering into a detailed examination of the claim the Italian Commissioner deems it proper to observe that, in accordance with the views expressed by him in former claims, he holds in this, that the widow, no more than the children of the deceased Poggioli, can be excluded from a share in whatever indemnity may be awarded. To the juridical reasons which he has in this

The fundamental principles affecting the responsibility of the respondent are discussed by Commissioner Little, of the American-Venezuelan Commission of 1890, who held in the de Hammer case (Moore, 2968) that —

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 seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. 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.

In the same case Commissioner Findlay held (Moore, 2969) that —

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 of American-Venezuelan Commission of 1890, p. 486.)

The rule laid down by Bluntschli in *Le Droit International Codifié* (sec. 380) seems in point:

L'état a le droit et le devoir de protéger ses ressortissants à l'étranger par tous les moyens autorisés par le droit international. * * *

(b) Lorsque les mauvais traitements ou dommages subis par un de ses ressortissants ne sont pas directement le fait de l'état étranger, mais que celui-ci n'a rien fait pour s'y opposer.

We may add as follows:

The responsibility of the state results from its neglect or inability to control the conduct of its subjects, or its neglect or inability to punish the offenses and crimes which they commit. (Halleck, *International Law*, Ch. XI, sec. 6, citing Vattel, *Droit des Gens*, liv. 2, ch. 6, secs. 71, 72; Phillimore, *International Law*, Vol. 1, sec. 218; Rutherford's *Institutes*, b. 2, ch. 9, sec. 12; De Felice, *Droit de la Nat.*, tome 2, sec. 15; Burlamaqui, *Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2.

¹ Compare Martini case, *supra*, p. 644.

regard expressed on previous occasions he desires to add arguments based on equity.

Americo Poggioli was, presumably, murdered by one of the men who, as will appear in the sequel, had attempted the life of his brother Silvio, and who were arbitrarily liberated by Gen. Diego Bautista Ferrer. However this may have been, he was the victim of an act committed on Venezuelan soil, and the perpetrators remained unpunished. Under these circumstances the writer finds another reason why the heirs of the victim should not be denied the right to apply to this tribunal for redress. Should the foregoing contention not find acceptance with the honorable umpire, it will certainly not escape his diligent examination of the case that Silvio Poggioli was, before as well as after the death of his brother, the sole manager and responsible agent of the commercial affairs of both. From the contract drawn up between them in March, 1892, it appears, further, that the assets of the firm were, on December 31 of the preceding year, 2,803,524 bolivars, and the liabilities 1,234,729 bolivars, including 72,000 bolivars due Manuela Rosales; that therefore the net balance amounted to 1,568,795 bolivars; that the personal share of Silvio was 501,703 bolivars, the common share 1,067,092 bolivars, and that consequently the total amount of Silvio's interest, 1,035,249 bolivars, constitutes 65.99 per cent of the whole, and even under the most unfavorable estimate he would be entitled to a proportionate share of the indemnity on the basis of this calculation.

Should the honorable Commissioner for Venezuela raise a question of principle and deny the right of the Poggiolis to appeal to this Commission, on the ground that they were not included among the Italian claimants for indemnity for the war of 1892, whose claims were subsequently quieted by the representations of the royal minister, Count Roberto Magliano, to the Venezuelan Government, the undersigned would hasten to reply that in his opinion such an exception should not be sustained, for the reasons set forth in his memorial anent the claim of Constantino Murzi.¹

¹ No opinion was filed by Doctor Zuloaga in this case, and it never reached the umpire. Mr. Agnoli's opinion is as follows:

The honorable Commissioner for Venezuela rejects the above claim on a question of principle — that is, he holds that the claimant has forfeited every right to demand indemnity before this Commission, because his claims go back to and have their origin in the civil war of 1892, after which the Italian Government had settled with the Government of Venezuela on account of other claims arising from the same war.

The Italian Commissioner, without reiterating the reasons given by him on former occasions why, in general, the opinion of his honorable colleague should not be accepted as establishing the forfeiture of the right of Italian citizens to urge their claims before this arbitral tribunal for damages occurring prior to wars of the last five years, observes that this special objection, as regards the claims of 1892, is singularly inconsistent, since various claims of that period, and particularly that of Giuseppe Menda, No. 199, and that of Giuseppe Lasala, No. 6, have been discussed and favorably received.

Doctor Zuloaga's objection seems to be based on the fact that Count Magliano, formerly Italian minister in Caracas, in his private note of August 30, 1894, addressed to the Venezuelan minister of hacienda, referred to a "final settlement of all claims arising out of the revolution of 1892."

The phrase employed in the aforementioned note has led the Commissioner for Venezuela to the conclusion that that settlement of indemnities was general and comprehensive.

Against this conclusion the Italian Commissioner, proceeding from the consideration that the word "surjidas" may not be applied to other claims than those the demand for settlement of which was pending before the Italian diplomatic representation, believes it opportune to call attention to the fact that the last phrase of the letter of the Venezuelan Government, to which the above-mentioned note of Count Magliano was an answer, proves beyond question that reference was made to some, not all, of the claims arising from Crespo's revolution, since by it there was asked the exoneration of Venezuela from every ulterior responsibility toward the Italian Government and toward claimants "for all such claims for indemnity as were by that agreement forever extinguished."

There remained, however, undetermined the rights of those whose claims had not been examined.

In any case this exoneration of Venezuela from all responsibility the Italian Government is not willing to accord, even with regard to the claims then settled, in the name and on account of which it refused, as appears in the letter of Minister Pirrone of December 14, 1894, to make any declaration whatsoever "inasmuch as"

With these premises laid down, he will now proceed to a detailed study of the circumstances and motives of the present claim.

The Poggiolis asked for indemnity for five kinds of damages, to wit:

1. Requisitions of animals and merchandise and destruction of crops and property.

2. Arbitrary closure of the port of Buena Vista.

3. Personal insults, threats, and imprisonments.

4. Forcible separation from their property, and consequent abandonment of their business from daily annoyances; total lack of protection and safety, with resulting economic loss.

5. Judicial and other expenses connected with the preparation of their claim.

A separate examination of these five heads is now in order for the purpose of establishing the amount of indemnity due thereunder.

(a) Requisition of 95 mules, at 520 bolivars each, equal 49,400 bolivars.

It is well known that the price of cattle in the State of Andes is somewhat higher than it is in Caracas. At all events, the witnesses have asserted that the sum mentioned was the value of these mules, and it is well to note that the witnesses summoned by Poggioli to prove the damages suffered by him have been selected from among the best known and most respected persons in that State. Among those whose names appear in the "guistificativo" No. 2, which refers to this requisition and other damages, are Gen. Ramón Rueda, who was governor of Trujillo; Dr. José Antonio Hernandez, a noted physician who is favorably known in Caracas; Col. Juan de la Paz Peña, and Col. Carlo Hernandez, wealthy and esteemed merchants and landowners; Adolfo M. Sanchez, ex-public register and now district judge of Escuque; Luis F. Carrasquero, repeatedly jefe civil and president of the municipal council of said district; Jesús Contreras, highly esteemed merchant and proprietor of the neighborhood, and other respectable persons.

The testimony of such witnesses should be accepted without the slightest hesitation or reserve.

It is true that in the contract with Mr. Ribero (Document I) a part of the mules had been valued at 400 per head in 1890, but the increase in price is easily accounted for when it is understood that the animals were taken at a time when both the Government and the "Legalista" revolution (which culminated in the advent of General Crespo to the Presidency of the Republic) were greatly in need of draft and pack animals, as well as cattle, for their respective armies.

For these reasons it is just that the amount claimed for the mules should be allowed, and for similar reasons the estimate of 200 bolivars per head of cattle should not be deemed exorbitant, although the cattle contracted for by Ribero was in part valued at 150 bolivars per head, the total under this item being 20,000 bolivars.

The sacking of the store at San José de Palmira is proved by the testimony set forth in fascicle 2, both as regards the fact itself and the quantity of the goods

says the letter, "to the understood agreement there had been given the character of a decision by reasons of equity adopted by the junta of public credit within the sphere of its competency."

This note of Pirrone, as well as the others concerning the negotiations in question, is special in its nature and proves once more the official and limited character of those acts by which neither one party nor the other assumes a more extended obligation than that which constitutes the explicit object of the stipulated agreement.

Among the claims then examined that of Constantino Murzi did not appear, nor did those of Menda and Lasala, above referred to, and others now pending, and the first-named, as well as any other dating from that period, would be wrongfully excluded by this Commission on the exception so tardily raised by the Commissioner for Venezuela.

On questions of fact in this claim it does not seem probable that disagreement may arise between the Commissioners. They are nevertheless respectfully submitted to the decision of the honorable umpire.

taken. The importance of that business house is shown by documents contained in fascicle II — that is, by the contracts with Mr. Barone, administrator of the same, and by the relative accounts and invoices. It is consequently equitable to concede an indemnity of 32,000 bolivars for this item.

The requisition of merchandise made upon the highway between Arapuez and Monte Carmelo is established by the declarations of Martinez and Nieto. The testimony of Martinez includes in general all the facts referred to in that document. The other is apparently restricted as to quantity, but taken as a whole the testimony is to the effect that all the merchandise en route was levied upon, and Silvio Poggioli declares most positively and is willing to swear that none of those goods ever reached him. Therefore, while giving due respect to any appraisalment the honorable umpire may see fit to make of this loss the Italian Commissioner holds that an indemnity of 4,800 bolivars should be allowed therefor.

The damages caused by the Government's agents in burnings at the port of Buena Vista, and by the destruction of five bridges on the road leading to said port, are estimated at 24,000 bolivars (see fascicle 2), which should be granted without prejudice to the indemnity for other damages following as the immediate and necessary consequence of said destruction and of the arbitrary closing of the port, which will be referred to further on.

We should now consider a series of damages suffered by the Poggiolis at the hands of four individuals, namely, Rudecindo Hernandez, Carlos Solarte, Rafael M. Trejo, and Faustino Suarez, who wounded Silvio Poggioli. While these persons were on trial they were arbitrarily liberated by Gen. D. B. Ferrer. The records in the case were spirited away. Notwithstanding the accusations of the claimants and orders received from the central Government at Caracas, which, however, took no steps to insure their execution, as will be more fully explained in the course of this paper, the authorities of Monte Carmelo, and generally those of the State, not only allowed them to remain undisturbed, but actually used them as instruments in persecuting the Poggiolis. The negligence and malice of the authorities toward these latter, as clearly shown by all the documents exhibited to us, had one of its clearest manifestations in the passive attitude toward and encouragement of these four malefactors, and constitutes one phase in the system of persecutions which has led to the ruin of the Poggiolis.

Wherefore the Italian Commissioner insists that there was an implied responsibility on the part of the Government in these events, even if only a part of them were executed by its agents, because all were by them at least suggested or tolerated.

Let us proceed to the specification of these damages:

1. Burning of house and stores at St. Rafael (fascicle 19, question 2), valued at 4,000 bolivars.
2. Renewed destruction by fire of the same buildings (fascicle 19, question 3), valued at 4,875 bolivars.
3. Burning of 10 hectares of sugar cane ready for the mill (it would scarcely have burned green; fascicle 19, question 4). The sum of 1,600 bolivars claimed for this loss represents the cost of planting and cultivating the cane, which would have produced for ten years or more with ordinary attention.
4. Loss of sugar from the cane for the first year, 1893 (fascicle 19, question 3), 12,000 bolivars.
5. Loss, by destruction, of coffee and banana plantations on the St. Emigdio property (fascicle 19, question 6), which occasioned a damage estimated at 12,800 bolivars.

6. Destruction of a coffee-cleaning mill on the same property (fascicle 19, question 6), 500 bolivars.

7. Destruction of 5,000 banana trees on the Miraflores property (fascicle 19, question 7), 800 bolivars.

8. Burning of a house, by a Government official, on the Pescado property (fascicle 19, question 8), 1,000 bolivars.

9. Destruction, by Government officials, of two coffee-cleaning mills on same property (fascicle 19, question 9), 7,200 bolivars.

10. Killing and maiming of animals on San Emigdio place (fascicle 19, question 10), 1,728 bolivars.

The total of clearly established damages, which have been moderately appraised by Messrs. Poggioli, therefore amounts to 176,703 bolivars, and this loss, occasioned either by the direct acts of the authorities or by the connivance or apathy of the same, should be indemnified.

Let us now consider the damages coming under item 2, referred to in the beginning of this opinion, i.e., the unwarranted closure of the port of Buena Vista, a measure easily understood and accounted for by the animosity displayed against the brothers Poggioli, as seen in documents contained in fascicle 35.

The authorities attempted to attenuate the arbitrariness of this measure by declaring the port closed through reasons of public order and to prevent the revolutionists from procuring arms and munitions of war. But that this was a mere pretext is demonstrated by the fact that at the same time the port of La Dificultad, 1,200 meters away, was permitted to remain open, though just as liable to be used for contraband purposes as the other.

At No. 13 of fascicle 2 it is shown that during the first year of the closure the damages resulting therefrom to the brothers amounted to 24,000 bolivars, that port serving not only their purposes, but being used likewise by a number of importers and exporters of Monte Carmelo and surrounding neighborhood, for the exchange of produce with Maracaibo, by paying the appropriate duties. It is true that some three months after the closure the port was reopened, but this reparation was too tardy to be of avail so far as the Poggioli interests were concerned, either because the port buildings and bridges leading thereto had been destroyed, or because the Poggiolis could not, menaced and persecuted as they had been, return and restore these things to working order with neither money nor credit. And inasmuch as their enforced absence from Monte Carmelo lasted three years, it seems to the Italian Commissioner that the indemnity under this head should be at the rate of 24,000 bolivars per year, or 72,000 bolivars.

We come now to the third class of damages. From all the papers in the case it appears that General Ferrer instituted against the claimants an absurd suit for alleged introduction of arms for the revolutionists. Before the beginning of the suit they were thrown into prison, having been taken from Monte Carmelo to Valera, where they remained from April 29 to June 9, 1892, just at the time when coffee was to be gathered. Both brothers were subsequently again imprisoned, Silvio for fifteen days from September 26 of the same year and Americo for five days in January, 1893.

All these details, as well as the declaration of the superior court of Trujillo establishing the innocence of the brothers, appear from the documents of the claim. In fascicle 15 the court of first instance, referring to the imprisonment and trial of the claimants, acknowledges as "fully demonstrated the injustice and political passion of the usurpers of the public powers (and these could have been none others than the magistrates and agents of the legal Government) against the said Italian subjects, the Poggioli brothers."

The persecutions of the claimants were so varied and numerous and so long

continued that we can not but regard them as proving the existence of a plot well organized and of long standing, prosecuted with a most diabolical malignity and with the connivance of the Government, which thus failed in its principal duties.

The undersigned therefore concludes that the indemnity of 100,000 bolivars asked on account of illegal and arbitrary imprisonments, threats, etc., given the position of the claimants and the importance of their commercial affairs, can not be considered excessive.

The fourth class of losses is the most consequential; from it has come, as an immediate and direct consequence, the utter ruin of the claimants.

The proofs of daily prosecutions suffered by them either from public officials or with their connivance, appear clearly and indisputably from the papers in the case.

In 1891 Silvio was seriously wounded by Rudecindo Hernandez, in complicity with Carlos Solarte, Rafael María Trejo, and Faustino Suares, and remains a cripple for life.

The perpetrators were put on trial, and when it appeared they would be convicted they were arbitrarily discharged by General Ferrer, while the records of the case were caused to disappear. Afterwards they went about Monte Carmelo for years, terrorizing the inhabitants or inciting them against the Poggiolis, burning and destroying the property of the latter, while the authorities remained impassive, notwithstanding the denunciations of the dependents of the claimants, and the orders from the minister of the interior, Felice Azevedo, at Caracas, dated July 27, 1893, to punish the malefactors, and institute a trial for the disappearance of the records. This order remained a dead letter, and the central Government took no further heed of the matter. In fact, the proceedings were never reversed, and the four criminals are living at liberty in the neighborhood of Mérida.

In 1899 Americo was barbarously murdered, and among the suspects of this crime figures Carlos Solarte.

In 1892 the claimants were subjected to an odious trial, from which they were freed only in 1893, after having been harshly arrested and thrown into prison for a long time; 95 mules, used by them in their business, were requisitioned, as were likewise 100 steers; they were robbed of merchandise at San José de Palmira and on the road to Arapuey from Monte Carmelo; their houses, etc., at the port of Buena Vista, another essential element of their business, were destroyed by fire. The bridges leading to the port were ruined, and the port closed, though afterwards reopened when it had become impossible for the Poggiolis to use it.

Twice were the stores at St. Rafael burned, and plantations of cane in the same locality ravaged, as were plantations of coffee and bananas at San Emigdio and Miraflores. The coffee-cleaning mills at San Emigdio, Santa María, and Pezcado, and at the latter place another house, shared the same fate, with accompanying inundation.

The authorities either perpetrated these abuses or tolerated them, and even incited not only the banditti, but also the employees of the firm to commit outrages of all sorts on the property, and to refuse the payment of dues and rents, creating a system of most unjust war and persecutions and a situation profoundly immoral and subversive of order, as reported by the minister of the interior, Dr. Gen. José Ramón Nuñez at the session of Congress of March 28, 1895.

In 1892 Silvio Poggioli is again arrested, and Americo twice, in 1893 and 1894.

In 1894 they are again brought to trial, but the reason assigned was so absurd

and unjust that General Fernandez ordered the suspension of the trial, thereby committing an act contrary to law but according to justice.

The Poggoli brothers, threatened, deprived of every safeguard for themselves and families, for their property, were thus obliged to abandon the seat of their business, while their dependents, seeing them thus driven and persecuted, became emboldened to refuse obedience and payment of their just dues and considered as common property all things belonging to the masters, since they had reason to believe these latter would never return to claim. The few dependents who had remained faithful were in their turn persecuted by the Government for no other reason.

In fascicle 16 the honorable umpire will find, among other things, the sworn statement of Gen. G. B. Araujo, a man whose integrity is recognized throughout Venezuela, from which statement it appears that the object of General Ferrer, the author or instigator of the persecutions showered upon the Poggolis, was the possession of their property. It is clear that to carry out this scheme he had to resort to all kinds of iniquitous measures, some of which it is impossible to specifically prove.

The credit for which the claimants had labored and upon which they had counted was and still remains utterly lost.

In January, 1894, Americo attempts to return to Monte Carmelo, in order to resume the management of his affairs, but is arrested. Silvio betakes himself to Palmira the same year, but being again threatened, gathers together a few faithful dependents and tries to flee from an ambushade in which he is fired upon and his life attempted, and this with the connivance of the authorities.

By a letter of February 4, 1894, the president of the State of Los Andes (see fascicle 18) acknowledges that the Messrs. Poggoli, by reason of the persecutions to which they are exposed, are unable to establish themselves in the parish of Monte Carmelo, and in a letter of February 13, 1894, Gen. Antonio María Rincón, chief of the district of Escuque, states to the jefe civil of Monte Carmelo that when Americo Poggoli returned on two occasions to said locality to look after the interests of the firm and ascertain what measures had been taken against the four bandits above named, he was arrested, and testifies that the denunciations of Poggoli were well founded.

Finally, by letter of November 5, 1894, that appears in fascicle 21, Gen. Luis F. Carrasquero, jefe civil at that time of the district of Escuque, acknowledges and testifies to the long series of vexations and persecutions suffered by the claimants, and offers them the necessary guaranties to enable them to return to their homes. The same officer, by letter of the following day, informs the jefe civil of Monte Carmelo that the Poggolis will return to the direction of their business through guaranties finally obtained from the president of the state, and gives orders that there be no repetition of the occurrence which took place in October of that same year, to wit, the requisitioning of a train of eight mules by an armed guard of the Government.

Fascicle 36 contains the proof furnished by the Venezuelan minister of the interior that up to the end of 1895, though for years the "Legalista" revolution had been triumphant, there was no security in the state for persons or property, and for this condition of affairs the Government was and is responsible.

This fully accounts for the Poggolis being compelled to leave their several properties, their interests, and their business up to the end of the year 1894. At that time their persecutions finally ceased, after having lasted since 1891, and having been most severe in 1892, 1893, and 1894.

What has been the direct and necessary consequence of all this, if not the entire ruin of the family?

The Poggoli brothers had, as appears from the partnership contract of

March 4, 1892, at that time a liability of 1,162,729 bolivars, exclusive of the 72,000 bolivars which they owed to Manuela Rosales de Poggioli, wife of Silvio (see fascicle 7). It is shown at fascicle 2 that they were paying an interest of between 12 and 15 per cent per year—that is, about 157,000 bolivars each year.

During the three years of the abandonment of their factories they lost, in the first, 6,000 quintals of coffee, and in the other two 4,000 quintals each, and these latter do not represent more than half the average production of their haciendas in Monte Carmelo. This is an extremely moderate estimate, since the actual loss exceeds half the average yield per year, the price of which then was 72 bolivars per quintal, as shown in fascicles 2, 28, and 32. The total actual loss is stated at 1,008,000 bolivars.

The burning of the port of Buena Vista and the compulsory removal of the Poggiolis was injurious to them from another point of view, in that it prevented the opportune shipment of various quantities of coffee stored in Monte Carmelo, in San José de Palmira, and in San Cristóbal de Piñango, and the merchandise was spoiled in consequence. The loss under this item is estimated at 78,400 bolivars.

The plantations having suffered an almost total abandonment for four years (since neither the Poggiolis nor anyone else, whether native or foreigner would have dared to care for them, as by so doing they would have incurred persecution from the authorities of Monte Carmelo), became, from fruitful fields, a wilderness of noxious weeds, and it seems just that such an injury should be compensated. For this item the sum of 100,000 bolivars is claimed.

The greatest of all their disasters, however, was the inevitable loss of their credit as the direct consequence of the above-named facts. In their character of industrious, intelligent, and wealthy inhabitants, they enjoyed, before the beginning of the persecutions mentioned, a credit of considerable proportions, but subsequent to these they were unable to meet their liabilities, either principal or interest, from 1892 to 1894. Those who had reposed in them a well-merited faith now seeing them become the objects of daily attacks, hindered in different ways from exercising their industries and enjoying the fruits of their labors and fearing that this odious condition would be prolonged indefinitely, and result finally in the loss of every opportunity to recover their capital, closed their coffers to the claimants, and within only three months of the time when they were enabled to resume operations, compelled them to give up everything, their property passing into the hands of an administration which controls it to this day for the benefit of the creditors.

Had the Poggiolis on the contrary been permitted to work their property during those three years when coffee was selling in Monte Carmelo at 72 bolivars per quintal, they would have been able to meet their liabilities, instead of which they have to-day only a property encumbered by the same debts which burdened it in 1892, and by interest at 5 per cent which it has not been possible to pay, because coffee has fallen as low as 20 bolivars per quintal at Monte Carmelo, while the cost of production is 15 bolivars per quintal.

It is not urged that the ruin of the claimants is due to this fall in the price of coffee. They would have borne this without great difficulty had it not been that their property was mortgaged to the extent of 1,200,000 bolivars, undiminished at the beginning of 1895, and increased by the interest due on an additional sum of 150,000 for the years 1892, 1893 and 1894, solely because during said three years they could not harvest their coffee, which was then bringing remunerative prices, as already mentioned.

The Poggiolis are not as yet bankrupt because the contract for the management of their property was made for ten years from 1895 when the coffee was

still fairly remunerative, but at the close of this contract, unless the indemnity awarded them by the umpire is such as to enable them to meet their obligations, they will be utterly ruined.

These exemplary settlers, who, by their energy, opened a large territory to cultivation, established a port, canalized a stream, erected mills, populated a semi-deserted region, are, by the hostility of the Government and its agents, to whom patriotism, common sense, and justice should have suggested the opposite course, driven to the verge of beggary.

The Government is clearly responsible for their financial disaster, brought about by the loss of credit (that most cherished possession of the merchant), the fatal consequences of which have been summed up in the foregoing, and for which they claim an indemnity of 1,000,000 bolivars. This sum does not appear excessive when it is considered that it includes the stipend of 144,000 bolivars for the managers of the Poggioli estate for a period of ten years, and which they were compelled to pay on account of the persecutions inflicted upon them by the agents of the Government.

The liabilities of the claimants, which would have been discharged in 1892, 1893, and 1894, had they been permitted in that period of prosperity to manage their property unmolestedly, amounted, as has been said, to nearly 1,200,000 francs in 1895. With the direct damages suffered by them should be included the interest on the above to date; but the claimants intend to reduce their demand under this item to interest at 5 per cent on 969,015, as appears in the contract of May 7, 1895 (see fascicle 27), the other creditors having accepted partial settlements. It is certain that this accumulated interest, which constitutes one of the causes of the impending ruin of the Poggiolis, would never have been incurred had they been allowed to enjoy the freedom and personal guaranties in the management of their affairs to which they were entitled. Said interest, calculated at 5 per cent as per the contract of 1895, and including all of 1894, would amount to 436,056 bolivars, and this special indemnity is considered due them as well as the others, and for similar reasons.

The last category of damages suffered by the Poggiolis relates to the expenses of the two political trials to which they were subjected and for the preparation and prosecution of their claim, comprising the cost of Silvio Poggioli's residence in Caracas on two occasions for a considerable period; one from 1893 to 1894, and another at a later period, and also the costs of contract with creditors; in all, estimated at 52,313 bolivars, which is deemed within reason.

The claim of the Poggiolis is equitable from every point of view, and even in the determination of the responsibility of the Government in the events of which they were the sufferers, they have followed rules of moderation and reason. In fact, they make no claim for the wounding of the one and the assassination of the other, notwithstanding these may be considered as the first and last links in the chain of violences and persecutions mentioned in this paper. The responsibility for other maltreatments appears sufficiently established. It needs but to examine the odious animosity displayed by General Ferrer in his dealings with the unfortunate Poggiolis, in which he took the initiative and set the sad example of the vexations suffered by them.

The honorable umpire should consider the autograph letter of that officer in fascicle 37, in which he orders the destruction of 2,000 coffee trees belonging to one Felice Terán, solely because he had refused the General a loan, rendered impossible by reason of serious illness. See also a letter by him addressed to the jefe civil y militar of Monte Carmelo, of April 28, 1892, in which he orders the capture of the Poggiolis, and the seizure of all their mules and cattle without regard to any jurisdiction or respect for any law but that of his own will, justifying his odious procedure by referring to the refusal of the Poggiolis in the

exercise of their right as foreigners to furnish 40 mules on an arbitrary requisition of that officer, as a proof that they were themselves revolutionists and enemies of the Government. In that letter reference is made to verbal instructions mysteriously transmitted to General Briceño. What these instructions were, subsequent events adequately demonstrate.

General Ferrer was at that time invested by the Government with supreme authority in the State of Los Andes, in Barquisimeto and Zulia. If this was the conduct of one who should have been the best guarantee of the rights and liberty of the inhabitants what could logically be expected of the subordinate authorities?

It appears, besides, from documents in fascicle 35, that Generals Vázquez and Briceño, who were filling important positions in the State of Los Andes at the time of Ferrer's administration, were likewise enemies of the Poggioli brothers.

Is it admissible that he who is intrusted with the delicate and important duties of a public functionary should suffer his actions to be controlled by his sympathies or animosities?

This sufficiently explains how the persecutions and arbitrary treatment which precipitated the claimants from the height of their commercial prosperity to the condition of actual ruin lasted so long and took so many divers forms.

The "giustificativo" and counterproof submitted by the Government to this Commission on March 12, 1904, can not overcome the full and complete documentation submitted by the claimants. As a matter of fact, it was prepared in the absence of Silvio Poggioli and on the basis of declarations of persons notoriously inimical to the claimant family. The facts therein alleged are effectively contradicted by the memorial presented to the royal Italian legation by the claimant on the 22d of April, 1904.

The honorable Venezuelan Commissioner alleges that many of the damages suffered by them were the outcome of private feuds engendered by their conduct toward certain of their creditors, whose property they had seized in satisfaction of debts under harsh foreclosures, and in support of this opinion he cites the case of Rudecindo Hernandez, who wounded Silvio Poggioli and who lost five haciendas by the latter seizing them in satisfaction for a few loads of coffee.

Upon an examination of the circumstances attending this affair it appears that Hernandez, in 1885, was indebted to the Poggiolis for 154 loads of coffee to the value of 15,800 bolivars, plus 11,367.78 bolivars in money. They awaited in vain for the settlement of the account to October, 1890, and on the 23d of that month an agreement was drawn up by mutual accord and recorded the 1st of December of the same year, by which 23,280 bolivars was acknowledged as due the Poggiolis, who granted the debtor delays in the payment of said amount in coffee and money.

The first payment fell due in February, 1891, with the condition that if payment was not then made the creditors would be authorized to seize the property held as security therefor. Hernandez did not meet his obligation in February, and on the 28th of May he fired upon and wounded Silvio Poggioli at night, in the plaza of Monte Carmelo, perhaps as a means of avoiding the fulfillment of the clauses of his contract. After this, Poggioli had no further hope of securing payment of the debt, and could not in reason be expected to show friendliness or regard toward Hernandez. In October of that year he obtained judgment from competent authority, and by a decree which explains and justifies the attitude then taken by the claimant secured possession of the property of the debtor.

Whatever of odiousness there was in this transaction can not certainly be

attributed to Poggioli, who used his right only after daily proof of forbearance and after a delay of years in its exercise. It will be noted further that at this time Hernandez was in jail for the wounding of Poggioli, and but for the arbitrary intervention of Ferrer would probably have remained there some years, leaving in abandonment the property held as security for the payment of his debts.

In conclusion, the Italian Commissioner asks that the present claim be recognized in the total sum of 3,023,472 bolivars, which, unless the undersigned has erred in his calculations, is the amount asked by the claimants, of which sum, Silvio Poggioli's share is 1,955,033 bolivars, or 65.99 per cent of the whole, while the share of the heirs of Americo Poggioli is 1,028,439 bolivars. Should the honorable umpire not recognize the latter as entitled to claim before this Commission, it is asked that his decision against them be without prejudice to their rights in the manner employed by him in former cases.

ZULOAGA, Commissioner :

Silvio and Americo Poggioli, Italians, domiciled in Monte Carmelo, Escuque District, State of Los Andes, were associated under the firm name of Poggioli Hermanos from 1885 to 1895, and dealt in coffee and cultivated it, whereby they constantly acquired new properties. Poggioli Hermanos were very much disliked in the neighborhood, so much so that on May 28, 1891, an attempt was made to kill Silvio, who was wounded by a shot fired from ambush. The deed was charged against Rudecindo Hernandez, Rafael Trejo, Carlos Solarte, and Faustino Sanches (the first of those named had sold a plantation to the Poggiolis). Process was instituted against these persons, but they escaped from the jail of Trujillo during a revolution; no action was taken and the suit was dropped. In 1892 a terrific civil war broke out in Venezuela, and the State of Los Andes, together with the government there, supported it. The Government at Caracas sent Gen. D. B. Ferrer against the government of Los Andes. When he arrived there the Poggiolis were denounced to him as revolutionists and the possessors of firearms, and Ferrer having demanded of them a certain number of animals and cattle for the army they refused to deliver them. Ferrer took the animals and cattle and put the Poggiolis in prison, ordering that they be tried, as appears from the order of April 28, addressed to the civil and military chief of Monte Carmelo, which reads as follows:

The refusal of the Poggiolis to deliver over the 40 mules which I have demanded of them, and other reasons which you will verify with General Briceño in a judicial manner, gives rise to the presumption that they are revolutionists and enemies of the National Government, and to this end, and in order to prove them such, you shall follow the verbal instructions which I have given Briceño, who will bear the original of what I communicate.

The Poggiolis were released by Ferrer himself, but later, on June 6 of the same year, the judge of the first instance ordered that they be taken prisoners in order that the suit pending against them might proceed; and they were imprisoned on September 26 of said year, and sent to Valera, but later set at liberty. The Caracas Government, in whose service Ferrer was, having been defeated and the revolution having triumphed in Los Andes, the tribunal constituted thereby, on February 7, 1893, dismissed the suit against the Poggiolis, declaring that in said action could be discerned the political passion of the partisans of the Government which Ferrer served. This judgment was confirmed by the court.

The Poggiolis having returned to their home, they were again antagonized by their numerous private enemies. Private individuals burned down small properties of the Poggiolis, they cut down some plantations of bananas (5,000

trees), they killed a saddle horse and 3 head of cattle, and at the time when Silvio was going to take charge of certain plantations, certain unknown persons discharged firearms on him from ambush. Some witnesses state that public opinion attributed it to persons who were delinquent with respect to payment of mortgages on certain coffee plantations which did not belong to the Poggiolis. In a letter from Poggioli to Ferrer it is said that Garceliano Usma and Santos Rivero had taken possession of the real estate of which in due form they had transferred title to him.

In the year 1891 the affairs of the Poggiolis prospered, but they had made free use of credit and owed more than 1,000,000 bolivars, and they paid thereon an interest of from 1 to $1\frac{1}{4}$ per cent monthly. The Poggiolis from 1892 had found themselves in commercial difficulties, and this state grew worse until in 1895 they were forced to deliver their property to their creditors. The Poggiolis ascribe this situation solely to the persecutions suffered. They say that in 1892 during the days they were imprisoned in May and June they lost three-fourths of their crops which they could not harvest; that they lost as estimated 4,500 quintals of coffee in the Escuque District in Trujillo and 750 loads in the Miranda District, in Mérida; that they suffered other losses because coastwise trade was forbidden in the port of Buena Vista, on Lake Maracaibo, etc. It appears, however, that the loss of the coffee crop, if there was any, did not fall alone on the Poggiolis, since L. F. Carrasquero says, in answer to the eighth interrogatory (record 2, p. 9), that the crop was lost *not only by the Poggiolis but by all the farmers of that district*. The coffee crops (in so far as they were not gathered, but according to the evidence submitted at that time — the time of the imprisonment — they were already harvested), were lost, no doubt because not only the government of the State which was in the revolution but also the general in campaign from Caracas recruited soldiers, and men who were not in the army, fled and hid themselves, workmen therefore being scarce. The imprisonment of the Poggiolis could not materially influence the harvest of the coffee. The plantations, no doubt, had their foremen or overseers and they could carry it out.

The Poggiolis, in their complaint to the minister of Italy, charge a large portion of these persecutions to the parish authorities who were their personal enemies, "who owned real estate and commercial houses in the district where the Poggiolis were residing and to whom their absence was very advantageous." Witnesses testify that the authorities of the town provoked uprisings against the Poggiolis, in order that they should not deal with the latter and should sell to Cheuco Brothers, Terán & Moreno, etc. The Poggiolis appear to have complained to the higher authorities and the latter took steps, in October, 1894, against these acts counteracting the measures of the local authorities. The civil chief of the district, L. F. Carrasquero, gave orders to the local authorities and in a letter of November 5, 1894, said to the Poggiolis: "Considering the great number of unjust damages, injuries, and persecutions that had already occurred, principally because of an avaricious spirit of mercantile rivalry, taking advantage of the political advantages in order the better to injure their interests, etc.," it was pleasing to him to offer, in the name of the president of the State, the amplest protection. Said Carrasquero, as appears from the evidence, was a great friend of the Poggiolis and is still their attorney in many matters. Some years later (the date does not appear precisely) Americo Poggioli was assassinated by an unknown person, and Silvio charges his death to his long-standing private enemies.

The cause of these deep hatreds toward the Poggiolis and of the *private* violences which followed upon them, is easily discerned in the documents submitted in support of the case. The Poggiolis had rapidly become rich, and

had obtained a large part of the coffee plantations in the neighborhood where they had located themselves, notwithstanding that they labored under a heavy indebtedness, for which they paid dearly, since they paid interest at from 1 to 1½ per cent per month. Under these circumstances it is not natural that they should prosper greatly in their farming business, which does not in itself make large returns; but the Poggiolis were very overbearing and oppressive to the small farmers of the locality, an ignorant and candid people, with whom they entered into extremely advantageous contracts, which allowed them to acquire these properties at an extremely low price.

The contract for sale with the right of repurchase is very common in Venezuela for the purpose of borrowing money as a loan, with security, and although the purchaser may retain possession of the property, if after the term of repurchase has elapsed the vendor does not repurchase it, this being regarded as usurious is rarely done. Therefore the buyer gives repeated extensions to the vendor or debtor. The Poggiolis did not act thus, and conforming with the original clause of limitation of time for repurchase, they imposed new and additional obligations upon the debtor. In the titles accompanied by the claim for destruction, incendiarism and destruction, it is seen in that passed by Rudecindo Hernandez that the latter was paying to the Poggiolis 25 loads of coffee in annual installments, of which the first 25 loads of coffee had to be delivered in February, 1891. Because this first 25 loads of coffee were not delivered the Poggiolis took possession of the property called "San Rafael," planted with sugar cane, together with the sugar mill, buildings, improvements, and pastures; of the coffee property "San Emigdio," of the ranch "Miraflones," planted with bananas; of another plantation of coffee and small fruits, the house and mill; and of another coffee plantation, a dwelling house, and plowed field.

The Poggiolis obtained all this from Rudecindo Hernandez under enforced execution because he had not paid them 25 loads of coffee. Hernandez believed himself wrongfully dispossessed.

Likewise the deeds of sale with the privilege of repurchase are found from Rafael Rivera to his ranch "Santa María" planted in coffee and small fruit with a water-power mill for the treatment of coffee, a tile oven, etc. The price of the conditional sale was 5,506 bolivars to be paid in March, 1888, and thirteen and one-half loads of coffee; and in the same month of other years following the same amount (neither the price nor the quality of coffee to be delivered are fixed). The Poggiolis took possession of the estate in 1887 for default in payment of *part* of the first installment — about 400 bolivars. There is also in evidence the deed by virtue of which Francisco Antonio Gonzales sold the Poggiolis with the privilege of repurchase his plantation of coffee and bananas, dwelling house, grinding mill for coffee, etc., for 7,840 bolivars. This amount Gonzales was to return to them by delivering 20 loads of coffee each year. The contract was executed in 1891. In 1892 Gonzales did not pay the first installment and the Poggiolis took the ranch. These were the sort of negotiations which the Poggiolis were carrying on in Monte Carmelo, as appears from the few deeds which have been produced. These plantations were, as is said, cut down or burned by unknown parties. It is not difficult to imagine the motives.

The facts which give rise to the Poggioli claim are as follows: First. Wrongful imprisonment by Ferrer in 1892, and subsequently the process which he instituted against them. Second. Indirect damages caused by this imprisonment, such as the loss of crops and loss of credit. Third. Direct damages for the confiscation by General Ferrer of 95 mules and 100 head of cattle and the confiscation of merchandise in the village of Palmira. Fourth. Indirect damages because of the closing of the coastwise port of Buena Vista by order of the civil and military chief of the State of Trujillo, whereby they believe they

suffered in their credit. Fifth. Damages for local antagonism after 1892 until 1895.

First. The imprisonment which Ferrer ordered is justified by the denunciation which the Poggiolis themselves declare their enemies made to said general, of being enemies of the government of Caracas, a denunciation which was corroborated by the refusal to deliver him mules. Ferrer immediately compelled the proper trial to be instituted, and the subsequent imprisonment of the Poggiolis by virtue of the decree of the judge until the action was discontinued is perfectly lawful and can not give rise to any claim.

Second. The indirect damages which the Poggiolis may have suffered by reason of the imprisonment, even in case they were proved, could not be recovered, in the first place, because the imprisonment was justified, and, in the second place, because the Commission, in accordance with the fixed rule always followed by the Commissioners and umpire, does not allow indirect damages (see case of Giacopini decided by the umpire, p. 765), and in the matter of loss of crops in other commissions the point has been decided against the claimants. It is not certain, moreover, that the losses of the Poggiolis were caused by their imprisonment but by the misfortunes which in general wars bring, such as the scarcity of workmen, the difficulty of transportation, limitation of credit, etc.

Third. It appears that the Poggiolis suffered losses because General Ferrer took from them 95 mules, valued at 49,400 bolivars, and 100 head of cattle, valued at 20,000 bolivars; because of merchandise taken by the forces of General Ferrer at San José de Palmira, about 32,000. The half of these three amounts, or say 50,700 bolivars, belong to Silvio Poggioli, and I agree that it is owed by the Government of Venezuela. The other half belongs to the widow and son of Americo Poggioli, who are Venezuelans, and it can not be awarded by this Commission.

Fourth. The indirect damages claimed because the Government closed the port of Buena Vista. In the first place, it is not true that they exist, since the witnesses attribute the damages, not to the closing of the port, but especially to the lack of means of transportation; but even supposing that they might exist, they would not be recoverable, because beyond all doubt it is the right of the authorities to close a way of communication because it believed it expedient for military operations.

Fifth. Damages because of local antagonism from 1892 to 1895. The acts charged to the local authorities are not substantiated. The burning and devastation of some properties, which are the same ones that the Poggiolis so cruelly wrested from Rudecindo Hernandez, appear to be charged by the witnesses to this latter individual and to others who had escaped from prison and had succeeded in freeing themselves from a voluminous process which the judge of the first instance of Trujillo had instituted against them. No concrete determined damage can be found or ascertained. The bases of this item of the claim are the same as in the case of Victor de Zeo¹ and ought therefore to be disallowed for the same reasons as those expressed by the honorable umpire.

The coffee crop, even in the cold regions, is not gathered after January.

The instrument of 1891, in which the association of the Poggiolis appears, is not executed before the commercial judge; nevertheless if it be examined it will be seen that the real estate was not large.

The Poggioli claim amounts, for losses of the crops of certain plantations and other agreements of a temporary nature, to more than double the whole of their

¹ See *supra*, p. 526.

capital. Naturally this capital is exaggerated, and the damages are not asked except for the loss of the *products* of the capital.

The true cause of the losses of the Poggiolis in their interests is to be found in their immense debts, on which they were paying high interest, in the general depression in the time of war, and in the falling of the price of coffee during all these years.

This claim was presented to the Italian legation in 1892, and the claim ended, since the legation did not take any account of it, and therefore it is not admissible.

In the case of Giacomini ¹ the honorable umpire disallowed indirect damages very similar to those of the Poggiolis.

I maintain that the loss of the Poggiolis is not a direct damage of the Government.

RALSTON, *Umpire*:

The above-entitled claim for 3,419,223.28 bolivars is referred to the umpire on difference of opinion between the honorable Commissioners for Italy and Venezuela.

Silvio and Americo Poggioli, natives and subjects of Italy, were domiciled in Venezuela long prior to 1892, the period when the larger share of the losses for which claim is made, was experienced. They had been in partnership for many years in the cultivation and sale of agricultural products, being, besides, the owners of considerable mercantile establishments at several points.

In the spring of 1892 the Legalista revolution broke out in the State of Los Andes, and early in its career, on the 26th of April, 1892, General Ferrer, who was the governmental chief in charge of the headquarters at Valera, demanded from the brothers a certain number of mules, which were not furnished, Americo insisting that they were no longer the property of the Poggiolis, but by contract belonged to another firm. He was given three days in which to produce them, at the end of which time, the mules not appearing and the Poggiolis being in Monte Carmelo, about 10 leagues away, some 85 soldiers were sent to that point, and they were put under arrest, retained there for a few days and afterwards transported elsewhere, remaining prisoners for forty-two days, when they were set at liberty.

About the time of their arrest a charge was instituted against them, at the instigation of the highest military officials, of having imported arms and ammunition intended for the use of the revolutionists, and witnesses were, according to the testimony, by subordination, threats, and promises, made to appear to sustain it. This charge, however, after being fully investigated by the court of first instance, was found to be without foundation, both by that court and its superior court.

About the time of the imprisonment of the Poggiolis there were taken from them 95 mules and 100 cattle, of the entire value of 69,400 bolivars.

After the release of the Poggiolis they went to Mendoza to recover their health, which had been injured by imprisonment, but before they were completely restored Silvio was again, in the following month of September, arrested, being kept in confinement this time some fifteen days, when he was released.

The arrest of the Poggiolis was the signal for the destruction of their extensive properties, since we find that by government authorities their sugar mill and house at San Rafael were at once destroyed, with a loss of 4,000 bolivars. Being reconstructed, they were again burned and robberies committed, the

¹ *Supra*, p. 594.

additional loss being 4,875 bolivars. Heavy losses at San Antonio, San Rafael, San Emigdio, Los Ranchos, and Miraflores were attributed to an understanding between the criminals hereinafter referred to and the authorities, whereby was established a plan with fire and machete to devastate the properties. Ten hectares of sugar cane were destroyed, which, had it been harvested, would have yielded 12,000 bolivars. At San Emigdio there were destroyed coffee and a coffee mill of a total value of 6,900 bolivars. At Miraflores were destroyed banana trees, capable of producing to the value of 800 bolivars. At El Pescado a house worth 1,000 bolivars was burned by Juan Torres, agent of the government and commissary of the Caserio Cristóbal. At Santa María and El Pescado coffee mills worked by water, and worth 7,200 bolivars, were destroyed by agents of the government. When the employees of the Poggioli brothers complained to the authorities of the parish, some were recruited in the army and others expelled. At Emigdio 3 cattle were killed and a horse injured, at a total loss of 1,728 bolivars. The authorities at Monte Carmelo took and destroyed property to the value of 48,500 bolivars.

It is further stated circumstantially that high government officials convoked the agents and debtors of the Poggiolis, threatening them with all sorts of injuries unless they should give up their management of the properties of the brothers and refuse to pay their debts to them, and in many cases those who continued their friendship were finally driven off by violence. As incidental to the dispersal of their agents, and their own enforced absence, the Poggiolis claim to have lost, but without giving satisfactory details, 100,000 bolivars through neglect of their properties.

While the Poggiolis were prisoners, they had at Monte Carmelo 600 loads of coffee ready for shipment; at San José de Palmira 725 loads, and at San Cristóbal de Piñango 250 cargoes, but the port of Buena Vista was closed and exportation there and at the port of La Dificultad prevented, with a consequent loss of 24,000 bolivars.

Packages of merchandise on the road from Arapuey to Monte Carmelo, valued at 4,800 bolivars, were taken by the government troops.

The agents of the civil government, under General Vásques, burned the bodega at Buena Vista and other houses; the total loss of materials and labor at that point amounting to 24,000 bolivars.

The mercantile establishment of the brothers at San José de Palmira, containing a large quantity of merchandise, was completely sacked, and coffee destroyed of a total value of not less than 32,000 bolivars.

The preceding year B. Hernandez, C. Solarte, R. H. Trejo, and F. Suares had attempted the life of Silvio Poggioli, and in consequence were arrested and found guilty. They nevertheless were allowed to enter the army, while the expediente showing their guilt disappeared. The Poggioli brothers repeatedly called the attention of the superior authorities of the state, commencing at least as early as May 12, 1892, to this condition of affairs, insisting that these men should be rearrested, but in vain. So far from being retaken, they seemed to have received the tacit protection of the authorities at Monte Carmelo, who would warn them when there was danger of their being disturbed, and who with other officials joined with them in the larger part of the various offenses committed against the Poggiolis, this continuing to be the case until 1895, when the Poggiolis, were at last, after repeated efforts, finally assured of a proper administration of justice; competent and reliable authorities at Monte Carmelo replacing those against whom the Poggiolis had protested, even to the secretary of the interior of Venezuela.

Until the last of 1894 the Poggiolis were unable to return to their home at Monte Carmelo because of the events narrated, one effort resulting in the

attempted assassination of Silvio, and their properties therefore being meanwhile utterly neglected.

That the general condition in Los Andes was bad and a reign of anarchy existed we may readily believe, from the fact that on March 27, 1895, the minister of interior affairs at Caracas refused to favor calling elections because the State of Los Andes was "an eternal slaughterhouse," and laws protecting life and property were for the time being nonexistent. Another index of the local conditions is afforded in the fact that the officials of Monte Carmelo were changed seven times between April, 1892, and September, 1893.

As late as 1894 the Poggiolis were again called upon to defend themselves against an unfounded charge of introduction of arms, but this claim was quickly disposed of by the intervention of the superior authorities, although for the time being it subjected them to inconvenience and trouble.

They were compelled to expend in defending themselves from the various false charges 7,615.34 pesos, and they further expended to send Silvio Poggioli to Caracas to advance their claim the additional amount of 3,407 pesos.

As the result of all the acts herein set forth, the Poggiolis fell into a state of bankruptcy.

As early as June, 1893, Silvio Poggioli presented to the Venezuelan Government an account of the damages and injuries to which he and his brother had up to that date been subjected, and as a consequence on June 27, 1903, the secretary of the interior wrote to the President of Los Andes, ordering that the criminals be immediately imprisoned and an inquiry had as to the authors of the suppression of the expediente against them, in order to punish them severely. This was regularly transmitted to the authorities of Monte Carmelo, who filed it away without attention.

The foregoing is not a complete statement of the offenses and annoyances to which the Poggiolis were subjected, but gives a sufficient and at the same time concise account of their most grievous troubles.

It is urged, by way of excuse or defense, that the Poggiolis were usurers and had entrapped their neighbors into many contracts extremely disadvantageous to them, and that all of the difficulties to which they were subjected were to be attributed to personal animosities born of their conduct rather than to the acts of officials for which the government should be liable, and, supporting this, it is said that Hernandez himself lost his property because of an unfair contract executed by him at the instance of the Poggiolis, which they rigidly enforced, and that his activity in the various offenses committed against them was to be attributed to personal enmity. In addition, it is to be noted that General Francisco Vásquez, civil and military chief of the Trujillo section of the State of Los Andes, and Gen. Gabriel Briceño, who took part against the Poggiolis, were personal enemies of theirs before the war, while in the letter of Carrasquero, chief of the district of El Pescado in November, 1894, promising protection to the Poggiolis, their difficulties were spoken of as arising from commercial rivalries.

Again, some of their troubles with relation to loss of coffee sent by them to the port of La Dificultad for exportation seem to have relation to the fact that they refused to pay taxes thereon, which had been ordered, apparently illegally, by district councils.

These excuses are not, however, of a character to affect liability if it otherwise existed.

Since the events of which we speak, Americo Poggioli has died, having in fact been killed by a musket ball fired by one of the garrison stationed at Valera, and, it is suggested, by Solarte, one of the criminals who had assaulted Silvio Poggioli in the year 1901, and who had escaped confinement, practically

receiving in fact Government protection. However this may be, the claim of Americo Poggioli died with him, so far as this Commission is concerned, as his only heirs consist of his widow and children, all of whom are Venezuelans by birth. The claim of his heirs is therefore Venezuelan, under the rules heretofore adopted by the umpire, particularly in the Brignone and Miliani cases.¹

As a preliminary question, it is suggested that all the Italian claims originating because of the acts of the revolution in 1892, were settled by an arrangement entered into between the Italian minister accredited to Venezuela and the Venezuelan Government, and some language contained in the expediente of the correspondence and negotiations between the two parties gives color to this opinion; for instance, a private letter from Count Magliano de Villar San Marco, the Italian minister, speaks of giving a definite solution to all the Italian reclamations arising from the revolution of 1892. An examination of the papers, however, fails to show that the Poggioli claim was ever taken into consideration between the two Governments, so far as the settlement in question is concerned, although it is manifest from the expediente under present consideration that during practically all the period when Italian claims were being adjusted, this claim was being urged by the Italian legation, receiving attention from the Venezuelan Government down to 1896.

The umpire is therefore disposed to consider that it was not the intention of the two Governments to determine the claim of the Poggioli brothers at that time, and he is confirmed in this belief by the fact that the Venezuelan *direccion de crédito público*, in its letter of March 9, 1895, addressed to the *tesorero del servicio público*, speaks of the amounts considered under the agreement as for aids (*suplementos*) to the national revolution, and the account accompanying the letter refers, not to all Italian claims, but to the Italian claims recognized by the *junta de crédito público*, and similar language is used in further communications of the Venezuelan Government. At a later period, in giving a list of the claims, those then settled are referred to as being for "*suplementos*" for the national revolution. Again, attached to a letter from the *direccion de crédito público* dated July 5, 1895, reference is made to what is entitled "*Convención Entre la Legación Italiana y el Ministerio de Hacienda*," which contains a *résumé* of the claims for "*suplementos*," etc.

Further, the *junta*, under the law of June 9, 1893, giving it special jurisdiction of claims arising out of the revolution, could scarcely have given an award indemnifying for all or any large portion of the offenses complained of in this case.

Before in detail passing upon the facts before us and the responsibility of the Venezuelan Government incident thereto, it may be worth while to state as nearly as may be some of the general principles to be applied to them.

Not many cases have been presented to international tribunals in which responsibility was claimed for the acts of private individuals, or for trespasses committed by civil authorities. The only cases brought to his attention are recited in the opinion of this umpire in the *De Zeo* case,² and to be found in 3 Moore, pages 3018 and 3032. In one it was claimed that the Government of Mexico had tolerated, and even set on foot, disorders affecting the claimant's business, and the Commission thought that so grave a charge should be maintained by the most unquestionable proof and alleged as a distinct act and ground of reclamation; and in the other (for the seizure of a boy by the governor of a State) relief was refused, because it did not appear that ample redress might not have been obtained by resort to the judicial tribunals of the country.

¹ See *supra*, pp. 542 and 584.

² See *supra*, p. 526.

Had the courts of Mexico been closed to the claimant and justice denied him, that might have constituted a ground for a claim of indemnity against the Government of Mexico. No such case, however, is presented. No appeal was made by the claimant to the courts, and no denial of justice had been proved. Under these circumstances, the board can not regard the Government of Mexico as responsible.

Let us now consider the question from the standpoint of text writers.

Calvo says:

SEC. 1263. Dans l'intérieur des limites juridictionnelles, les agents de l'autorité de toute classe sont personnellement seuls responsables dans la mesure établie par le droit public interne de chaque État. Lorsqu'ils manquent à leurs devoirs, excèdent leurs attributions ou violent la loi, ils créent, selon les circonstances, à ceux dont ils ont lésé les droits un recours légal par les voies administratives ou judiciaires; mais à l'égard des tiers, nationaux ou étrangers, la responsabilité du gouvernement qui les a institués reste purement morale et ne saurait devenir directe et effective qu'en cas de complicité ou de déni de justice manifeste.

Bonfilis, in his *Manuel de Droit International Public*, section 330, says:

Des étrangers, établis ou transitants sur le territoire d'un État, sont lésés à l'intérieur de ce territoire par des fonctionnaires en violation des lois. La responsabilité de pareil acte pèse sur les fonctionnaires qui en sont les auteurs. La partie lésée peut les poursuivre par les voies légales, judiciaires ou administratives. En principe, l'État n'est pas plus responsable vis-à-vis de ces étrangers qu'il ne l'est à l'égard de ses nationaux. Mais si l'acte dommageable était suivi d'un déni de justice; si les tribunaux locaux refusaient d'entendre l'étranger, d'accueillir son action à raison de son extranéité même, l'État qui tolérerait une pareille lésion deviendrait responsable du déni de justice, et le souverain de l'étranger pourrait par voie diplomatique demander que réparation soit accordée.

En ce qui concerne les actes réguliers et légaux d'instruction, de juridiction et de répression exercés sur des étrangers, le principe est que l'étranger reste soumis au régime de droit commun qui pèse sur les nationaux eux-mêmes.

After denying that a state is ordinarily responsible for the acts of its subjects, he adds (sec. 330):

Mais le gouvernement doit avoir pris les précautions nécessaires et ordinaires, ne pas laisser ces faits impunis quand il vient à les connaître, ou, si sa législation propre l'y autorise, livrer les coupables à l'État offensé.

Creasy says, page 343:

Apply then to a state the analogous test of whether it has been as diligent to provide itself in its neighbor's behalf with a sufficient system of criminal process as it is diligent in providing itself safeguards against mischief in its own important affairs; and, furthermore, bear in mind that the mere proof of an affirmative in answer to this interrogation would not be a sufficient justification against complaints if it appeared that the inculpatated state was habitually and grossly careless and disorderly in the management of its own affairs. But if it appeared that the state in question was civilized, and was reasonably firm and orderly in its self-government, an answer in the affirmative would be sufficient.

Halleck says, ch. 11, sec. 7, that —

The sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury and becomes responsible for it.

Hall says, page 227, fourth edition:

With private persons the connection of the state is still less close. It only concerns itself with their acts to the extent of the general control exercised over everything within its territories for the purpose of carrying out the common objects of

government; and it can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are effectually concealed or if, for sufficient reason, the state has failed to repress them, it as obviously becomes responsible, by way of complicity after the act, if its government does not inflict punishment to the extent of its legal powers.

With regard to responsibility for the acts of administrative, official, naval, and military commanders, he holds, page 226, that —

Presumably, therefore, acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. 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.

Again, on page 232, he speaks of the higher degree of responsibility of the state which is "not reasonably well ordered."

Let us first seek to apply generally the principles above enunciated to the facts before us.

It appears that in 1891 an attempt was made upon the life of Silvio Poggioli by four people who were subsequently recruited into the Venezuelan army, and who have to this day escaped punishment, although guilt appears to have been completely established and although repeated requests were made of the higher officials in the state, judicial and administrative, that they be rearrested and subjected to proper punishment for their act. We find that one of these requests was made within two weeks after the wrongful arrest of the Poggiolis, and occasioned by the fact that these criminals were then engaged in ravaging their properties and driving off their employees.

After this demand for relief the criminals still remained at large, with the connivance of the authorities, who seemed to have notified them on at least one occasion of the danger of their arrest, so that they might temporarily conceal themselves. As late as 1894, notwithstanding express orders given by the Central Government at Caracas, we find the State authorities so blind to their duties that, although they thereafter afforded the Poggiolis the protection they had lacked for two previous years, they failed to make any arrests. It seems to the umpire that under these circumstances the local authorities of Venezuela were derelict in their duty and were guilty of a denial of justice, for justice may as well be denied by administrative authority as by judicial.¹ And it further appears to him that when the authorities of the State of Los Andes have acted in apparent conjunction with criminals, and have with them and under the circumstances heretofore detailed joined in the commission of offenses against private individuals, and no one has been punished therefor and no attempt made to insure punishment, the act has become in a legal sense the act of the government itself. One can not consider that the acts were the acts of a well-ordered state, but rather that for the time being some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the Government of Venezuela must be held responsible. We are the more justified in this conclusion because of the opinion of the minister of interior affairs already quoted, and notwithstanding the undoubtedly correct intentions of the National Government.

Reviewing the authorities, it seems to the umpire that this case differs from

¹ 13 Opinions Attorneys-General, p. 547.

those cited from Moore's Arbitrations,¹ in that it is sustained by the clearest proof following distinct allegations, and that there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility "in case of complicity or of manifest denial of justice," for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes, during the years in question, in the language of Creasy, was "habitually and grossly careless and disorderly in the management of its own affairs;" that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes, rendered itself "in some measure an accomplice in the injury" and has become "responsible for it," and that, according to Hall, the acts complained of being "undisguisedly open and of common notoriety" and being of importance, the State "is obviously responsible for not using proper means to repress them," and has not inflicted "punishment to the extent of its legal powers."

The first considerable offense committed against the Poggiolis was their arrest and imprisonment; first, for a period of forty-two days, and second, of Silvio for a period of fifteen days. It is conceivable that such arrests might take place upon misinformation or mistake even of law, and that, honesty at any rate being assumed, no recourse would have remained for the unfortunate victim. In the case under examination, however, it is clearly manifest that the arrests took place pursuant to the order of the general in command, and that they were merely the result of bad feeling engendered by a very proper refusal on the part of the Poggiolis to surrender without compensation mules and other animals to the use of the Government. In another case² the umpire has awarded in favor of men of considerable financial means the sum of 250 bolivars for each day of detention, and the same award may now be made in favor of Silvio Poggioli; that is to say, the sum of 14,250 bolivars.

It is strenuously urged that an allowance should be made for the loss of credit to which the Poggiolis were subjected, but this item is entirely too indefinite and uncertain to be taken into consideration by the umpire.

A large claim is presented because threats of violence were made against agents and debtors unless they should give up their management of the properties of the Poggiolis and refuse to pay their debts to them. For the destruction of the properties involved in this situation, a sufficient award is made, but no award will be made for the refusal to pay the debts; the reason being that the debts might have been collected at a subsequent period, together at least with interest on them, which would measurably at any rate offset the important temporary loss to the Poggiolis. Aside from this, however, the loss is too indirect and uncertain.

Large damages are claimed for the closing of the port of Buena Vista with consequent injury to the commerce of the Poggiolis, and it is argued that the reason given for the closing of the port — that is, that arms were imported there for the use of the revolution — was insufficient, inasmuch as the port of La Dificultad, 1,200 meters distant, still remained open, where the same offense could have been committed, if there were foundation for the charge, and it is urged, therefore, that the port was closed simply as a matter of spite toward the Poggiolis. This may have been the case, but the umpire has nothing whatever

¹ Referred to and relied upon in the De Zeo case, *supra*, p. 526.

² Giacomini case, *supra*, p. 594.

to do with the reasons inducing the Government to close the port. The umpire assumes that it was within its police power to close it, and no contract existing between the Poggiolis and the Government (as in the Martini case ¹), by virtue of which damages could be claimed for the closing of the port, the power of the Government must be regarded as plenary and the reasons for its exercise beyond question.

An award is asked of 1,008,000 bolivars for the loss of the coffee crops, estimated at 14,000 quintals, during the three years of the enforced abandonment of the Poggioli plantations. In the opinion of the umpire, this claim is greatly exaggerated. Payment for a large part of the crop of the year 1892 taken and destroyed by Government officials and others is provided for in this opinion, and the Poggiolis returned to their properties in the latter part of the year 1894. The umpire believes he will be doing full justice if he makes an award for 5,000 quintals at 72 bolivars per quintal (less 15 bolivars per quintal for the cost of production) or a total of 285,000 bolivars. In the judgment of the umpire this loss was the direct result of the actions of the agents of the Government, joined with those of unpunished malefactors, and for which the Government was responsible, and is not at all to be classed as indirect, the umpire adhering to the rule in this respect laid down by him in the Martini case,¹ no suggestion being made that considerable crops were not or could not have been made during the time in question.

Without reciting in further detail the surrounding circumstances, an award will be made covering the following losses:

	<i>Bolivars</i>
Burning of San Rafael sugar mill and house (first time)	4,000
Burning of San Rafael sugar mill and house (second time)	4,875
Destruction of bodega and other houses and property at Buena Vista . .	24,000
Merchandise and coffee at San José de Palmira	32,000
Cost of defending wrongful charges of importation of arms	30,460
Trip to Caracas to submit claim to legation and Venezuelan Government	13,628
Taking of mules and cattle	69,400
Destruction of 10 hectares of sugar cane and crop	13,600
Destruction of coffee and coffee mill at San Emigdio	6,900
Destruction of banana trees at Miraflores	800
Burning of house at El Pescado	1,000
Destruction of Santa María and El Pescado coffee mills	7,200
Cattle killed and horse injured at Emigdio	1,728
Sacking, etc., of store at Monte Carmelo	48,500
Injuries to properties from driving off agents, etc. (loss reckoned in absence of details)	25,000
Taking and destruction of coffee at San José de Palmira, San Cristóbal, and Monte Carmelo	24,000
Taking of merchandise on road to Monte Carmel	4,800
Loss of coffee from various points, taken or prevented from exportation at Buena Vista or La Dificultad	2,400
Loss of coffee crop during abandonment of plantations	285,000
Total	599,291

It is said that the assets of the firm on December 31, 1901, were 2,803,524 bolivars and the liabilities 1,234,739 bolivars, including 72,000 bolivars due Manuela Rosales. The net worth of the firm was 1,568,795 bolivars. It appears, therefore, by a careful calculation made by the honorable Commis-

¹ See *supra*, p. 644.

sioner for Italy, that Silvio Poggioli's interest amounted to 65.99 per cent of the whole, and all allowances made on account of injuries to the partnership are to be represented by an award of this percentage in favor of Silvio Poggioli, without any award to the heirs of Americo Poggioli for reasons above stated.

A sentence will therefore be signed in favor of Silvio Poggioli for 14,250 bolivars, plus 395,672.13 bolivars, with interest at the rate of 3 per centum per annum on 395,672.13 bolivars from July 1, 1893, to December 31, 1903. And the claim of the heirs of Americo Poggioli will be dismissed without prejudice to their right to relief in any appropriate forum.
